

BUTTERWORTHS'

**Ten Years' Digest**

OF

**REPORTED CASES,**

1898—1907.





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**Ten Years' Digest**  
OF  
REPORTED CASES,  
1898 TO 1907.

A DIGEST OF REPORTED CASES DECIDED IN THE SUPREME  
AND OTHER COURTS DURING THE YEARS 1898 TO 1907,

INCLUDING

A COPIOUS SELECTION OF REPORTED CASES DECIDED IN THE IRISH  
AND SCOTCH COURTS, WITH LISTS OF CASES DIGESTED,  
OVERRULED, CONSIDERED, ETC.

ISSUED UNDER THE GENERAL EDITORSHIP OF

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## Ten Years' Digest

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### POWERS.

POWER OF APPOINTMENT.	COL.
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*For* POWER OF ATTORNEY *see* AGENCY.

*For* POWER OF SALE *see* BANKERS, 27;  
MORTGAGES; TRUSTS; WILLS.

*And see* CONFLICT OF LAWS; EXECUTORS;  
SETTLEMENTS; TRUSTS; WILLS.

### POWER OF APPOINTMENT.

*And see* BANKRUPTCY, 218.

#### (a) Construction.

1. *Appointment to Uses of Prior Settlement or such of them as are "Capable of taking Effect."*—Where property is appointed under a special power to the uses of a prior settlement or "such of them as are capable of taking effect," these latter words are not to be limited to what is still existing or possible in fact, but extend also to what is allowable in law.

So, if property is appointed under a special power in a will, to the uses of a prior settlement made on the marriage of the appointor's daughter, the appointment does not fail because one of the beneficiaries of the settlement (*e.g.*, the husband) is not an object of the power, or because in the case of children being born the rule against perpetuities would be broken. It may take effect as to the wife's life-interest and her power of disposition in default of children.

IN *RE* FINCH AND CHEW'S CONTRACT, [1903]  
[2 Ch. 486; 72 L. J. Ch. 690; 89 L. T. 162—  
Kekewich, J.]

B.D.—VOL. III.

2. *Duration of Powers—Power of Sale—Absolute Vesting of Estate in Person not capable of taking Conveyance—Power held not to be Determined.*—A testator left his estate to trustees upon trust for his daughter for life; and, after her death, upon trust in their discretion, and of their uncontrollable authority, to administer, expend, and apply it for the benefit of his grandchildren and the survivor of them. There were certain remainders over, which were admitted to be invalid; and there was also power given to the trustees, when they in their own discretion should consider it necessary, to sell and convert his estate and effects into money. The testator's daughter died soon after her father, leaving two children—Jane, who died without ever being married and intestate in 1882, and Robert, who was of unsound mind, and who died intestate in 1902. The trustees had sold some land before the death of Jane, and other land after her death, but in Robert's lifetime; and the question now arose whether the proceeds of this last-mentioned land formed part of his personal estate, and this depended upon whether the power of sale was in fact subsisting when the trustees purported to exercise it.

**HELD**—that the intention of the testator was that the trust should last until the death of Robert; and that it was not determined by the fact that Robert in 1882 became solely entitled, for he was never capable of calling for, or accepting, a conveyance; and that therefore the power of sale existed and was duly exercised, and the property must devolve accordingly.

*Re Cotton's Trustees* ((1882) 19 Ch. D. 624; 51 L. J. Ch. 514; 30 W. R. 610; 46 L. T. 813) discussed.

IN *RE* JUMP, GALLOWAY *v.* HOPE, [1903] 1 Ch. [129; 72 L. J. Ch. 16; 51 W. R. 266; 87 L. T. 502—Eady, J.]

3. *Intention—Reference to Power.*—Where it is manifest on the construction of a will that the testator intended to dispose thereby of property

**Power of Appointment—Continued.**

of his own, and also of property over which he had a special power of appointment, and under the disposition made by the will the property subject to the power is given to a member of the class amongst whom it can be appointed, the property passes under the power, it being immaterial whether the testator supposed that the property passed by the power or by virtue of his own interest therein.

BYRNE v. CULLINAN, [1904] 1 Ir. R. 42—C. A.

**4. Marriage Settlement—Power of Appointment—Wife's Property—Ultimate Limitation—***"Or otherwise as she shall direct."*—By a marriage settlement real estate belonging to the wife was vested in trustees, and during the joint lives of the spouses the rents were to be paid to the wife during her life for her separate use without power of anticipation. After her death, in case her husband survived her, he was to have a life estate; after his death it was to go as his wife should appoint by deed or will. In default of that limitation it was to go unto and to the use of the surviving husband "or otherwise as he or they shall direct." If the wife survived her husband, which happened, the trustees were to re-convey the lands to her, "her heirs, executors, administrators and assigns respectively for her and their own use and benefit, or otherwise as she shall direct."

HELD—that the words "or otherwise as she shall direct" did not impliedly give the wife a general power of appointment, for to imply such a power would be entirely to alter the scheme of the settlement.

VAN GRUTTEN v. FOXWELL AND OTHERS, (1901)  
[84 L. T. 545—H. L. (E.).]

**5. Married Woman—General Power of Appointment—Appointment in Discharge of Debt—Erroneous Statement of Indebtedness—Insolvency—Administration—Assets—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 4.**—Where a married woman, having under a settlement a general power of appointment by will, made a will and directed her trustees to pay legacies, including one of £1,100 to D. in satisfaction of a debt due from testatrix to D., and, subject thereto, the testatrix, in exercise of the power under the settlement, appointed a life interest in the trust funds to her husband; and where the testatrix's estate was insolvent, and the debt of £1,100 was not due from the testatrix to D., but from her husband to D., and the husband, after the wife's death, paid the debt of £1,100 to D.:—

HELD—(1) that the debt of £1,100 being the husband's, the legacy of £1,100 was perfectly effective at the date of the testatrix's death, and payment of the debt by the husband did not make any difference; (2) that a valid appointment was made of the £1,100, and, by sect. 4 of the Married Women's Property Act, 1882, the other property not being sufficient to pay debts, that the legacy must go for that purpose.

IN RE HODGSON, DARLEY v. HODGSON, [1899]  
[1 Ch. 666; 68 L. J. Ch. 313; 47 W. R. 443;  
80 L. T. 276—North, J.]

**6. Power of Appointment by Deed or Will among Children—Appointment to one Child by Deed, and subject thereto Bequest to all equally by Will—Double Portions—Burden of Proof.**—

A testator bequeathed £10,000 to trustees upon trust to pay the income to his daughter for life, and afterwards to distribute the fund among her children as she should by deed or will appoint, and in default thereof in equal shares. The daughter had three children, to one of whom she by deed appointed sums of £2,000 and £1,333, and by her will she appointed the whole fund to her three children in equal shares. A summons was taken out to ascertain whether the child so preferred should not bring those amounts into account before sharing in the fund appointed by the will. It was decided by Stirling, J. that the rule against double portions practically only applied to the case of a father (*Powys v. Mansfield*, 3 My. & Cr. 359); that the burden of proof in other cases rested on those who sought to establish that the rule applied; and that, as in this case there was no evidence to show that the grandfather or the mother had assumed the duty of providing for the children which *prima facie* belonged to the father, the rule did not apply. His lordship also decided that the mere fact that, in consequence of appointments in this form, the fund would be enjoyed in unequal shares, could not be sufficient to exclude or rebut the application of the rule in a proper case.

On appeal:—

HELD, on the facts of the case, without expressing any opinion on the question of double portions, or whether the daughter was *in loco parentis* to her children, within the meaning of that expression as applied to the rule against double portions, that the appeal must be allowed with costs.

Decision of Stirling, J. ((1898) [1897] 2 Ch. 574; 66 L. J. Ch. 731; 77 L. T. 49; 46 W. R. 138) reversed.

IN RE ASHTON, INGRAM v. PAPILLON, [1898] 1 Ch.  
[142; 67 L. J. Ch. 84; 77 L. T. 582; 46 W. R.  
231—C. A.]

**7. Power superadded to a Life Interest—Insufficiency of Income—To use "as she may deem expedient"—General Power of Appointment.**—Where the testator gave the income of his estate to his wife for her life with remainder to residuary legatees, but directed that "in case such income shall not be sufficient, she is to use such portion of my said real and personal estate as she may deem expedient":—

HELD—that she had a general power of appointment during her life over the capital.

*In re Pedrotti's Will* ((1860) 27 Beav. 583; 29 L. J. Ch. 92—M. R.) distinguished.

IN RE RICHARDS, UGLOW v. RICHARDS, (1901)  
[50 W. R. 90; 85 L. T. 452; [1902] 1 Ch. 76;  
71 L. J. Ch. 66—Farwell, J.]

**8. Power to Appoint in favour of a Class—Donee of Power a Member of Class—Right of Donee to appoint to Self.**—Under a settlement trust funds were, in the events which had happened, to be held in trust for such persons

**Power of Appointment—Continued.**

and purposes and in such manner as the settlor should appoint, "so only that every such appointment be made to or in favour of a grandchild or grandchildren" of the settlor's grandfather.

HELD—that there was no reason why the settlor should not appoint the trust funds to herself.

TAYLOR *v.* ALLHUSEN, [1905] 1 Ch. 529; 74 L. J. Ch. 350; 53 W. R. 523; 92 L. T. 382—Kekewich, J.

9. *Power to appoint Life Estate with Remainder in Tail—Execution—“To E. R. A. and his Issue”—Construction.*—A power was given enabling the donee in the events which happened to appoint certain real estate to his, the donee's, sons for an estate not exceeding a life estate with remainder to their issue in tail. The donee by a codicil to his will, after referring to the power, appointed one part of the estate to "E. R. A. and his issue." E. R. A. was one of the donee's sons.

HELD—that the Court could only come to the conclusion that he intended E. R. A. to take an estate tail; and that consequently E. R. A. took a life estate, and after his death the estates must go as in default of appointment.

Decision of Buckley, J. (54 W. R. 42; 93 L. T. 742) reversed.

RE ADAMS, ADAMS *v.* ADAMS, (1906) 94 L. T. 720—C. A.

10. *Real Estate—Appointment to Trustees upon Trust for Sale.*—A testator devised real estate to the use of his daughter for life, with remainder to the use of such of her children as she should by will appoint, and, in default of appointment, to the use of her children as tenants in common. And he empowered the trustees of his will to sell the property, with the consent in writing of the persons for the time being in possession under the above limitations. By her will the testator's daughter, in exercise of her power, appointed the real estate to trustees in trust for sale, and to stand possessed of the proceeds upon trusts for her children.

HELD—that the parties entitled to sell the real estate were the trustees of the daughter's will, and not the trustees of her father's will.

RE PAGET, MELLOR *v.* MELLOR, [1898] 1 Ch. 290; 67 L. J. Ch. 151; 78 L. T. 72; 46 W. R. 328—Kekewich, J.

11. *Revocable Appointment of Policy Moneys—Subsequent Will disposing of all Testator's Property—Revocation—Wills Act, 1837 (1 Vict. c. 26), s. 27.*—A general residuary bequest or devise is not in itself sufficient to revoke a previous appointment. A testator in 1882 effected a policy of insurance on his life for £500, and in that year by an instrument in writing he nominated and appointed certain persons to receive the policy moneys on his death. This instrument was lodged with the insurance society and remained with them until his death. By

another instrument of even date he declared that the nominees should hold the policy moneys upon trust to pay the income to his wife for life, and at her death to pay £500 to the Religious Tract Society, and the surplus, if any, to his brother; and he expressly reserved to himself the power by will or writing in his lifetime to revoke or alter the above dispositions and to make fresh dispositions. By his will made subsequently the testator cancelled all previous wills and gave an annuity of £500 to his wife, and a legacy of £500 to the Religious Tract Society, and as to the rest of the property, which on his wife's decease was not therein disposed of, he directed that it should be divided equally between certain of his nephews and nieces.

HELD—that the will did not revoke the appointment of 1882. A general disposition of all property is not, in itself, sufficient to revoke a previous appointment.

RE NEWMAN HALL, RAWLINGS *v.* HALL, [1903] 19 T. L. R. 420—Eady, J.

13. *Stock “sufficient to raise” a “net” Sum—Succession Duty.*—A tenant for life under a marriage settlement, in exercise of a power of appointment in favour of the children of the marriage, by deed appointed "that so much of the stock, funds, shares, and securities" then subject to the trusts of the settlement "as shall be sufficient to raise the net sum of £2,000," should, subject to the life interest therein of the appointor, "henceforth belong and be vested in" S. and be held in trust for him, his executors, administrators, and assigns.

HELD—that the appointee took the £2,000 clear of all charges including succession duty.

Decision of Stirling, J. ([1897] 1 Ch. 888; 66 L. J. Ch. 503; 76 L. T. 343; 45 W. R. 456) reversed.

*Banks v. Braithwaite* ((1862) 32 L. J. Ch. 35) considered and questioned.

RE SAUNDERS, SAUNDERS *v.* GORE, [1893] 1 Ch. 17; 67 L. J. Ch. 55; 77 L. T. 450; 46 W. R. 180—C. A.

14. *Successive Appointments—Intention of Appointor.*—A father and mother who had power to appoint £7,000 among their children (other than an eldest son) at a time when they had seven younger children living, appointed £1,000 to each of two daughters.

The father and one of the five younger children, in whose favour no appointment had been made, died; and the mother by a deed, which did not refer to the first appointment, but recited a power of appointment over £7,000, appointed one-sixth of the £7,000 to each of her six younger children then living. Some error having been discovered, she executed another deed of similar purport, which concluded: "My intention is that each of my said six children . . . shall take a vested interest in . . . one-sixth of the said sum of £7,000."

HELD—that her intention was clear; that the second appointment was substitutional, and that each of the six children took one-sixth of the £7,000.

**Power of Appointment—Continued.**

*England v. Lavers* ((1866) L. R. 3 Eq. 63; 15 W. R. 51—Lord Romilly, M.R.) followed.

IN RE TANCRED'S SETTLEMENT, SOMERVILLE v. [TANCRED, [1903] 1 Ch. 715; 72 L. J. Ch. 324; 51 W. R. 510; 88 L. T. 164—Buckley, J.

**15. Testamentary Power—Execution—Incomplete Recital—Intention**—"After the Death of my said Wife" read "subject to my said Wife's Interest."—A testator recited in his will that he had power under his marriage settlement to appoint a fund after the death of his wife, though the power was in fact somewhat wider in the event of the wife's re-marrying, her life interest then being cut down to one moiety. The testator appointed that "after the death of my said wife" the fund should as to three-fifths be held upon trust for his elder son and as to two-fifths for his younger son. The wife re-married after the testator's death. The elder son having attained his majority, claimed his proportionate share of the moiety set free by his mother's re-marriage.

**HELD**—that there was an absolute intention to appoint the entire fund subject to the wife's interest; that the testator's reference to his wife's death showed that he did not intend to displace her interest; that the reference to the point of time at which the prior interest determined was not the material matter, but the reference to the prior interest itself was important; that the true meaning of the words "after the death of my said wife" was "subject to my said wife's interest": that the elder son was therefore entitled to payment of three-fifths of the free moiety of the fund.

*Maddison v. Chapman* ((1858) 4 K. & J. 709, 719—Wood, V.-C.) followed.

IN RE SHUCKBURGH'S SETTLEMENT, ROBERT-SON v. SHUCKBURGH, [1901] 2 Ch. 794; 50 W. 132; 85 L. T. 406; 71 L. J. Ch. 32—Farwell, J.

**16. Testamentary Power—Excessive Execution—Cypres.**—A *cypres* estate can only be implied in lieu of excessive limitations of real estate under a testamentary power, when it will include all persons intended to take under such void limitations, and no others.

B. had power to appoint real estate among his children or other issue born in his lifetime. He appointed it to his son W. for life with remainders to his sons and grandsons in tail male with remainder to his daughters, with remainder to testator's daughter for life with remainder to her sons in tail male. Upon the true construction of the will the remainders to W.'s children (who were not born) failed; but it was contended that W. took an estate tail by the doctrine of *cypres*.

**HELD**—that W. took only a life estate, for no estate tail could be given to him which would not defeat the testator's intention by including a class for whom he did not mean to provide, or excluding persons for whom he did intend to provide.

*Hampton v. Holman* ((1877) 5 Ch. D. 183; 46 L. J. Ch. 248—Jessel, M.R.) followed.

IN RE RISING, RISING v. RISING, [1904] 1 Ch. [533; 73 L. J. Ch. 455; 90 L. T. 504—Eady, J.

**(b) Exercise.**

And see WILLS, 366—369.

**17. Exercise—Power to charge limited Sum on Real Estate—General Power to appoint Charge—General Gift—Wills Act, 1837** (7 Will. 4 & 1 Vict. c. 26), s. 27.—A testator by his will declared that it should be lawful for A. by deed or writing to limit and appoint, grant, sell, release and confirm all or any part of certain land to any person or persons by way of mortgage or otherwise as a security for any sum not exceeding £2,000, or by any such deed, writing, or by will to charge and incur the lands with the payment of any sum not exceeding £2,000 for such use, intent and purpose as A. should think fit to direct and appoint. A., by his will made after the Wills Act, and which did not refer to the power, gave, devised, and bequeathed to his wife all his property, real and personal, and all his estate, goods and chattels, money and charges secured upon lands of or to which he was possessed or in any way entitled.

**HELD**—that A.'s will did not operate under sect. 27 of the Wills Act as an exercise of the power of charging and appointing in favour of the wife.

In *re Gomes, Greene v. Gordon* (34 Ch. D. 65) distinguished.

The 27th section of the Wills Act presupposes the existence of some real estate, or some personal estate, as the case may be, which is subject to a general power of appointment, and which, though not the testator's property, is at his uncontrolled disposition. The language of the section does not extend to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to this conversion *pro tanto* of the real estate of another into a money charge, which if and when charged will be personal estate which the testator will have power to appoint as he may think fit, but which has no existence unless and until the testator creates it.

IN RE ESTATE OF JOHN WALLINGER AND [OTHERS, [1898] 1 Ir. R. 139—C. A. (Ir.).

**18. Exercise of a Power by Will—Exercise of a Power by subsequent Will**—"Give, devise, bequeath, and appoint"—Evidence of no other Power—No Clause of Revocation—Exercise of Power by first Will superseded by Exercise of Power by second Will.—The mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together, and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such later instrument will revoke the former as to those parts only where they are inconsistent.

A testator's testamentary paper, dated October 16th, 1894, contained these words: "I hereby

**Power of Appointment—Continued.**

devise, bequeath, and appoint all my real and personal estate whatsoever belonging to me or over which I have a power of appointment under the will of my late father . . . unto my trustees upon trust. . . ."

By a testamentary paper, dated December 4th, 1896, he commenced: "This is my last will and testament." There was no clause of revocation, but he named the same two persons as executors and trustees of "this my will." He continued: "I give, devise, bequeath, and appoint all my real and personal estate whatsoever unto my trustees upon trust. . . ." There was no other power of appointment—general or special—which could have been intended to be exercised under the particular power given to the testator by his father's will.

**HELD**—that the testator by the word "appoint" in the second will did not intend merely to use a conventional term, but did intend to execute the power of appointment in a way to supersede the exercise of his power by the first will; and that the second will effected the revocation of the first will.

*In re Mayhew, Spencer v. Cutbush* ([1901] 1 Ch. 677; 70 L. J. Ch. 428; 49 W. R. 330; 84 L. T. 761—Farwell, J., No. 38, *infra*) followed.

*KENT v. KENT*, [1902] P. 108; 71 L. J. P. 50; [86 L. T. 586; 18 T. L. R. 293—Jeune, P.

**19. Exercise by Will—Residuary Clause—Blending Testatrix's own Property and that over which she had a general Power—Direction to pay Debts—Lapse—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.**—A testatrix, having, under her marriage settlement, a general testamentary power over certain stocks, funds, and securities, appointed by her will the sum of £5,000 and the stocks, funds, and securities representing the same, and of such part of the stocks, funds, and securities comprised in the said settlement as should with the said sum of £5,000, or the securities representing the same, make up the sum of £9,000, in trust in six equal shares for six persons respectively in the will named. She empowered the trustees of the settlement and her executors to appropriate any security or investment subject to her powers of appointment or belonging to her at the time of her decease at the market value of the day in or towards payment and satisfaction of the legacies. And as to the rest and residue of her real and personal estate she "devised, bequeathed, and appointed" the same, subject to the payment of her debts, funeral and testamentary expenses, unto her brother H. S. absolutely. H. S. died in the lifetime of the testatrix. The testatrix had no real estate.

**HELD** (Vaughan Williams, L.J., dissenting)—that the residuary clause was a true residuary clause, and operated as a general residuary appointment; that it expressly blended into one fund that which was the testatrix's own property, and that over which she had a general power of appointment, the whole being made subject to her debts, funeral and testamentary expenses; and that the next of kin of the testa-

trix were entitled to that part of the property which had not been effectually appointed, and that the title of the person who would have taken in default of appointment was defeated.

*In re Pinède's Settlement* ((1879) 12 Ch. D. 667; 48 L. J. Ch. 741; 28 W. R. 178; 41 L. T. 579—Jessel, M.R.) followed by Romer, L.J.

*In re Davies' Trusts* ((1871) L. R. 13 Eq. 163; 41 L. J. Ch. 97; 20 W. R. 165; 25 L. T. (N.S.) 227—Wickens, V.-C.) and *In re De Lasi's Trusts* ((1879) 3 L. R. Ir. 232) distinguished by Romer, L.J.

*Cowen v. Rowland* ([1894] 1 Ch. 406; 63 L. J. Ch. 179; 42 W. R. 568; 70 L. T. 89—Stirling, J.) followed by Cozens-Hardy, L.J.

Decision of Byrne, J. ([1901] 1 Ch. 370; 70 L. J. Ch. 354) reversed.

*IN RE MARTEN, SHAW v. MARTEN*, [1902] 1 Ch. [314; 71 L. J. Ch. 203; 50 W. R. 209; 85 L. T. 704—C.A.

**20. Exercise and Creation by Will—Donee exercising by Will—Death of Donee in Donor's Lifetime—Invalidity.**—A power created by will has no existence until the death of the testator. Therefore, where a husband by will created a power of appointment in favour of his wife, and she purported to exercise it by will and predeceased him, the appointment by her was held to be invalid.

*Jones v. Southall* ((1864) 32 Beav. 31—Romilly, M.R.) followed.

*SHARPE v. McCALL*, [1903] 1 Ir. R. 179—V.-C.

**21. Exercise of Power by Will—Foreign Will—Unattested—Whether a Valid Appointment—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, 27.**—English law recognises as a valid will a will made by a domiciled foreigner in accordance with the law of his domicile, though not valid according to the Wills Act, 1837. But sect. 27 of the Wills Act, being a rule of construction, does not apply to such a will, which cannot therefore operate as an appointment under a power contained in an English settlement, unless it refers to the power or the property, or by its language imports into itself the English rule of construction.

An English settlement containing a power of appointment was made on the marriage of an Englishwoman and Frenchman, whose domicile she then took and retained till her death. She might by will have exercised the power of appointment; but her will, though valid according to French law, was unattested, and it made no specific reference to the settlement, or any power of appointment.

**HELD**—that it did not operate as an appointment under the settlement.

*In re Price* ([1900] 1 Ch. 442; 69 L. J. Ch. 225; 48 W. R. 373; 82 L. T. 79—Stirling J., No. 37, *infra*) distinguished.

*IN RE D'ESTE'S SETTLEMENT TRUSTS, POULTER v. D'ESTE*, [1903] 1 Ch. 898; 72 L. J. Ch. 305; 51 W. R. 552; 88 L. T. 384—Buckley, J.

**22. Extent of Exercise—Appointment of specified Sum described as One-third Portion—**

**Power of Appointment—Continued.**

*Deficiency of Fund.*]—B. had a power of appointment in favour of her younger children over £4,500 raisable out of lands and over lands: in default of appointment such money and lands were to be equally divided between the younger children. At a time when she had three younger children alive, she appointed in favour of one who was about to be married "that the sum of £1,500 being one-third portion of the sum of £4,500 so raisable . . . be raised and also interest therefor at 5 per cent. . . . and that the said sum of £1,500 and the interest . . . shall immediately belong to" the child about to be married. She also appointed to this child one moiety of the lands. She never made any appointment of the residue. The lands proved insufficient to raise the £4,500.

HELD—that the specific sum of £1,500 and interest was nevertheless payable in full out of the amount actually raised.

BUTLER v. BLACKALL, [1907] 1 Ir. R. 405—  
[Ross, J.]

**23. Foreign Will—Attestation—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, and 27—Lord Kingsdown's Act, 1861 (24 & 25 Vict. c. 114), s. 1.**]—A. had under the will of her father a general power of appointment by will over one-fifth share of his residuary estate. A. lived in France, and after her death the following paper writing signed by her, but unattested, was found: "To my executors: I leave Arthur Brandt in case of my death the sum of (£600) six hundred pounds."

This paper writing was a valid will according to the French law.

HELD—that the paper writing not having been attested in accordance with sects. 9 and 10 of the Wills Act, did not operate as an execution by A. of her general power of appointment.

HUMMEL v. HUMMEL, [1898] 1 Ch. 642; 67 [L. J. Ch. 363; 78 L. T. 518; 46 W. R. 507—  
Kekewich, J.]

And see No. 37, *infra*.

**24. General Power to appoint by Will—Bequest of Stocks, Shares and Securities—"Personal Property described in a General Manner"—Wills Act, 1837 (1 Vict. c. 26), s. 27.**]—J. M. had under her marriage settlement a general power of appointment by will over personal property (subject to a life interest in her husband, if he survived her). She had a similar power under her father's will over other property.

At the time of her death the trust funds consisted of railway and colonial stocks, and her husband was alive.

By her will she bequeathed to her sisters, subject to her husband's life interest, "all stocks, shares and securities which I possess or to which I am entitled."

HELD—that this bequest operated as an exercise of the powers, being a "bequest of personal property described in a general manner"

within the meaning of sect. 27 of the Wills Act, 1837.

IN RE JACOB, MORTIMER v. MORTIMER, [1907] 1 Ch. 445; 76 L. J. Ch. 217; 96 L. T. 362—  
Parker, J.]

**25. General and Limited Powers—Exercise by Will—No Reference to Power—Intention to Exercise.**]—A testatrix had a power of appointing a life estate and other powers. By her will, after giving her husband all her own property, she appointed all real and personal estate over which she might have a power of appointment to her husband.

HELD—that it was not necessary to have a reference to the power or to the property, if the intention to exercise the power was otherwise clear, and that the testatrix had clearly expressed her intention of exercising every power she had in favour of her husband.

IN RE SHARLAND, IN RE REW, REW v. [WIPPELL, [1899] 2 Ch. 536; 68 L. J. Ch. 747; 81 L. T. 384—Kekewich, J.]

**26. Implied Execution of—Express Intention of—Donee to the Contrary—Mistake—Election—Conditional Appointment.**]—The donee having under a will a power of appointment of a sum of £15,000, appointed two-sixths of it in trust for her son and his children and one-sixth in trust for her daughter A. and another sixth in trust for her daughter B., and declared as follows: "I make no appointment of the other two-sixth parts of the said sum of £15,000, as I wish them to pass directly to my said two daughters so as to give them an immediate vested and disposable interest therein, and I also declare that neither my son nor his children (if any) shall take any share or interest in the said unappointed parts of these trust funds."

HELD—that the donee did not in effect appoint under her codicil the balance of the fund by implication, as she had expressly said that it was unappointed, and that she appeared to have acted under a mistake which could not be rectified.

HELD, also, that no question of election arose or could arise, and that a condition could not be implied that if the son chose to make a claim under the will in default of appointment to the unappointed part of the fund his children's interest should cease under that appointment.

IN RE JACK, JACK v. JACK, [1899] 1 Ch. 374; [68 L. J. Ch. 188; 80 L. T. 321—Romer, J.]

**27. Intention to exercise Power—Gift of Property "over which I have disposing Power."**]—A testator had by his marriage settlement power to appoint a rent-charge of £30, subject to the life interests therein of himself and his intended wife, amongst the children of the marriage, and in default of appointment his wife had a like power. He had no other power of appointment. The testator by his will devised and bequeathed to his executors all properties to which he might be entitled or was possessed of



**Power of Appointment—Continued.**

at the time of his death, or over which he had any disposing power, on trust to pay the income thereof to his wife for life, and after her death to his children, share and share alike. There were three children of the marriage. The testator's wife survived him, and by her will devised and bequeathed the residue of the property belonging to her, or over which she had any power of appointment or disposition, to her daughter A.

**HELD**—that there was no intention to exercise the power expressed in the will of the testator, and that the annuity passed under the will of his wife.

**SYKES v. CARROL**, [1903] 1 Ir. R. 17—M. R.

**28. Interpretation—Special Power of Appointment—Exercise by Will dated prior to the Creation of Special Power—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 24, 27.**—The 27th section of the Wills Act, 1837, applies to general and not to special powers of appointment.

The combined effect of sects. 24 and 27 of the Wills Act, 1837, is to enable a general power of appointment by will to be well exercised by a will executed prior to the date of the instrument creating the power.

A special power of appointment by will cannot be well exercised by a will dated prior to the creation of the power by virtue of the operation of sect. 24 of the Wills Act, 1837.

H., the younger, by his will, dated December 29th, 1884, gave all the residue of the property over which, at the time of his death, he should have a disposing power, upon trusts (*inter alia*) to pay the yearly income to his wife for life or widowhood, and afterwards for his children.

H., the elder—the father of H., the younger—by his will, dated June 10th, 1893, empowered each child of his by his or her will to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in his—H., the elder's—residuary estate, for life of such wife or husband, or for any interest determinable on or before the death of such wife or husband. H., the elder, died in 1895, and H., the younger, in 1899, leaving a widow and three children.

**HELD**—that, there being no specific description of or reference to the property in question, the case could not be dealt with upon the footing that, not being within sect. 27, sect. 24 of the Wills Act, 1837, applied, and that the power of appointment contained in the will of H., the elder, was not well exercised by the will of H., the younger.

**Stillman v. Weedon** ((1848) 16 Sim. 26; 18 L. J. Ch. 46) discussed and considered.

Decision of **Byrne, J.** ([1900] 2 Ch. 332; 69 L. J. Ch. 691; 49 W. R. 25; 83 L. T. 152; 16 T. L. R. 448) affirmed.

**IN RE HAYES, TURNBULL v. HAYES**, [1901] 2 [Ch. 529; 70 L. J. Ch. 770; 49 W. R. 659; 85 L. T. 85; 17 T. L. R. 740—C. A.

**29. Joint Power of Appointment to Father and Son—Contingent Sole Power of Appointment to**

**Son if surviving—Covenant by Son to execute Sole Power—Subsequent Exercise of Joint Power—Defective Execution of Power—Mortgage subject to certain Charges so far only as they affect the Land—Priority—Derogation from Grant.**—By a disentailing deed, executed and enrolled in 1862, lands were limited to such uses as A. and B., subject to the life estate of A. during their joint lives, should by deed appoint, and, in default of such appointment, to such uses as B., if he should survive A., should, after the death of A., by any deed made after the decease of A. appoint, and, in default of such appointment, to such of the uses of a certain settlement as were subsisting before the execution of the disentailing deed, under which B. took an estate tail.

In 1868 B. by a deed of arrangement with his creditors covenanted that in case he survived A., and came into possession of the premises, he would grant and appoint the lands by way of mortgage to trustees to secure the sum of £2,010, the aggregate sum due to his creditors.

In 1872 A. and B., in exercise of their joint power, mortgaged the lands (A. conveying his life estate therein) to the petitioners, it being stated in the mortgage that the security thereby created was to be subject to several charges, including the sum of £2,010 secured by the deed of 1868 so far as the same were then subsisting and capable of taking effect, and so far only as they affected the lands.

In 1880 A. and B., in further exercise of their joint power, by deed mortgaged the lands to M., subject to the charges mentioned in the schedule to the deed (which included the deed of 1868), but not so as to give the same, or any of them, any greater or other priority, lien or security than they respectively had.

A. having died in 1898:—

**HELD**—that after the death of A. the deed of 1868 took priority over the two mortgages of 1872 and 1880, though these latter deeds were executed under the joint power given to A. and B.

Decision of **Ross, J.** ([1901] 1 Ir. R. 12) reversed.

**IN RE LAMBERT'S ESTATE**, [1901] 1 Ir. R. 261 [—C. A.

**29a. Marriage Settlement—Covenant to Jointure—Power to Jointure not yet in Existence—Approval of Draft Deed—Effect of, as Exercise of Power.**—A. by his marriage settlement covenanted to charge all property which might come to him on his father's death with a jointure of £400 to his wife for life. At that date his father had already made a will giving A. power to appoint a jointure of £400 to any wife for her life, to be charged on certain estates settled by the will. After his father's death A. approved a draft deed intended to fulfil his covenant by appointing a jointure of £400 to his wife for life, to be charged upon the settled property: he died a few days later without executing the deed, but having made a will appointing in alleged exercise of the power a jointure of £400 during widowhood only.

**HELD**—(1) that the covenant followed by the approval of the draft deed amounted to a due exercise of the power.

**Power of Appointment—Continued.**

*Affleck v. Affleck* (1857) 26 L. J. Ch. 358; 3 Sm. & G. 394) applied.

And (2) that the jointure was charged on the settled estates.

*Coventry v. Coventry* (1724) 2 P. Wms. 222; 1 Str. 596) followed.

*CHARLTON v. CHARLTON*, [1906] 2 Ch. 523; [75 L. J. Ch. 715; 95 L. T. 714—Warrington, J.

**30. Marriage Settlement—Power of Appointment—Exercise by Will of a Domiciled Foreigner—Disposition of Property.**—The execution of any power of appointment validly created and given to a foreigner is in no way affected by any disability which he or she may be under to dispose of his or her own property by the laws of his or her domicile; but different considerations would arise if the appointee predeceased the appointor by will, and the effect of the appointment is held to be to take the appointed property out of the instruments creating the power for all purposes, and to make it part of the property of the appointor.

A domiciled Frenchwoman made her will in France, which was admitted to probate in England. The will recited a special power of appointment under her English marriage settlement, and purported to exercise the power.

**HELD**—that the execution of the power was good, as it did not bring the appointed property into the will of the appointor at all, but operated as a nomination of the person whose name was to be inserted in the settlement, and that there was no disposition of property belonging to the testatrix, so that it was immaterial that the testatrix could not by French law dispose of property at all, or only part of it.

*POUEY v. HORDERN*, [1900] 1 Ch. 492; 69 L. J. [Ch. 231; 82 L. T. 51; 16 T. L. R. 191—Farwell, J.

**31. Marriage Settlement—Power of Appointment—Wife's—“By any Writing in the Nature of or purporting to be a Will”—Execution of Power.**—A marriage settlement creating a power of appointment contemplated the execution of it by the wife “by any deed or deeds, writing or writings . . . sealed and delivered . . . or by her last will or testament, or any codicil or codicils thereto . . . or any writing in the nature of or purporting to be a will or codicil.” The donee of the power, previously to her death, signed a document commencing with the words “This is the last will of me,” and going on, “I bequeath . . . I further bequeath . . .” This document was not duly executed because the maker of it did not sign it in the presence of two witnesses, but was otherwise a valid execution of the power.

**HELD**—that the document was one which purported to be a will, and was a good execution of the power.

*IN RE BROAD, SMITH v. DRAEGER*, [1901] 2 [Ch. 86; 70 L. J. Ch. 601; 84 L. T. 577—Kekewich, J.

**32. Power to charge Limited Sum on Real Estate—General Gift of Personality—Effect as to exercising Power to charge Realty—Wills Act, 1837 (1 Vict. c. 26), s. 27.**—Sect. 27 of the Wills Act presupposes the existence of some realty or personality (as the case may be) which is subject to a general power of appointment, and at the testator's uncontrolled disposition, although not his property; and the section does not extend to the imposition of an otherwise non-existent charge upon the property of another person, which, if and when created, would be personal estate which the testator would have power to appoint by a general bequest.

The reasoning of FitzGibbon, L.J., in *In re Wallinger's Estate* ([1898] 1 Ir. R. 139) adopted and followed.

A testator had under a settlement power by deed or will to charge real estate, of which he was only tenant for life, with payment to himself or any other person or persons of any sum or sums not exceeding in the whole £6,000, with interest, and to appoint the premises charged to any person for any term of years upon trusts for raising the sums charged; by his will he gave all his real property to one person and all his personal property (except some pecuniary legacies) to other persons.

**HELD**—that the gift of personality did not operate as a charge in favour of the donees, on the real estate which he had power to charge.

*IN RE SALVIN, MARSHALL v. WOLSELEY*, [1906] [2 Ch. 459; 75 L. J. Ch. 825; 95 L. T. 289—Buckley, J.

**33. Special Power—Settled Land—Inoperative till Death of Testator exercising the Power.—No Relation back—Lapse by Reason of Death of Appointee, or Failure of Subject-matter prior to Appointor's Death—Leases by Appointor in Consideration of Premiums—Ademption—“Capital Money”—Change of Investments—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 23, 24, 27—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22, sub-s. 5.**—The rules for construing a will exercising a power are, except so far as they are altered by the Wills Act, the same as those for construing a will disposing of a testator's own property.

The exercise of a power of appointment by will does not take effect upon the death of the testator as from the date of the will. The appointment is absolutely inoperative until the death of the testator. Nothing vests in the appointee at the date of the execution of the will. It differs in this respect from an appointment by deed under a power giving a power of revocation. Although what is taken by the appointee, whether realty or personality, is taken under the authority of the power, yet it is not taken from the time of the creation of the power. There is no relation back so as to make things vest from the time of the power. The same principle which makes a gift to an appointee, under a special power of appointment by will, fail or lapse by reason of the death of the appointee before the death of the testator also applies to the failure of the subject-matter of the appointment.

**Power of Appointment—Continued.**

*In re Doucsett* ([1901] 1 Ch. 398; 70 L. J. Ch. 149; 49 W. R. 268—Farwell, J., No. 46, *infra*) approved.

*Cooper v. Martin* (1867) L. R. 3 Ch. 47; 17 L. T. 587—dicta of Lord Cairns approved.

A testator gave by will to his trustees his freehold estates in the Westminster Bridge Road and in the Dover Road upon trust for his son for life, and after his death for the children of his son as the son should appoint. The son, while tenant for life, under the Settled Land Act, 1882, granted leases of two of the houses in Westminster Bridge Road; each lease was granted in consideration of a premium of £750. The premiums were paid to the trustees of his father's will and invested. The son also granted a lease of one of the houses—a public-house—in the Dover Road in consideration of a premium of £14,400; this premium was also paid to the trustees and invested. The son exercised his power of appointment by his will, which was made prior to the granting of the leases, and he died subsequently to the granting of the leases.

HELD—that the appointment did not operate as regards the premiums and the investments representing them, which therefore passed as in default of appointment.

Decisions of Byrne, J., and C. A. ([1902] 1 Ch. 100; 71 L. J. Ch. 101; 85 L. T. 596; 18 T. L. R. 147—C. A.) (*sub nom. In re Moses, Beddington v. Beddington*) affirmed.

*BEDDINGTON v. BAUMANN AND ANOTHER*, [1903] A. C. 13; 72 L. J. Ch. 155; 51 W. R. 383; 87 L. T. 658; 19 T. L. R. 58—H. L. (E.).

**34. Special Power—Exercise by Will—Word “appoint” used—Indications of Contrary Intention.**—For the exercise by will of a special power there must be either (1) a reference to the power, or (2) a reference to the property subject to it, or (3) an intention otherwise expressed in the will to exercise the power.

X. had power to appoint by will certain hereditaments among his children, who in default of appointment would share equally. In his will, after bequeathing certain articles of personal use, X. used the word “appoint,” giving, devising, bequeathing, and appointing all the residue of his estate to trustees in trust for three of his children: he declared that his other children were sufficiently provided for.

Notwithstanding the use of the word “appoint,” the Court held that the will did not amount to an exercise of the power: a contrary intention was inferred from the fact that X. directed the conversion of his residue (which he could not do as to property subject to the power), and that he directed the shares of residue destined for two infant sons to be invested (which again he could not do, so far as his residue included property subject to the power).

*In re Mayhew* ([1901] 1 Ch. 677; 70 L. J. Ch. 428; 49 W. R. 330; 84 L. T. 761—Farwell, J., No. 38, *infra*) distinguished.

*IN RE WESTON'S SETTLEMENT, NEEVES v. [WESTON]*, [1906] 2 Ch. 620; 95 L. T. 581; 76 L. J. Ch. 51—Buckley, J.

**35. Special Power—Legacies to Persons not Objects of Power—Residue to Object of Power—Evidence of Testator's Intention to exercise Power—Implied Contrary Intention.**—In determining whether a testator has exercised by will a power of appointment, the Court will look at the will to discover therefrom evidence of the testator's intention to exercise the power; it will not infer a contrary intention from such circumstances as bequests to persons not objects of the power.

A testatrix had, under a father's will, a special power of appointment in favour of her husband. By her will she bequeathed to persons not objects of the power certain legacies out of “my separate estate or out of the estate and effects over which I have any disposing power,” and gave, bequeathed, and appointed all the residue of her estate and effects to her husband. Her husband survived her.

HELD—that the power was well exercised.

*IN RE MILNER, BRAY v. MILNER*, [1899] 1 Ch. [563; 68 L. J. Ch. 255; 47 W. R. 369; 80 L. T. 151—Stirling, J.

**36. Sum to be invested—Appointment of Specific Sums part of Sum to be invested—Increase of Value of Invested Sum—Intention to exercise Appointment of Incestment.**—A father by his will gave his daughter power to appoint a sum of £30,000, which was to be invested in the manner directed by his will, together with the interest thereof. The daughter in her will recited the exact words of her father and said: “In exercise of the power given me by the said will of my father, I direct that the said sum of £30,000 together with the interest and annual proceeds thereof, by the will of my father directed to be held in trust for me, my children and grandchildren, and over which I have such power of appointment as aforesaid” should after her death remain and be, and the trustees of her father's will should stand possessed thereof, “upon trust that the sum of £30,000, together with the interest and annual proceeds thereof, should be held by the said trustees upon the trusts thereafter declared of and concerning the same, that is to say, as to the sum of £1,000, part thereof” for her daughter E., and upon trusts as to other parts thereof for others, and as to “the remainder of the said sum of £30,000” for another child.

HELD—that the power was in effect to appoint an invested fund which was to produce interest, and that when the daughter appointed the sum of £1,000 she meant an invested fund of £1,000—a sum of £1,000 as it was invested—which as it happened was worth more than £1,000, and that when she appointed the last sum, which she described as “the remainder of the said sum of £30,000,” she was dealing with the £30,000 as an invested sum, and she did not intend to leave any part of it unappointed, and that the whole £39,000, which the investments were worth, was appointed.

*IN RE CRUDDAS, CRUDDAS v. SMITH*, [1900] 1 Ch. 730; 39 L. J. Ch. 355; 82 L. T. 514—C. A.

**Power of Appointment—Continued.**

**37. Testamentary Power—Domiciled Foreigner—Execution—Unattested Will—Interpretation—Administration with Will annexed—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 9, 10, 27—Wills (Lord Kingsdown's) Act, 1861 (24 & 25 Vict. c. 114), s. 1.**—*M. F.*, the wife of a French subject domiciled in France, was the donee under an English will of a power of appointment of a fund of £2,000. By her holograph French will she declared that she bequeathed to her husband everything which she possessed or might possess, and declared that the will should be considered in England the same as in France. She had no other property but the fund in question. The will had been admitted to probate and letters of administration had been granted with the will annexed.

**HELD**—that it was competent for her to exercise the power of appointment by such will as was recognised by the Probate Division; that, as the law of France did not recognise the mode of disposition by appointment, and a French Court would consider and apply the English rules of law applicable to the construction of a will for the purpose of carrying out the intention of the testatrix, such rules were to be applied here, with the result that there was a valid execution of the power.

*D'Huart v. Harkness* (1865) 34 Beav. 324; 34 L. J. Ch. 311; 13 W. R. 513 followed.

*In re Kirwan's Trusts* ((1883) 25 Ch. D. 373; 52 L. J. Ch. 952; 32 W. R. 581; 49 L. T. 292—*Kay, J.*) and *Hummel v. Hummel* ([1898] 1 Ch. 642; 67 L. J. Ch. 363; 46 W. R. 507; 78 L. T. 518—*Kekewich, J.*, No. 23, *supra*) distinguished.

**IN RE PRICE, TOMLIN v. LATTER**, [1900] 1 Ch. 442; 69 L. J. Ch. 225; 48 W. R. 873; 82 L. T. 79; 16 T. L. R. 189—*Stirling, J.*

**38. Testamentary Power—Exercise of Limited Power—"Appoint, devise, and bequeath"—Direction to pay Debts—Evidence of no other Power.**—A testatrix had a special power of appointment by will, given to her by the will of her father, over a share of his personal estate in favour of her nephews and nieces. The words of her will were simply, "I appoint, devise and bequeath my real estate, and the residue of my personal estate, to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between" four named nephews and nieces. Evidence was tendered to show that the testatrix had no other power of appointment.

**HELD**—that the limited power was exercised; that the direction to pay debts was not enough to negative an intention to exercise the power; and that the evidence that the testatrix had no other power was admissible.

*In re Teape's Trusts* ((1873) L. R. 16 Eq. 442; 43 L. J. Ch. 87; 21 W. R. 780; 28 L. T. (N.S.) 799—*Lord Selborne, L.C.*) and *In re Swinburne* ((1884) 27 Ch. D. 696; 54 L. J. Ch. 229; 33 W. R. 394—*Pearson, J.*) followed.

*Dictum* of Chatterton, V.-C., in *In re Richardson's Trusts* ((1886) 17 L. R. Ir. 436, 442), dissented from.

**IN RE MAYHEW, SPENCER v. CUTBUSH**, [1901]—[1 Ch. 677; 70 L. J. Ch. 428; 49 W. R. 330; 84 L. T. 761—*Farwell, J.*

**39. Testamentary Power—"Purport to exercise."**—*W.*, under a testator's will, had power to appoint funds by her own will provided such will "expressly purported to exercise the power."

By her will *W.* disposed of all the estate "of which I shall be possessed at the time of my death, or over which I have or shall have any disposing power."

**HELD**—a good exercise of the power.

**IN RE WATERHOUSE, WATERHOUSE v. RILEY**, [1907] 96 L. T. 688—*Joyce, J.*

**40. Testamentary Power—Special Formalities—Donee a Foreigner—Unattested Will valid according to Donee's Domicil, but invalid according to English Law—No Execution of Power—Non-compliance with Formalities.**—In the case of the donee of a testamentary power of appointment being a foreigner, it is not enough, where special formalities are required by the instrument creating the power, that the instrument should be a will according to the law of domicil, but in cases where the provisions of the Wills Act do not apply, such will must comply with the terms of the power.

A lady, being a domiciled Frenchwoman, made a will valid according to French law, but invalid according to English law, being unattested. The will had been admitted to probate, being a good will in accordance with the law of the testatrix's domicil; the question arose whether or not it operated as a good execution of a general power of appointment created by an instrument coming into operation before the Wills Act. The power in question was a power to appoint "by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be respectively executed by her in the presence of, and attested by, two or more creditable witnesses."

**HELD**—that the will of the testatrix did not operate as a good execution of the power, not having been executed in accordance with the formalities required by the instrument creating the power.

*In re Kirwan's Trusts* ((1883) 25 Ch. D. 373; 52 L. J. Ch. 952; 32 W. R. 581; 49 L. T. 292—*Kay, J.*) and *In re Price, Tomlin v. Latter* ([1900] 1 Ch. 442; 69 L. J. Ch. 225; 48 W. R. 873; 82 L. T. 79; 16 T. L. R. 189—*Stirling, J.*, No. 37, *supra*) considered.

**BARRETTO v. YOUNG**, [1900] 2 Ch. 339; 69 [L. J. Ch. 605; 83 L. T. 154—*Byrne, J.*

**41. Testamentary Power—Special Power—Void Execution of in Favour of Legatee—Election—Covenant to exercise in Particular Way—Enforcement of Covenant—Costs "as between Solicitor and Client"**—*R. S. C.*, 1883, *Ord.*

**Power of Appointment—Continued.**

65, r. 27, sub-r. 29—*R. S. C., January, 1902, r. 10.*—A testator, A. B., had, under W. B.'s will, a power of appointment among his children. He purported to exercise the power so as to give to persons to whom the law would not allow him to give, by reason of the rule against perpetuities, and therefore the appointment to those persons was bad. The result was that the property which he purported to dispose of went to those who, under the original will of W. B., took in default of the exercise of the power of appointment; but to those very persons A. B. had given property which was his own and which he might give, in a legal manner, as he pleased, the result being that those persons who took in default of appointment were themselves beneficiaries under A. B.'s will.

**HELD**—that, as in the case of an appointment to a person not an object of the power a case of election was raised, so in the case of an appointment such as this which was void for remoteness, a case of election was raised.

*In re Warren's Trusts* ((1884) 26 Ch. D. 208; 53 L. J. Ch. 787; 32 W. R. 641; 50 L. T. 454—Pearson, J.) distinguished.

**HELD**, also, that A. B.'s covenant with the trustees of his marriage settlement to exercise the special power in a particular way was bad, and could not be enforced against his estate.

**HELD**, also, that it was still necessary to use the words "as between solicitor and client" in such a case as this.

*IN RE BRADSHAW, BRADSHAW v. BRADSHAW*, [1902] 1 Ch. 436; 7 L. J. Ch. 230; 86 L. T. 253—Kekewich, J.

**42. Will—Subsequent Wills—Probate of First and Last Wills, omitting 'Intermediate Will—Revocation.**—Under the will of her father a testatrix had a power of appointment by will over a sum of £4,000. She left three testamentary documents dated respectively 1890, 1894 and 1895. By the will of 1890 she gave that sum "being the sum left to me by the will of my late father" to her daughter Gertrude for her sole use and benefit absolutely. By the will of 1894 she bequeathed the sum of £4,000 to her daughter Gertrude without specifying any fund. By the will of 1895 the bequest to her daughter was in these terms: "All the property, real, freehold, or personal, wheresoever situate, of which I may die seised or possessed for her own absolute use and benefit and to dispose of as she may think fit." Neither the will of 1894 nor the will of 1895 contained any words of revocation.

**HELD**—that as there was no express revocation of the first will, and the second and third wills contained nothing inconsistent with the execution of the power, admittedly brought by the first will, and as, moreover, sect. 27 of the Wills Act did not apply, the general words of bequest contained in the later wills could not revoke or affect the previous valid execution of the power.

*CADELL v. WILCOCKS*, [1898] P. 21; 67 L. J. P. [8; 78 L. T. 83; 44 T. L. R. 100; 46 W. R. 394—Jeune, P.

**(c) Release.**

**43. Joint Power—Power as Survivor of Donees—Dealing with Estate—Extinction of Power—Implied Release of Subsequent Appointment.**—Any dealing with the estate by the donee of a power inconsistent with the exercise of the power puts an end to it.

Under a marriage settlement property was settled after a life estate upon trust for Jackson and the children or issue of the marriage in such shares as the husband and wife should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of such appointment for others. The husband and wife and the parties entitled in default of appointment, by deed of 1886, assigned the property to Jackson for his own absolute use, subject as therein mentioned. The joint power was not referred to in the deed. The husband executed a deed of appointment to the infant children of Jackson. The wife subsequently died intestate.

**HELD**—that the deed of 1886 operated as a release of the husband's power of appointment, and his subsequent appointment was inoperative.

*In re Hancock* ([1896] 2 Ch. 173; 65 L. J. Ch. 690; 44 W. R. 545; 74 L. T. 658—C. A.) applied.

*FOAKES v. JACKSON*, [1900] 1 Ch. 807; 69 [L. J. Ch. 352; 48 W. R. 616; 83 L. T. 26—Farwell, J.

**44. Limited Power of Appointment—Donee of Power the ultimate Reversioner—Donee a Bankrupt—Claim of Trustee to release Power—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120.**—A bankrupt was under a settlement donee of a limited power of appointment and also the ultimate reversioner. His trustee in bankruptcy claimed to be entitled to release the power for the benefit of the estate.

**HELD**, by Farwell, J. ([1904] 2 Ch. 348; 73 L. J. Ch. 726; 91 L. T. 254) that he was not so entitled: on appeal order discharged by consent without any decision upon the point.

*IN RE ROSE, HASLUCK v. ROSE*, [1905] 1 Ch. [94; 74 L. J. Ch. 22; 91 L. T. 821; 11 Manson, 353—C. A.

**45. Marriage Settlement—Wife's Life Interest without Power of Anticipation—Power of Appointment by Wife—Release of Power—Acknowledgment—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52**—By antenuptial settlements made in 1872 the intended wife had a life interest in personal property, without power of anticipation, with a power of appointment among her issue. There was issue of the marriage. By an indenture made in 1899 she released her power.

**HELD**—that she could do so under sect. 52

**Power of Appointment—Continued.**

of the Conveyancing and Law of Property Act, 1881, and acknowledgment was not necessary.

IN RE CHISHOLM'S SETTLEMENT, IN RE [HEMPHILL'S SETTLEMENT, HEMPHILL v. HEMPHILL, [1901] 2 Ch. 83; 70 L. J. Ch. 533—Stirling, J.

**(d) Validity.**

**46. Ademption—No Person to take or no Property on which Power can operate—General or Special Power—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 23.]**—In the case of the will of a person having a general or a special testamentary power of appointment, the question whether there has been a failure by ademption is one of construction. You have to read the power with the instrument creating it, and then if you find that at the date when the instrument comes into operation, either there is no person to take, or that there is no property on which the power can operate, in either case the appointment fails. There is no distinction for this purpose between general and special powers.

There is no difference in principle between a gift of "Blackacre" or of moneys specifically described, by virtue of property in "Blackacre," and an appointment under a general or special power of "Blackacre" or moneys so specifically described. If the testator, having made his will in those terms, afterwards parts with the property, the gift fails because there is nothing on which it can operate when the testator dies.

*Gule v. Gule* (1856) 21 Beav. 349; 4 W. R. 277; *Blake v. Blake* (1880) 15 Ch. D. 481; 49 L. J. Ch. 393; 28 W. R. 647; 42 L. T. 724—Jessel, M.R.; *Collinson v. Collinson* (1857) 24 Beav. 269, and *In re Johnstone's Settlement* (1880) 14 Ch. D. 162; 49 L. J. Ch. 596; 28 W. R. 593—Malins, V.-C.) considered and explained.

IN RE DOWSETT, DOWSETT v. MEAKIN, [1901] 1 Ch. 398; 70 L. J. Ch. 149; 49 W. R. 268—Farwell, J.

Approved in No. 33, *supra*.

**47. Equitable Limitations—Appointment to Trustees upon Trust for Sale—Validity of Appointment.]**—The fact that the limitations are equitable, and not legal, does not prevent the operation of the rule that a power to appoint land is well exercised by an appointment to trustees to sell.

Estates were conveyed unto, and to the use of, trustees upon trust to convey the same to such one or more of E.'s children or issue as E. might by will appoint. E. by her will appointed all her estates to a trustee to receive and apply the rents during the minority of her grandchildren, and to sell the estates and divide the proceeds among such grandchildren as soon as the youngest attained the age of twenty-one.

**HELD**—that the appointment was good, and the property (which had in fact not been sold) must be treated as converted into personalty at the date when the youngest grandchild attained twenty-one.

Rule in *Kenworthy v. Bate* ((1802) 6 Ves. 793, 6 R. R. 46) applied.

IN RE REDGATE, MARSH v. REDGATE, [1903] 1 Ch. 356; 72 L. J. Ch. 204; 51 W. R. 276—Buckley, J.

**48. Fraud on Power—Jointure—Bargain between Husband and Wife—Benefit to Husband.]**—It is no objection to the validity of a jointure that the husband receives a consideration for exercising the power so long as the wife receives the whole jointure and provides the consideration *aliunde*.

The Court will not inquire into the *quantum* of the consideration given by a wife to her husband in return for a jointure.

A tenant for life had a power of jointuring up to £300; fourteen years after marriage, while living apart from his wife, he appointed to her a jointure of £300 during widowhood, in return for a cash payment of £50. Upon his death the succeeding tenant for life impugned the appointment as being a fraud on the power or a corrupt bargain. There was evidence that, taking into account the respective ages of husband and wife, the jointure was not worth £50.

**HELD**—that the transaction was valid.

*Baldwin v. Roche* ((1842) 5 Ir. Eq. Rep. 110) approved and followed.

*Whelan v. Palmer* ((1888) 39 Ch. D. 648; 57 L. J. Ch. 784—Kekewich, J.) overruled.

Decision of Kekewich, J. (91 L. T. 282) reversed.

SAUNDERS v. SHAFTO, [1905] 1 Ch. 126; 74 L. J. Ch. 110; 53 W. R. 424; 91 L. T. 789—C. A.

**49. Period of ascertaining Class—Remoteness.]**—In 1835 a husband and wife, under the powers given them by their marriage settlement dated 1793, out of the residue of the settled funds, consisting of personalty, and subject to their life interest therein, appointed £1,500 to each of three then unmarried daughters, who should thereafter marry; directed the income of the residue to be paid to such of them as should remain living and unmarried, in equal shares; and gave the residue itself, in case one only married (which event happened), after the death, or, as the case might require, the marriage of the last daughter living and unmarried, to four other children, and such of the unmarried daughters as should marry, in equal shares. The last surviving daughter died unmarried in 1897.

**HELD**—(1) that the final gift was wholly void for remoteness; (2) that the gift of £1,500 to each of the three daughters was also invalid; and (3) that there was a good gift of an equal undivided third share of the income to each of the three daughters so long as she remained unmarried, but that the gift over, which upon the construction of the deed of appointment was intended, of the share of a daughter who married to her sisters who remained unmarried, was also void for remoteness.

RE GAGE, HILL v. GAGE, [1898] 1 Ch. 498; 67 L. J. Ch. 200; 78 L. T. 347; 46 W. R. 569—Kekewich, J.

**Power of Appointment—Continued.**

**50. Power to "demise"—Fund to Donee's Brothers or Sisters, or their Children, as she should think proper—Power executed in Favour of a Niece who predeceased the Donee—Residuary Gift.**—A testatrix bequeathed the sum of £3,000 upon certain trusts, and, amongst others, upon trust to pay the interest on a sum of £500, part thereof, to her niece Rebecca, for life, or until she should have married, in which event she directed the said sum of £500 should be settled. The testatrix then declared the trusts of other portions of the £3,000 in favour of her nieces Anne and Frances, and declared that it was her will and desire that her said nieces, or such of them as died unmarried, should have power to demise (*sic*) the above-mentioned legacies to such of their brothers and sisters, or their children, as she, or they, should think proper. The will contained a residuary gift to a sister of the testatrix. Rebecca died without having married. By her will she left the £500 so bequeathed to a sister who predeceased her.

HELD—that there was no trust for the objects of the power, and that the sum of £500 fell into the residue.

IN RE HALL, DECEASED, SHEIL v. CLARKE. [1899] 1 Ir. R. 308—M.R.

**(e) In General.**

**52. General Testamentary Power—Covenant to exercise Power as Security for Loan—Liability of Appointed Fund for Appointor's other Debts.**—Personalty appointed by will under a general power is assets liable for payment of the testator's debts in default of other assets.

L., the donee of a general testamentary power of appointment over £10,000, in order to secure a loan covenanted to, and did exercise, his power in favour of the lender. The rest of his estate was insufficient to pay his debts.

HELD—that the lender had no priority over other creditors in respect of the appointed fund.

*Fleming v. Buchanan* ((1853) 3 D. M. & G. 976—Knight Bruce, L.J.) followed.

Decision of C. A. *sub nom. In re Lawley, Zuiser v. Lawley* ([1902] 2 Ch. 799; 71 L. J. Ch. 895; 51 W. R. 150; 87 L. T. 536) affirmed.

BEYFUS AND ANOTHER v. LAWLEY AND [ANOTHER, [1903] A. C. 411; 72 L. J. Ch. 781; 89 L. T. 309—H. L. (E.).

**53. Successive Appointments of Specific Sums—Appointment of Residue—Costs of administering Fund, including Distribution—Borne by appointed Funds rateably—How Deficiency to be supplied—Estate Duty—Incidence.**—A testator and his wife, in pursuance of an ordinary power of appointment over trust funds, amongst the children of the marriage, directed on three several occasions that the trustees should stand possessed of £10,000, to be raised if necessary out of the funds in their hands in trust for three of their daughters. Then a fourth daughter

was about to be married, and it was not certain whether the trust funds would be sufficient to provide for the appointment of £10,000 to that daughter, as the donees of the powers desired, and therefore they directed the trustees to stand possessed of the remaining funds, after satisfying the three previous appointments, in trust for that daughter, indicating that they intended her to have £10,000, because there was a proviso that she was not to have more. The deficiency was to be made good out of the testator's estate. The time for distribution had arrived, and the question was how the costs of the trustees were to be borne. The funds were not sufficient to provide for the appointment of £10,000 to the fourth daughter.

HELD—that all the costs of the trustees in relation to the administration of the fund, including its distribution, must be borne by the appointed funds rateably.

Rule laid down by Chitty, L.J. *In re Saunders* ([1898] 1 Ch. 17, 23; 67 L. J. Ch. 55; 46 W. R. 180; 77 L. T. 450) applied.

HELD, also, that the deficiency to be supplied by the testator's estate was the sum required to make up the gross amount of the appointment to £40,000.

HELD, also, that the estate duty on so much of the testator's estate as was required to make up that deficiency was to be borne by that estate.

*In re Gray* ([1896] 1 Ch. 620; 65 L. J. Ch. 462; 60 J. P. 314; 44 W. R. 406; 74 L. T. 274—North J.) followed.

IN RE CHISHOLM, GODDARD v. BRODIE. [1902] 1 Ch. 457; 71 L. J. Ch. 289; 86 L. T. 183—Kekewich, J.

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See also ADMIRALTY; ARBITRATION; BANKRUPTCY; CHARITIES; COMPANIES; CONFLICT OF LAWS; CONTEMPT AND ATTACHMENT; CONTRACTS; COUNTY COURTS; CRIMINAL LAW; DISCOUNTS; EVIDENCE; EXECUTION; COVEY; EXECUTORS; HIGHWAYS, 99, 101; INJUNCTIONS; INTERPLEADER; LIBEL AND SLANDER, 8, 15, 38; LIMITATION OF ACTIONS: LUNATICS, 4, 8; PARTNERSHIP; PLEADING; RECEIVERS; SET-OFF; SPECIFIC PERFORMANCE; SHIPPING, 320-327, 357; TRADE MARKS.

# I. SERVICE OF WRIT OF SUMMONS.

1. Amended Writ — Defendant who has not appeared — Personal Service — Discretion of Court—R. S. C., Ord. 9, r. 2; Ord. 16, r. 13; Ord. 17, r. 4; Ord. 19, r. 10; Ord. 28, r. 1, 10; Ord. 67, rr. 4, 5.—The rules make no provision for personal service of an amended writ. Such a writ need not always be served personally upon a defendant who has failed to appear to the original writ.

In the exercise of its discretion the Court will require such service where otherwise injustice might be done to the defendant, *e.g.*, if the claim against him, as shown by the endorsement, has been substantially increased; but in other cases the amended writ may be served by filing it with the proper officer.

A defendant to an action brought by a colonial railway company and the governor of the colony (expressed in the statement of claim to be suing on behalf of the Government) did not appear. The writ was subsequently amended by adding as plaintiff the name of the governor's successor in office.

HELD—that filing the amended writ was sufficient service.

*In re Hartley* ([1891] 2 Ch. 121; 39 W. R. 604; 64 L. T. 786) and *Tilling, Ltd. v. Blythe* ([1899] 1 Q. B. 557; 68 L. J. Q. B. 350; 47 W. R. 273; 80 L. T. 44—C. A.) discussed and explained. See No. 170, *infra*.

JAMAICA RY. CO. v. COLONIAL BANK, [1905] 2 Ch. 677; 74 L. J. Ch. 410; 53 W. R. 564; 92 L. T. 548—C. A.

2. Enticing Defendant within the Jurisdiction — Setting aside Service.—If a person is induced by fraud of any kind to come within the jurisdiction for the concealed purpose of serving him with a writ in an action, the Court will set aside the service as an abuse of the process of the Court.

Where an invitation was issued to the defendant, who was a foreigner resident abroad and the general manager abroad of an English company, by the directors of the company to come within the jurisdiction with a real intention to discuss certain matters in difference between them and the defendant, although the directors also intended to serve him with a writ, and the





**Service out of Jurisdiction—Continued.**

Upon an affidavit stating that the defendant, a British subject, when in England promised to marry the plaintiff, it being agreed that the marriage should take place in England, and that the defendant refused to do so, the Court gave leave, under Ord. 11, r. 1 (e), to issue and serve a writ in an action for breach of the promise to marry upon the defendant, who was residing out of the jurisdiction.

COOPER v. KNIGHT, (1901) 17 T. L. R. 299  
[—C. A.]

9. *Different Cause of Action relied on to that stated in Affidavit on which Leave was granted—Writ and Service set aside—Ord. 11, r. 1 (e).*—The plaintiff having obtained leave to issue a writ for service out of the jurisdiction under Ord. 11, r. 1 (e), upon an affidavit alleging a breach of contract within the jurisdiction, the Court, upon the defendants applying to set aside the writ and the service upon the ground that that breach did not occur within the jurisdiction, refused to allow the plaintiff to set up and rely upon another and distinct cause of action.

PARKER v. SCHULLER AND ANOTHER, (1901)  
[17 T. L. R. 299—C. A.]

10. *English Agents of Foreign Insurance Company—Breach of Contract—Ord. 11, r. 1 (e).*—The defendants, a Spanish insurance company domiciled at Teneriffe, by a contract entered into at Teneriffe appointed the plaintiffs, who carried on business in London, their exclusive insurance agents for five years for the United Kingdom and elsewhere. The defendants bound themselves not to undertake any business which came within the agreement except through the intervention of the plaintiffs, and they undertook to open banking credits at a bank in London for the use of the plaintiffs. The business of the agency was carried on for a year at the plaintiffs' office in London, when the agent-general of the defendants came to London, and, acting on behalf of the defendants, terminated the agreement of agency from that date.

HELD—that it was an implied term of the agreement that the defendants would do nothing to prevent the plaintiffs from acting as their representatives in England; that there was a breach within the jurisdiction of the contract, which, according to the terms thereof, ought to be performed within the jurisdiction within Ord. 11, r. 1 (e), and leave could be granted to serve notice of a writ of summons on the defendants out of the jurisdiction.

MUTZENBECKER AND OTHERS v. LA ASEGUARA-  
[DORA ESPAÑOLA, [1906] 1 K. B. 254; 75  
L. J. K. B. 172; 54 W. R. 207; 94 L. T. 127;  
22 T. L. R. 175—C. A.]

11. *Writ of Summons—Foreclosure Action—"Breach of Contract"—Action "properly brought" against Person within Jurisdiction—Ord. 11, r. 1 (e) and (g).*—An action for foreclosure by a first mortgagee against his mortgagor and the assignees of a second mortgagee as co-defendants is not founded on any "breach of

contract" within the meaning of Ord. 11, r. 1 (e), between the plaintiff and defendants, nor is it an action "properly brought" within the meaning of Ord. 11, r. 1 (g), against the assignees of the second mortgagee when such assignees are merely trustees for the plaintiff; leave to serve notice of the writ of summons upon the defendant mortgagor to be given.

DEUTSCHE NATIONAL BANK v. [Ch. 283; 67 L. J. Ch. 156;  
T. L. R. 193; 46 W. R. 211]

12. *"Ought" to be performed—Jurisdiction—Ord. 11, r. 1 (e).*—The plaintiff not be allowed to be served with a writ of summons under Ord. 11, r. 1 (e), in respect of which the act which must be performed is "Ought" in that Where a merchant out-  
tracted to sell goods in England:—  
HELD (reversing the judgment below)—that no part of the contract was to be performed in this country upon a writ could not be issued for service to the either for breach of the contract or will had and received.

COMBER v. LEYLAND, [1898] A. C. 524;  
[L. J. Q. B. 884; 79 L. T. 180—H. L. (E.)]

13. *Person domiciled in Scotland—Agreement for Service on Agent in England—Validity—R. S. C., Ord. 9, rr. 1, 2; Ord. 11, r. 1 (e).*—In a contract of sale made between the plaintiffs and the defendants it was agreed that the service of proceedings upon a party residing or carrying on business in Scotland or Ireland by leaving the same at the office of an association in London, together with the posting of a copy of such proceedings to the address in Scotland or Ireland of such party, should be deemed good service.

The defendants were domiciled and carried on business in Scotland. The plaintiffs brought this action against the defendants in respect of the contract of sale, and the writ was served in the manner provided by the contract.

HELD—that the agreement as to service was valid and binding, and that the defendants were not entitled to have the service of the writ set aside.

Tharsis Sulphur Co. v. Société Industrielle des Métaux (60 L. T. 924) approved.

British Waggon Co., Ltd. v. Gray ((1896) 1 Q. B. 35) distinguished.

MONTGOMERY, JONES & CO. v. LIEBENTHAL & Co. (No. 1), [1898] 1 Q. B. 487; 67 L. J. Q. B. 313; 78 L. T. 211; 14 T. L. R. 201; 46 W. R. 292—C. A.]

14. *Place of Payment—Agreement made Abroad by Foreigner to pay Money to English Creditor—Debtor to seek his Creditor—R. S. C., Ord. 11, r. 1 (e).*—A French firm had as agents

**Service out of Jurisdiction—Continued.**

in England a firm consisting of the plaintiff and a partner. The plaintiff was a naturalised Englishman who was resident and domiciled in England. The French firm took legal proceedings in France against the English firm. While these proceedings were pending the plaintiff was in Paris, where he saw an agent of the defendant, and the agent agreed with him that, if the plaintiff would compromise the proceedings, the defendant would pay him £8,000, and the compromise was effected. The plaintiff sued on that agreement in England.

**HELD**—that the Court ought not to infer that there was an implied term in the contract that the payment was to be made in England; and that the plaintiff failed to bring his case within Ord. 11, r. 1 (e), so as to allow service of the writ out of the jurisdiction.

ANGER v. VASNIER, (1902) 18 T. L. R. 596—  
[C. A.]

**15. Place of Payment — Ord. 11, r. 1 (e).—**In order to allow service of a writ of summons out of the jurisdiction under Ord. 11, r. 1 (e), it is not necessary that the contract should expressly state that it is to be performed within the jurisdiction.

By a contract made abroad the plaintiffs, who carried on business in England, appointed the defendants, who were domiciled and carried on business abroad, their agents to sell their goods abroad. By the contract the defendants had to pay the net balance of the price of the goods sold, after the necessary deductions, to the plaintiffs, but the contract did not state where the payment was to be made. The plaintiffs sought to sue the defendants here for moneys alleged to have been received by them, but not paid over.

**HELD**—that, as the payments ought to have been made within the jurisdiction, there was power to give leave to issue the writ and to serve notice thereof on the defendants out of the jurisdiction.

CHARLES DUVAL & CO., LD. v. GANS AND PICK,  
[1904] 2 K. B. 685; 73 L. J. K. B. 907; 91  
L. T. 308; 20 T. L. R. 705; 53 W. R. 106—  
C. A.

**16. Through Carriage—Contract alleged to be made in Ireland with Agent — Interpretation—Motion to set aside the Order—Ord. 11, r. 1.—**The plaintiff entered into a contract with a steamship company in Ireland for the through carriage of certain live stock from Londonderry to York. The carriage necessitated the live stock being taken to Liverpool, and thence by two lines of railway to their destination.

**HELD**, on the construction of the contract and on the facts, that there were three independent contracts with the steamship company and the two railway companies; that the contracts with the railway companies were made and to be performed in England; and that, consequently, an order giving leave to issue and serve a writ out of the jurisdiction, in an action for a breach at B.D.—VOL. III.

York of one of these contracts, could not be maintained, and should be discharged.

M'GETTIGAN v. NORTH EASTERN RY. CO. OF  
[ENGLAND, [1899] 2 Ir. R. 375—Q. B.]

**17. Wrongful Dismissal—Letter of Dismissal written and posted Abroad—R. S. C., Ord. 11, r. 1 (e).—**The plaintiff was employed in this country by the defendant, who was a foreigner resident abroad, as the London correspondent for the European edition of a newspaper. Subsequently the defendant wrote and posted a letter abroad addressed to the plaintiff in England, giving him notice to terminate his employment. The plaintiff obtained leave to issue a writ and serve notice thereof out of the jurisdiction, claiming damages for wrongful dismissal, and he served notice thereof on the defendant abroad.

**HELD**—that the alleged breach of contract of employment occurred when the letter was posted abroad; that therefore there was no breach of the contract within the jurisdiction within Ord. 11, r. 1 (e); and that the notice of the writ and the service thereof must be set aside.

HOLLAND v. BENNETT, [1902] 1 K. B. 867; 71  
[L. J. K. B. 490; 50 W. R. 401; 86 L. T. 485;  
18 T. L. R. 510—C. A.]

**(b) Injunction.**

**18. Action for Damages and an Injunction—Claim for Injunction not bonâ fide—Reasonable Probability of obtaining Injunction — R. S. C., Ord. 11, r. 1 (f).—**An application under Ord. 11 r. 1 (f), for leave to issue a writ for service out of the jurisdiction in an action brought for damages and an injunction will not be allowed if it appears that the claim for an injunction is made not *bonâ fide*, but merely for the purpose of bringing the case within Order 11. Neither will the Court allow the application if it is satisfied that there is no reasonable probability that the plaintiff will obtain an injunction even though successful in his action.

Service of a writ in a libel action against a Scotch newspaper was set aside although the plaintiff asked for an injunction to restrain further publication within the jurisdiction, the defendants selling few copies of their paper in England and disclaiming any intention of repeating the alleged libels.

WATSON & SONS, LD. v. "DAILY RECORD"  
[GLASGOW], LD., [1907] 1 K. B. 853; 76  
L. J. K. B. 448; 96 L. T. 485; 23 T. L. R. 333  
—C. A.]

**19. Alleged Infringement of Patent—R. S. C., Ord. 11, r. 1.—**In an application for leave to serve a writ or notice of a writ out of the jurisdiction, if the facts are in dispute the judge must try to ascertain from the affidavits whether the plaintiffs have made out a good cause of action, meaning thereby a *prima facie* probability of their being successful at the trial.

The actual words "good cause" need not be used in the affidavit, if as a whole it sets out sufficient facts based on satisfactory sources of information to make it a proper inference that

**Service out of Jurisdiction—Continued.**

there is a good cause of action in the sense above described.

Even if the facts are admitted, but there is a difficult point of law arising out of them, *quaere* whether he is bound to hear and determine that point of law instead of allowing the action to go on to trial in the ordinary course.

Decision of Buckley, J., affirmed.

**BADISCHE ANILIN UND SODA FABRIK v. W. G. [THOMPSON & Co., LD., (1903) 88 L. T. 492, n.; 20 R. P. C. 422—C. A.]**

**20. Alleged Infringement of Patent—Affidavits founded on "Information and Belief"—Question of Law—Sufficient *prima facie* Case of Infringement—Ord. 11, r. 1 (f).]**—The evidence necessary to support an application under Ord. 11, r. 1, discussed.

The plaintiffs' patent gives them the sole right to "make, use, exercise, and vend" their invention for making dyes within the United Kingdom; their affidavits, founded on information and belief, suggested that the defendants had through travellers exhibited samples and solicited orders for dyes, made according to the plaintiffs' patent, from dealers (but not consumers) in this country, such orders being executed by delivery abroad to the purchasers' agents. If these facts were established, it would be a question of law whether they constituted an infringement.

**HELD**—that leave had rightly been given to serve notice of writ out of the jurisdiction.

Decision of C. A. (88 L. T. 490; 19 T. L. R. 382; 20 R. P. C. 413) affirmed.

**CHEMISCHE FABRIK VORMALS SANDOZ v. [BADISCHE ANILIN UND SODA FABRIK (1904) 90 L. T. 733; 20 T. L. R. 552; 21 R. P. C. 533—H. L. (E.)]**

**21. Tacking on Cause of Action not within Ord. 11—Notice of Writ of Summons—R. S. C., Ord. 11, r. 1 (f).]**—Where it is intended to serve notice of a writ out of the jurisdiction under Ord. 11, a cause of action not within the terms of that order cannot be tacked on to one which does fall within it.

If the plaintiffs in such a case make out a *prima facie* cause of action within the terms of the order, and the defendants raise an issue of fact, service out of the jurisdiction should be allowed, and the issue of fact reserved for the trial.

**BADISCHE ANILIN UND SODA FABRIK v. [CHEMISCHE FABRIK VORMALS SANDOZ, (1904) 21 R. P. C. 345—Eady, J.]**

**(c) Miscellaneous.**

**22. Claim to have a Charging Order on Shares enforced by Sale—R. S. C., Ord. 11, r. 1.]**—A writ of summons claiming to enforce a charge upon personal property in this country cannot under any existing rule be served out of the jurisdiction.

**KOLCHMANN v. MEURICE, [1903] 1 K. B. 534; [72 L. J. K. B. 289; 51 W. R. 356; 88 L. T. 369; 19 T. L. R. 254—C. A.]**

**23. Company out of Jurisdiction—Special Mode of Service—Writ containing False Address within Jurisdiction—R. S. C. (Ireland), Ord. 9, rr. 5, 11; Ord. 11, r. 1.]**—Where there is a statutory provision as to service of process on a defendant, by which service ought to be effected at a place outside the jurisdiction, service on an agent within the jurisdiction is bad, nor can an order be made for substituted service.

The head office of a railway company is the office where the government of the company is carried on; if such office is in England an Irish writ against the company cannot be validly served on the person in charge of the company's office in Dublin, nor can an order be made for substituted service on such person.

If a plaintiff, knowing a defendant's true address to be outside the jurisdiction, deliberately inserts in a writ a false address within the jurisdiction, the writ may be set aside on that ground.

**CLOKEY v. LONDON AND NORTH WESTERN [Ry. Co., [1905] 2 K. B. 251.—K. B. D.]**

**24. Ex parte Order of Court of Appeal giving Leave to serve Writ out of Jurisdiction—Motion to set aside—Where Application to be made.]**—Where the Court of Appeal makes an order *ex parte*, giving the plaintiff leave to issue and serve a writ out of the jurisdiction, an application to set aside that order is properly made to the Divisional Court.

**JOHNSTON v. STODDART, [1899] 2 I. R. 233—[Q. B.]**

**25. Summons for leave to enforce Award—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 1, 12.]**—A mercantile contract between the appellants and the respondents, who were and are foreigners resident out of the jurisdiction, provided for the reference of disputes to arbitration. The appellants, alleging that a dispute had arisen, appointed an arbitrator, and he made an award against the respondents, who failed to appoint any arbitrator, in their absence.

The appellants, thereupon, took out a summons for leave to enforce the award.

**HELD**—that it could not be served out of the jurisdiction. The general agreement to refer disputes did not amount to a submission to the jurisdiction on the part of the respondents; and no statutory enactment has authorised service of such process outside the jurisdiction.

**RASCH & Co. v. WULFERT, [1904] 1 K. B. 118; [73 L. J. K. B. 20; 52 W. R. 145; 89 L. T. 493; 20 T. L. R. 70—C. A.]**

**26. Writ for Service out of Jurisdiction—Substituted Service within Jurisdiction—R. S. C., 1883, Ord. 10.]**—Where a concurrent writ has been issued for service out of the jurisdiction, an order for substituted service to several addresses, some within and some without the jurisdiction, may properly be made.

**WESTERN SUBURBAN, &c., BUILDING SOCIETY [v. RUCKLIDGE, [1905] 2 Ch. 472; 74 L. J. Ch. 751; 54 W. R. 62; 93 L. T. 664—Eady, J.]**

## Service out of Jurisdiction—Continued.

## (d) Necessary or Proper Party.

**27. Cause of Action arising out of Jurisdiction—One Defendant Duly Served within Jurisdiction—Foreigner Co-defendant—Concurrent Writ—R. S. C., 1883, Ord. 11, r. 1 (g).]**—A collision occurred on the "high seas" between a British steamer and a French sailing vessel in tow of a British tug; the steamship owners issued a writ against the owners of the tug and of the sailing vessel: and, having served it upon the tug owners, obtained leave to issue a concurrent writ, and serve notice thereof upon the owners of the sailing vessel in France.

**HELD**—that, as the negligence might well be (as the plaintiffs alleged) the joint negligence of tug and tow, the owners of the latter were "proper" parties; the test is, "supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?"

Judgment of Lord Esher in *Massey v. Haynes* (1888) 21 Q. B. D. at p. 338; 57 L. J. Q. B. 521; 36 W. R. 834; 59 L. T. 470) cited with approval.

*Cause of action arising out of the jurisdiction:*

**HELD**, also, that this fact made no difference, one defendant having been already served within it.

Decision of Barnes, J. (19 T. L. R. 421; 51 W. R. 271) affirmed.

"**THE DUC D'AUMALE**," [1903] P. 18; 72 L. J. [P. 11; 51 W. R. 332; 87 L. T. 674; 19 T. L. R. 87; 9 Asp. M. C. 359—C. A.

**28. Colonial Company—Debenture-holders' Action—R. S. C., Ord. 11, r. 1 (g).]**—A colonial company that has borrowed money in this country on debentures issued by it is a "necessary or proper" party to an action by the debenture-holders for the protection of their security.

Decision of North, J., reversed

**BAWTREE v. GREAT NORTH-WEST CENTRAL** [Ry. Co., (1898) 14 T. L. R. 448.—C. A.

**29. Discretion of Court—R. S. C., Ord. 11, rr. 1 (g) 2.]**—The Court has a general discretion as to service out of the jurisdiction under Ord. 11, r. 1. Although under Ord. 11, r. 2, the Court is obliged to consider specially the comparative cost and convenience, while giving some weight to those considerations, it will consider principally whether the interests of justice are best served by trying the question here or leaving it to a foreign tribunal.

**LOPEZ v. CHAVARRI**, [1901] W. N. 115; 45 [Sol. J. 536; 36 L. J. (N.C.) 278—Farwell, J.

**30. English Debenture Deed—Foreign Assets—Receiver—Party out of Jurisdiction—R. S. C., 1883, Ord. 11, r. 1 (g).]**—The plaintiffs were a Brazilian firm, carrying on business in Bahia; one of the members of the firm was resident for the time being in England. The plaintiffs

brought an action to enforce an alleged prior equitable charge made in England, on property and assets in Brazil. The defendants were (1) a Dutch corporation, the trustees of a debenture deed, having no place of business or assets in England; (2) the receivers appointed under the debenture deed were resident in England; and (3) an English company having assets and property in Brazil. The plaintiffs moved for the appointment of a receiver of the property and assets comprised in the debenture deed. The Dutch corporation moved to set aside the writ, to which they had appeared under protest. It was agreed that the Dutch corporation's motion should be dealt with as though leave had been given to serve the notice of the writ abroad, and the application was to discharge the order giving leave.

**HELD**—that the case fell within the terms of Ord. 11, r. 1 (g), as the defendants, the trustees, were necessary or proper parties to an action properly brought against other persons served within the jurisdiction; that the application ought not to succeed, as to allow service in accordance with the rule was not to extend jurisdiction, but to enable the old jurisdiction to be exercised in a case where, at one time, it could not have been exercised by reason of defective rules of procedure; and that the plaintiffs were entitled to the appointment of a receiver of so much of the property as was within their contract.

**DUDER v. AMSTERDAMSCH TRUSTEES KANTOOR**, [1902] 2 Ch. 132; 71 L. J. Ch. 618; 50 W. R. 551; 87 L. T. 22—Byrne, J.

**31. Ex parte Order by Court of Appeal—Application to Court of first instance to set aside—R. S. C., Ord. 11, r. 1 (g).]**—The Court of Appeal made an order under Ord. 11, r. 1 (g), *ex parte* for the service of a writ on certain defendants in Scotland. They applied to Kekewich, J., at chambers to set aside the order.

**HELD**—upon the authority of *Honduras Banking Co. v. Compagnie Générale, &c.*, noted in "Annual Practice," 1904, p. 100, and an article in the "Solicitors' Journal," 1896, pp. 288, 289, that the judge had jurisdiction to set aside the order, but that, upon the merits, the order was rightly made, and would not be disturbed.

**BALFOUR v. WYLIE**, [1904], W. N. 72; 116 [L. T. Jo. 477; 39 L. J. (N.C.) 147.—Kekewich, J.

**32. Infringement of Patent—Party within Jurisdiction supplied by Party out of Jurisdiction—R. S. C., 1883, Ord. 11, r. 1 (g), (h), r. 2.]**—In an action against M., a vendor of cycles within the jurisdiction, and L. & F., cycle manufacturers in England, for an injunction to restrain the defendants from infringing in Ireland the plaintiffs' patent, and for damages, it appeared that L. & F. supplied M. with cycles having the article complained of as an infringement attached. The plaintiffs alleged that these cycles were sold by M. as agent for L. & F., while L. & F. alleged that the cycles were sold by them to M. for re-sale by him. L. & F. also alleged that the plaintiffs' invention had been anticipated and was not novel.

**Service out of Jurisdiction—Continued.**

M. had been duly served with the writ within the jurisdiction.

**HELD**—that the case came within both clause (g) and clause (h) of Ord. 11, r. 1, and that an order giving leave to issue a concurrent writ, and to serve it on L. & F. out of the jurisdiction, had been rightly made.

**JOYNT v. M'CRUM**, (1899) 1 Ir. R. 217—V.-C.

**33. Insufficient Disclosure of Facts—Discretion of Court—R. S. C., Ord. 11, r. 1 (g).**—This was an action brought against four persons for relief in respect of a breach of trust in improper investment of trust funds. The first three defendants were partners in a firm of solicitors practising in Calcutta; the fourth was the legal personal representative of the survivor of the two trustees who were alleged to be responsible for the breach of trust. He was resident in England, and had been duly served. An order had been made for service out of the jurisdiction upon the first three defendants upon affidavits which only stated that the money was in their hands when invested and the investment was really made by them. The three defendants now moved to discharge the order. It appeared from the evidence on this motion that the defendant's firm had only acted as solicitors for the trustees, the business having been brought in and entirely conducted by a deceased member of the firm.

**HELD**—that the order for service must be discharged because (1) the affidavits on which the order was obtained did not sufficiently disclose the facts; (2) the first three defendants were not necessary or proper parties to the action; (3) the case was not one in which the court ought in the exercise of its discretion to order the case to be tried in England.

**PLASKITT v. EDDIS**, (1898) 79 L. T. 136.—  
[North, J.]

**III. SUMMARY JUDGMENT ON SPECIALLY INDORSED WRIT.**

**34. Counterclaim or Defence.**—In an action by a company, carrying on business in Scotland, for the price of goods delivered, the defendant alleged that under the contract the goods ought to have been packed by the plaintiff for sending abroad, and this not having been done that he was entitled to deduct from the amount claimed in the action the sum he had spent in properly packing them.

**HELD**—that the plaintiff was not entitled to summary judgment, and that the defendant should have leave to defend.

Decision of Day, J., reversed.

**UNITED GUTTA-PERCHA CO., LD. v. WELCH & CO.**, (1898), 14 T. L. R. 154—C. A.

**35. Action on Foreign Judgment—Substantial Question for Trial—R. S. C., Ord. 14.**—Leave should not be given to sign judgment under Ord. 14 unless it is clear that there is no real substantial question to be tried. Therefore when,

in an action on a foreign judgment, the defendant made an affidavit that the judgment had been obtained by fraud:—

**HELD** (reversing the judgment of the court below)—that the plaintiff should not be allowed to sign judgment under Ord. 14.

**CODD v. DELAP**, (1905) 92 L. T. 510.—H. L. (E.).

**36. Bond conditioned on One Event—Liquidated Damages—Penalty—Judgment under Ord. 14, r. 1—8 & 9 Will. 3, c. 11, s. 8.**—To enable the defendant to get out of prison, where he was committed for disobeying an injunction, he executed a bond in favour of the plaintiff for £100, whose object was to secure obedience to the injunction. If he obeyed the injunction, he would not be called upon to pay; but if he disobeyed it, he was to be liable under the bond. He disobeyed it.

**HELD**—that the payment was conditioned on one event. The payment was therefore in the nature of liquidated damages and not in the nature of a penalty. The procedure of Ord. 14, r. 1, was applicable to the recovery of the £100. **STRICKLAND v. WILLIAMS**, [1899] 1 Q. B. 382; [68 L. J. Q. B. 241; 80 L. T. 4; 15 T. L. R. 131—C. A.]

**37. Co-defendants—Claim against Defendants Alternatively—Judgment against One—Election—R. S. C., Ord. 14, r. 5.**—The last words of r. 5 of Ord. 14 (*semble*, also, of r. 4 of Ord. 13) apply only to cases of joint liability, and not to cases of alternative liability.

Therefore, if a claim be made against two persons as liable in the alternative (*e.g.*, principal and agent), the plaintiff, by signing judgment against one, loses his right to recover against the other. Where, however, the claim is both joint and in the alternative, the plaintiff, after signing judgment against one, may still recover against the other by establishing joint liability.

Decision of C. A. ([1903] 1 K. B. 64; 72 L. J. K. B. 66; 51 W. R. 290; 87 L. T. 635; 19 T. L. R. 43) affirmed.

**MOREL BROS. v. EARL OF WESTMORELAND**, [1904] A. C. 11; 73 L. J. K. B. 93; 52 W. R. 353; 89 L. T. 712; 20 T. L. R. 38—  
H. L. (E.).

**38. Costs of Application under Ord. 14—Action Remitted to County Court—Order made for "Costs in Cause"—Jurisdiction—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65 and 116—R. S. C., Ord. 14, r. 9.**—Upon an application for judgment under Ord. 14, in an action of contract to recover £22, the defendant obtained leave to defend. Upon a subsequent application by the plaintiff at chambers, it was ordered that the action should be remitted to the county court, and that the costs of the application under Ord. 14 should be "costs in the cause."

**HELD**—that there was no jurisdiction to make the order as to costs.

**DUNN v. APPLETON**, [1898] 1 Q. B. 564; 67 [L. J. Q. B. 428; 78 L. T. 246; 14 T. L. R. 264—C. A.]

**Summary Judgment on Specially Indorsed Writ**  
—Continued.

**39. Joint Debtors—Effect of Summary Judgment—Judgment under Ord. 14 against One of Several Joint Debtors—No Bar to further Proceedings against other Defendants—R. S. C., Ord. 14, r. 5.]**—A plaintiff issued a summons for judgment under Ord. 14 against three defendants alleged to be jointly liable to him: Two of them obtained leave to defend; but the third did not appear on the summons and the plaintiff obtained leave to, and did, sign judgment, against him.

**HELD**—that the plaintiff had not thereby lost his right to continue the action against the other two defendants.

Dictum of Lord Davey in *Morel Bros. v. Westmoreland*, ([1904] A. C. 11; 73 L. J. K. B. 93; 2 W. R. 353; 89 L. T. 712—H. L., No. 37, *supra*) followed.

**WALTON & CO. v. TOPAKYAN AND OTHERS**, ([1905] 53 W. R. 657—C. A.

**40. Leave to Defend—"Security to the Satisfaction of the Master"—Sufficiency of Security Appeal.]**—In proceedings under Ord. 14, r. 6, where a defendant has been granted leave to defend upon the terms of giving security to the satisfaction of the master, the decision of the latter as to the sufficiency of the security given cannot be questioned on appeal.

**HOARE & CO. v. MORSHEAD**, (1903) 52 W. R. [87; 89 L. T. 125; 19 T. L. R. 632—C. A.

**41. Leave to Sign Judgment—Leave to Defend—Merits of Case—R. S. C., Ord. 14.]**—Unless the Court is satisfied that the defendant has no defence, the plaintiff is not entitled to judgment under Ord. 14. The merits of the case are not to be gone into upon an application under this order, and a defence is not to be shut out where on the disclosed facts a triable issue arises.

**JACOBS v. BOOTH'S DISTILLERY CO.**, (1901) 50 [W. R. 49; 85 L. T. 262—H. L. (E.).

**42. Money-lender's Action—Excessive Bonus—Harsh and Unconscionable Transaction—Ord. 14—Money-lenders Act, 1900 (63 & 64 Vict. c. 61), s. 1.]**—The plaintiff, who was a money-lender, lent to the defendant at various times sums of money amounting in all to £940, which, with a cash bonus of £100 agreed to be paid to the plaintiff, made a debt of £1,040. Upon each advance the defendant gave to the plaintiff a bonus in the shape of shares in a company. In this way the plaintiff received from the defendant shares to the value of £1,800, and he also held an undertaking to deliver a number of other shares. The defendant brought an action in the Chancery Division to have these transactions reopened, and the plaintiff sued in the King's Bench Division to recover the £1,040. Upon an application in this latter action for judgment under Ord. 14, the defendant alleged that the transactions were harsh and unconscionable, and that he was entitled to relief under the Money-lenders Act, 1900. The Master and judge gave the defendant leave to defend upon bringing £1,040 into Court.

**HELD**—that the case was not one for Ord. 14, and that the defendant must have unconditional leave to defend.

**DOTT v. BONNARD**, (1905) 21 T. L. R. 166—C. A.

And see under **MONEY AND MONEY-LENDERS**.

**43. Unconditional Leave to Defend—Calls on Shares resisted on the Ground of Deception in Prospectus—R. S. C., Ord. 14.]**—Where there is any question that should be submitted to a jury the defendant should have unconditional leave to defend.

Decision of Day, J., at chambers, reversed.

**TRUFFAULT CYCLE AND TUBE MANUFACTURING CO., LD. v. SAUNDERS**, (1898) 14 T. L. R. 40—C. A.

#### IV. PARTIES.

##### (a) Attorney-General.

**44. Alleged Public Wrong—Right of Individuals to Sue without Attorney-General.]**—Plaintiffs claimed, on behalf of themselves and other the burgesses of the borough of Hythe, an injunction to restrain the borough council from consenting to a Bill for the construction of certain tramways within the borough otherwise than in accordance with a certain resolution passed and confirmed by the council on August 5th and August 9th, 1905.

The preliminary objection was taken by the defendant council that, this action involving a public and not a private inquiry, the Attorney-General should be a party to it.

**HELD**, following the decision in *Eran v. Corporation of Aron*, (1860) 29 Beav. 144—that the objection was well founded, and that the action was not properly constituted.

**WATSON v. HYTHE BOROUGH COUNCIL**, (1906) [70 J. P. 153; 22 T. L. R. 245; 4 L. G. R. 340—Warrington, J.

**45. When Entitled to Maintain an Action.]**—The Attorney-General sues to protect the rights of the whole public, not those of a small portion, especially when that portion can themselves maintain an action.

Therefore, where the Attorney-General and a district council brought an action to defend certain rights, and it was eventually found that such rights were parochial and vested in the parish council:—

**HELD**—that the fact that the Attorney-General was a party did not get over the difficulty caused by the absence of the parish council.

**ATTORNEY-GENERAL AND SPALDING RURAL DISTRICT COUNCIL v. GARNER**, [1907] 2 K. B. 480; 76 L. J. K. B. 965; 71 J. P. 357; 97 L. T. 486; 23 T. L. R. 563; 5 L. G. R. 944—Channell, J.

##### (b) Compromise.

**46. Co-plaintiffs—One Compromising Action—Defendants applying to Strike out Name—Discretion of Court.]**—One of several plaintiffs is not entitled as of right to have his name struck out if he compromises the action.

**Parties—Continued.**

In an action by three plaintiffs against three defendants two of the latter applied to strike out the name of one of the plaintiffs, with her consent, on the ground that a compromise had been arrived at between them. The other plaintiffs opposed the application.

**HELD**—that the Court would refuse to make any order.

**IN RE MATHEWS, OATES v. MOONEY**, [1905]  
[2 Ch. 460; 74 L. J. Ch. 656; 54 W. R. 75;  
93 L. T. 158—Eady, J.]

**47. Power of Court to bind Absent Persons—***R. S. C., Ord. 16, r. 9A.*—In an action brought on behalf of the holders of bearer bonds of a company against the company and the trustees for the bondholders, the Court in 1894 sanctioned a compromise scheme, and ordered that the scheme should be binding on bondholders not parties to the proceedings.

**HELD**—that the Court had now jurisdiction to order bondholders, whose names were unknown, to come in within six months or be excluded from the benefit of the scheme.

Decision of C. A. (*sub nom. Collingham v. Sloper*, [1901] 1 Ch. 769; 70 L. J. Ch. 361; 84 L. T. 289; 49 W. R. 404) reversed.

**SARAGOSSA AND MEDITERRANEAN RY. Co. v. COLLINGHAM AND OTHERS**, [1904] A. C. 159;  
73 L. J. Ch. 568; 52 W. R. 609; 90 L. T. 212;  
20 T. L. R. 354—H. L. (E.).

**(c) Joinder of Defendants.**

**48. Adding Defendant—Breach of Trust—Trustees Jointly and Severally Liable—Action brought against One Trustee only—Right of Defendant to join Co-Trustee—***R. S. C., 1883, Ord. 16, r. 11.*—Two trustees committed a breach of trust, and were under a joint and several liability in respect of it. The *cestui que trust* sued only one of the trustees. The other trustee was dead, and his legal personal representative, Mrs. C., was in Ireland. The trustee who was sued asked that Mrs. C. should be added as a defendant to the action. The *cestui que trust* opposed, and said that he would not himself add her as a defendant.

**HELD**—that Mrs. C. was not a party "who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter" within Ord. 16, r. 11, and the defendant was not entitled to have Mrs. C. joined as a co-defendant; that, moreover, if Mrs. C. was joined as a defendant, and the plaintiff did not make any allegation against her, she might ask to be dismissed the action; and that on the ground that the action was ready to be set down for trial the order asked for should be refused.

*Diw v. Great Western Ry. Co.* ((1886) 55 L. J. Ch. 797; 34 W. R. 712; 54 L. T. 830) and *Montgomery v. Foy, Morgan & Co.* ([1895]

2 Q. B. 321; 65 L. J. Q. B. 18; 43 W. R. 691; 73 L. T. 12; 11 T. L. R. 512; 8 Asp. M. C. 36; 14 R. 575—C. A.) distinguished.

**McCHEANE v. GYLES** (No. 2), [1902] 1 Ch. 911;  
[71 L. J. Ch. 446; 50 W. R. 387; 86 L. T. 217—Buckley, J.]

**49. Adding Defendants—Breach of Trust—Necessity for joining the Representatives of last Surviving Trustee.**—An action for breach of trust was brought against the executors of one of two deceased trustees, without making the representatives of his co-trustee (who had survived him) parties.

**HELD**—that the action was not properly constituted; and that either the representatives of the surviving trustee, or new trustees (if appointed) must be added as defendants.

**IN RE JORDAN, HAYWARD v. HAMILTON**, [1904]  
[1 Ch. 260; 73 L. J. Ch. 128; 52 W. R. 150;  
90 L. T. 223—Byrne, J.]

**50. Conspiracy—Defendants joining Conspiracy at different Dates—Damages—***R. S. C. (Ireland), Ord. 16, rr. 4, 5; Ord. 18, r. 1.*—An action may be properly brought against a number of defendants jointly for an illegal conspiracy although they joined the conspiracy at different dates; there is in substance only one cause of action.

In such a case the jury may assess the damages against each defendant separately, taking into account the date at which he joined the conspiracy; and, *semble*, a defendant is not liable for such damages as resulted from the conspiracy before he joined it.

**O'KEEFE v. WALSH AND OTHERS**, [1908] 2 Ir. R. [681—C. A.]

**51. County Council and Water Company—Negligent Excavation—Separate Causes of Action—***R. S. C., 1883, Ord. 16, rr. 4, 5, 7.*—The plaintiffs claimed damages by reason of the defendants having negligently excavated the subsoil of the street adjoining the plaintiff's premises, and so taken away the support thereof, thereby causing a part of the premises to subside. The defendants, in their statement of defence, denied that the injuries complained of were caused by their acts, and alleged that the injuries were caused by the negligence of a water company in having their water main insufficiently stopped. The plaintiffs thereupon applied to add the water company as defendants in the action.

**HELD**—that the causes of action against the defendants and the water company were separate and distinct, and that therefore the water company could not be added as defendants.

**THOMPSON v. LONDON COUNTY COUNCIL**, [1899]  
[1 Q. B. 840; 68 L. J. Q. B. 625; 47 W. R. 435; 80 L. T. 512—C. A.]

**52. Similar Slanders—Conspiracy—Independent Causes of Action—***R. S. C., Ord. 16, r. 4; Ord. 18, r. 1.*—The plaintiff, who was employed by one of the defendants to act in a play at a



**Parties—Continued.**

theatre of which the other defendant was the lessee, sued the defendants in the same action for a similar slander spoken by each defendant at different times, but arising out of the same matter, and also for conspiracy wrongfully to dismiss him from his employment.

**HELD**—that the claims against the two defendants could not be joined in one action, because the slanders were quite independent slanders and were spoken at different times, and the claim for conspiracy had nothing to do with the slanders which were quite independent.

**POPE v. HAWTREY AND ANOTHER**, (1901) 85 [L. T. 263; 17 T. L. R. 717—C. A.]

**(d) Joinder of Plaintiffs.**

**53. Refusal to join as Plaintiff—Joint Promisee—Joined as Defendant—R. S. C., Ord. 16, rr. 2. 11.]**—A joint promisee, to whom an indemnity against costs had been offered, refused to join as plaintiff in an action brought by his co-promisee to enforce their joint rights.

**HELD**—that he might be joined as a defendant.

**CULLEN v. KNOWLES**, [1898] 2 Q. B. 380; 67 [L. J. Q. B. 821—Bigham, J.]

**54. "Same Transaction"—Separate Causes of Action—R. S. C., Ord. 16, r. 1.]**—In an action against the directors of a limited company and the company, the plaintiff claimed damages against the directors for fraudulently inducing him to buy shares in the company and in his particulars of their alleged fraud he stated that they had wrongfully declared and paid an interim dividend which was not paid out of the profits of the company. He also claimed on behalf of himself and the other shareholders of the company a declaration that such declaration of the interim dividend was *ultra vires* and illegal, and judgment against the directors for repayment of such moneys to the company.

**HELD**—that these two causes of action did not arise "out of the same transaction or series of transactions" within the meaning of Ord. 16, r. 1; and that therefore they could not be joined in one action.

**STROUD v. LAWSON**, [1898] 2 Q. B. 44; 67 L. J. [(Q. B.) 718; 78 L. T. 729; 14 T. L. R. 421; 46 W. R. 626—C. A.]

**55. "Same Transaction"—Common Cause of Action—R. S. C., Ord. 16, r. 1.]**—The expression "the same transaction" in R. S. C., Ord. 16, r. 1, does not necessarily imply a transaction taking place between two parties; and where different persons have causes of action arising out of the same transaction against the same defendants, they may be joined as co-plaintiffs.

**DRINGBIE v. WOOD**, [1899] 1 Ch. 393; 68 [L. J. Ch. 181; 47 W. R. 252; 79 L. T. 548; 15 T. L. R. 18; 6 Manson, 76—Byrne, J.]

**56. Same Transaction—Common Question of Fact or Law—R. S. C., Ord. 16, r. 1.]**—R. S. C., Ord. 16, r. 1, in its present form

is not intended to allow any number of different plaintiffs to join in one action any number of separate and different causes of action, but it is intended merely to effect a modification of the old rule, by which a limited liberty of joining plaintiffs with separate causes of action should be conferred. By the limitation it is necessary that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law in order that the case may be within the rule. Where the action arose out of the publication by the defendants of a series of books bearing the title "The Oxford and Cambridge Publications," or "The Oxford and Cambridge Edition," and otherwise bearing the name of "Oxford and Cambridge," and the user of those titles in such a manner as to induce belief that the books or publications of the defendants were publications of the Universities of Oxford and Cambridge, or emanated from the presses of those universities—

**HELD**—that the action arose out of one transaction, or series of transactions, and that there was a common question of law or fact, and that the plaintiffs were entitled to join in one action.

**Stroud v. Lawson** ([1898] 2 Q. B. 44; 67 L. J. Q. B. 718; 46 W. R. 626; 78 L. T. 729—C. A., No. 54, *supra*) followed.

**OXFORD AND CAMBRIDGE (UNIVERSITIES OF) v. GEORGE GILL & SONS**, [1899] 1 Ch. 55; 68 L. J. Ch. 34; 47 W. R. 248; 79 L. T. 338; 15 T. L. R. 21—Stirling, J.]

**57. Trade Union—Watching or Besetting—Interlocutory Injunction—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7—Joinder of Parties—Joint Cause of Action—R. S. C., Ord. 16, r. 1.]**—The eight defendants, who were officials of various trade unions, met men who had been brought over by the plaintiffs under contracts from Ireland to replace workmen on strike, at the railway station of their destination, and persuaded many of them to leave the place or to refuse to work for the plaintiffs. The seven plaintiffs were several master builders and members of a master builders' association.

**HELD**—(1) that the action was properly constituted, since the seven plaintiffs were suing the eight defendants on one and the same series of transactions, and there was a common question of fact, as well as law, to determine a question of combination; (2) that the acts complained of in two out of the eight cases were a "watching or besetting" within the meaning of sect. 7 of the Conspiracy and Protection of Property Act, 1875; and an injunction was granted in those two cases accordingly.

**Sadler v. Great Western Ry. Co.** ([1896] A. C. 450; 65 L. J. Ch. 462; 45 W. R. 51; 74 L. T. 561—H. L. (E.)) distinguished.

**Charnock v. Court** ([1899] 2 Ch. 35; 68 L. J. Ch. 550; 63 J. P. 456; 47 W. R. 633; 80 L. T. 564) followed. *See* TORTS, No 61.

**Stroud v. Lawson** ([1898] 2 Q. B. 44; 67

**Parties—Continued.**

L. J. Q. B. 718; 46 W. R. 626; 78 L. T. 729, C. A., No. 54, *supra* applied.

WALTERS v. GREEN, [1899] 2 Ch. 696; 68 [L. J. Ch. 730; 63 J. P. 742; 48 W. R. 23; 81 L. T. 151; 15 T. L. R. 532—Stirling, J.

**(e) Married Woman.**

58. *Receiver—Costs “Payable out of Married Woman’s Separate Estate, but not otherwise” — Equitable Execution — Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.*—A married woman, in an action unsuccessfully brought by her, was condemned in costs to be taxed and paid to the defendants “out of the plaintiff’s separate estate, but not otherwise.” The only separate estate to which the plaintiff was entitled was a reversionary share in some property left to her by her sister’s will. The share having come into possession, Kekewich, J., on the application of the defendants, and before the certificate of the defendants’ costs had been issued, appointed a receiver of the plaintiff’s share.

HELD—that apart from the Judicature Act, 1873, s. 25, there was jurisdiction in the Court to appoint a receiver of the married woman’s separate estate for the protection of the fund out of which the costs were directed to be paid.

Kearns v. Leaf ((1864). 1 H. & M. 681; 12 W. R. 462; 10 L. T. 185) followed.

CUMMINS v. PERKINS, [1899] 1 Ch. 16; 68 [L. J. Ch. 57; 47 W. R. 214; 79 L. T. 456; 15 T. L. R. 76—C. A.

**(f) Pauper.**

59. *Appeal—Respondent to—Opinion of Counsel—R. S. C., Ord. 16, rr. 23, 24.*—A respondent to an appeal need not produce an opinion of counsel in order to obtain leave to appear *in formâ pauperis*: an affidavit of poverty is sufficient.

HANDFORD v. GEO. CLARKE, LD., [1907] 1 [K. B. 181; 76 L. J. K. B. 76; 96 L. T. 175—C. A.

60. *Assignment of Solicitor—Official Solicitor—R. S. C., Ord. 16, r. 26.*—Though a judge has jurisdiction, under Ord. 16, r. 26, to order the official solicitor to take up the case of a pauper plaintiff or defendant, he ought not to do so except under very special circumstances, and when a pauper applies for leave to sue or defend an action *in formâ pauperis*, he should put forward the name of some solicitor other than the official solicitor, whom he suggests as a proper person to be appointed; and then the judge or master will have to consider whether the person so suggested shall be assigned to act as solicitor for the pauper.

MOUTRIE v. MITCHELL, [1901] 1 Q. B. 596; 70 [L. J. K. B. 401; 49 W. R. 274; 84 L. T. 187; 17 T. L. R. 258—C. A.

**(g) Representation.**

61. *Bankruptcy of Plaintiff—Plaintiff suing for Himself and other Creditors—Application to*

*Dismiss Action—“Representative Capacity”—R. S. C., Ord. 17, r. 1*—A plaintiff on behalf of himself and all other creditors of B. brought an action against B. and B.’s wife for an order setting aside a settlement of property made by B. in favour of his wife. Upon the plaintiff being adjudicated bankrupt:

HELD—that the action must be dismissed unless the official receiver intervened within a specified time. The plaintiff ceased to be a creditor when his assets vested by operation of law in his trustee, and could therefore no longer sue as a creditor, nor was he trustee of the right of action.

HELD, further, that the fact that an injunction had been granted and a receiver appointed in the action made no difference.

WOLFF v. VAN BOOLEN, [1906] 94 L. T. 502—[Kekewich, J.

62. *Guardian ad litem—Practice—Appearance in Person.*—A guardian of infants *ad litem* cannot appear in person on behalf of the infants.

IN RE BERRY, [1903] W. N. 125—Kekewich, J.

63. *Persons having same Interest in Cause or Matter—Market Rights—Attorney-General—R. S. C., 1883, Ord. 16, rr. 1, 9.*—The original right to Covent Garden Market was conferred by letters patent to the Earl of Bedford a great many years ago, and was the subject of the Covent Garden Improvement Act, 1828, which recognised and specified various classes of permanent stands of the market under the different heads of “Casual Cart Stands,” “Yearly Cart Stands,” and “Yearly Pitching Stands,” and by its enactments conferred on “the growers of fruit, flowers, vegetables, roots, and herbs” rights of priority in the occupation of the stands for the purposes of their business and at certain rates scheduled in the Act. The plaintiffs alleged that the defendant, the present Duke of Bedford, refused to give the plaintiffs and other “growers” the privileges of the occupation of the various classes of stands to which they had right under the statute, and that when they got such occupation the rates charged exceeded those allowed by the statute. The plaintiffs claimed a declaration as to the true construction of the statute, an injunction to restrain the infringement of their alleged statutory rights, and an account of overcharges. The Duke applied to set aside the writ.

HELD—that the plaintiffs had all “the same interest” in the cause or matter or in each of the different matters which were the subject of the action within Ord. 16, r. 9, and that that rule is not restricted to persons having or claiming some beneficial proprietary right, and that the Attorney-General need not be made a party to the proceedings.

Temperton v. Russell ([1893] 1 Q. B. 435; 62 L. J. Q. B. 300; 57 J. P. 518; 41 W. R. 321; 68 L. T. 425; 9 T. L. R. 304—C. A.) observed upon.

Decision of C. A. ([1899] 1 Ch. 494; 68 L. J. Ch. 289; 47 W. R. 385; 80 L. T. 332; 15

**Parties—Continued.**

T. L. R. 202) affirmed (Earl of Halsbury, L.C., and Lord Brampton dissenting).

BEDFORD (DUKE OF) *v* ELLIS [1901] A. C. 1; [70 L. J. Ch. 102, 83 L. T. 686; 17 T. L. R. 139—H. L. (E.).

64. *Unborn Children — Trustees — R. S. C.*, Ord. 16, r. 32 (a).—Upon a summons to determine the construction of a settlement, unborn children who take an interest under it are sufficiently represented by the trustees.

The Court cannot appoint a person to represent a class of which there is no member in existence.

IN RE WHITING, WHITING *v*. DE RUTZEN, [1905] 1 Ch. 96—Byrne, J.

**(h) Substituting Plaintiff.**

65. *Action in Name of Wrong Plaintiff—Bonâ-fide Mistake—Others substituted as Plaintiffs—R. S. C.*, Ord. 16, rr. 2, 11.—The plaintiff commenced an action against the defendants, and a question arose whether the plaintiff had made an absolute assignment of his claim against the defendants, or only an assignment by way of charge only, and on the decision of that point depended the plaintiff's right to bring an action. Wright, J., took one view of the case, and the Court of Appeal took another, viz, that there had been an absolute assignment of the debt within sect. 25, sub-sect. 6, of the Judicature Act, 1873, to Lloyd's Bank. The plaintiff thereupon applied for an order for the substitution of Lloyd's Bank as plaintiffs.

HELD—that the plaintiff had made a *bonâ-fide* mistake in commencing the action in his own name, and that let in the jurisdiction of the Court under Ord. 16, r. 2, to order the substitution of Lloyd's Bank as plaintiffs.

HUGHES *v*. PUMP HOUSE HOTEL CO. (No. 2), [1902] 2 K. B. 485; 71 L. J. K. B. 803; 50 W. R. 677; 87 L. T. 359—C. A.

66. *Change or Transmission of Interest—Death of Sole Plaintiff, a Tenant for Life, in Action to Recover Land—Non-Substitution of Tenant in Tail in Remainder—R. S. C.*, Ord. 17, r. 4.—The plaintiff, as tenant for life under an indenture of marriage settlement, executed on the occasion of his marriage in 1869, sued, in an action of ejectment on the title to recover lands in the county of Mayo. During the pendency of the suit, he died in the year 1895. His eldest son, as tenant in tail in remainder under the settlement, now applied to be substituted as plaintiff in the action.

HELD—that the applicant did not represent the interest of the plaintiff in the action; that there was no change or transmission of the interest of the plaintiff to the applicant; and that the application must be refused.

FERRALL *v*. CURRAN, [1899] 2 Ir. R. 470—Q. B.

**(i) Third Party Procedure.**

67. *Charter-party — Indemnity — Different Question arising between Sets of Parties—R. S. C.*, Ord. 16, r. 48.—A charter-party provided that the shipowner should keep the charterers indemnified to the same extent as the shipowner would be indemnified by the Protection and Indemnity Club, in which the ship was entered, against claims and risks covered by such Indemnity Club. Such claims and risks included damage to goods and loss consequent on seizure. The vessel was seized, as trading with an enemy, and claims were made against the charterers by the owners of goods on board.

HELD—that the defendants were not entitled to have the shipowners joined as third parties as questions might arise under the rules of the club as between the defendants and the shipowners, which, owing to many considerations, would be quite different from the questions which might arise between the plaintiffs and the defendants in the action.

DUNN *v*. DONALD CURRIE & Co., (1901) 6 Com. [Cas. 118—Bigham, J.

68. *Contract of Indemnity—Policy of Re-insurance—R. S. C.*, Ord. 16, r. 48.—A contract of re-insurance is not a contract of "indemnity" within the meaning of Ord. 16, r. 48.

Therefore, an underwriter, sued on a policy of marine insurance, cannot bring in as a third party another underwriter who has re-insured the same risk.

NELSON *v*. EMPRESS ASSURANCE CORPORATION, [LD, FABER, THIRD PARTY, [1905] 2 K. B. 281; 74 L. J. K. B. 699; 53 W. R. 648; 93 L. T. 62; 21 T. L. R. 555; 10 Com. Cas. 237; 10 Asp. M. C. 68—C. A.

69. *Counter-Claim—Plaintiff bringing in a Third Party—Jurisdiction—R. S. C.*, Ord. 16, r. 48.—There is jurisdiction to allow a plaintiff, against whom a counter-claim has been brought, to bring in a third party for contribution or indemnity, under the rules relating to third-party procedure.

LEVI *v*. ANGLO-CONTINENTAL GOLD REEFS OF [RHODESIA, LD., [1902] 2 K. B. 481; 71 L. J. K. B. 789; 50 W. R. 625; 86 L. T. 857; 18 T. L. R. 720—C. A.

70. *Right of Appeal by Third Party—R. S. C.*, Ord. 16, rr. 48, 52, 53, 55.—In an action by cargo owners against two sets of defendants, owners respectively of a barge and a tug, the tug owners served an indemnity notice on their co-defendants.

The plaintiffs recovered only against the tug owners, who, however, obtained their indemnity against the barge owners. The latter sought to appeal in respect of the plaintiff's judgment against the tug owners, the latter having entered and abandoned an appeal.

HELD—that they could not do so, for they were not parties to the judgment, further, not having paid the judgment debt, they were not subrogated to the tug owner's rights, and, even

**Parties—Continued.**

if subrogated, they could not avail themselves of an abandoned appeal; and, lastly, no order had been made under Ord. 16, r. 53, as to the extent to which they were to be bound by the judgment against their co-defendants.

**THE MILWALL**, [1905] P. 155; 74 L. J. P. 61; [53 W. R. 471; 93 L. T. 426, 429; 21 T. L. R. 846; 10 Asp. M. C. 110, 113—C. A.]

**71. Service out of Jurisdiction—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 24, sub-s. 3—*R. S. C., Ord. 11, rr. (1) (g), 2, Ord. 16, rr. 11, 48.*—The whole third-party procedure is the creation of the Judicature Act, 1873, s. 24, sub-s. 3, and that Act treats the third-party procedure as analogous to a cause instituted by the defendant as plaintiff against a third party. As the rules stand, the service of a third-party notice out of the jurisdiction can only be properly sanctioned when the subject-matter of the claim of the defendant—not of the plaintiff—covered by the third-party notice, is of such a character that, if the claim had been the subject of an independent action commenced by writ in the ordinary way, an order for service out of the jurisdiction could properly have been made in accordance with the provisions of Ord. 11, r. 1. An action for contribution not being mentioned in Ord. 11, r. 1, no third-party notice for contribution from a single person can be served out of the jurisdiction.

**MCCHEANE v. GYLES**, [1902] 1 Ch. 287; 71 [L. J. Ch. 183, 50 W. R. 376; 86 L. T. 1—C. A.]

**V. JOINDER OF CAUSES OF ACTION.**

**72. Action to Recover Possession of Land—Leave of Court or Judge—Waiver—Irregularity—R. S. C., Ord. 18, r. 2; Ord. 70, rr. 1, 2.**—The joinder in one action of other claims with a claim for recovery of possession of land without leave having been obtained under Ord. 18, r. 2, is an irregularity which may be waived under Ord. 70.

Even if it be not waived, leave may be obtained to join the causes of action after the writ in the action has been issued.

**LLOYD v. GREAT WESTERN AND METROPOLITAN DAIRIES, LD.**, [1907] 2 K. B. 727; 76 [L. J. K. B. 924; 97 L. T. 384; 23 T. L. R. 570—C. A.]

**73. Several defendants—Joint and several Torts—Claim for Damages—R. S. C., Ord. 16, rr. 4, 5—Ord. 18, r. 1.**—In an action against several defendants claiming damages for a joint tort the plaintiff cannot join a claim for another tort committed by some only of the defendants, although both causes of action may have arisen out of the same transaction.

**GOWER v. COULDRIDGE**, [1898] 1 Q. B. 348; 67 [L. J. Q. B. 251; 77 L. T. 707; 14 T. L. R. 165; 46 W. R. 214—C. A.]

**VI. PAYMENT INTO COURT.****(a) Acceptance.**

**74. Costs—Money paid into Court in satisfaction before Defence—Acceptance within four**

*days—Action without pleadings—Short cause—R. S. C., Ord. 22, r. 7.*—When, upon an application for leave to sign judgment under Ord. 14, an order is made that the action shall be tried as a short cause without pleadings, and the defendant subsequently pays money into Court which the plaintiff accepts in satisfaction of the whole of his claim, the provisions of Ord. 22, r. 7, apply, and the plaintiff is entitled to his costs under that rule.

**LOMER v. WATERS**, [1898] 2 Q. B. 326; 67 [L. J. Q. B. 653; 79 L. T. 81—C. A.]

**75. Costs—Plea of Tender before Action brought—Payment into Court of Amount Tendered with further sum—Recovery in the Action of Excess above Tender—Severable Items—Ord. 22.**—Where the defendant pleads tender before action brought, and lodges the amount tendered in Court, and also pleads payment into Court of a further sum, in addition to the amount lodged under the plea of tender, in full discharge of the plaintiff's claim, the plaintiff, on drawing the two sums out of Court in satisfaction of his claim, has "recovered in the action" only the excess above the tender, where the defendant's tender was made in respect of specific items in the claim severable in themselves, and is only entitled to costs accordingly.

**James v. Vane (Lord)** ((1860) 2 E. & E. 883; 29 L. J. Q. B. 169; 6 Jur. (N.S.) 731; 8 W. R. 446) followed.

**SCOTT'S STANDARD PNEUMATIC TYRE CO. v. THE NORTHERN WHEELERIES CYCLE MANUFACTURING CO.**, [1892] 2 Ir. R. 34—Q. B.

**(b) Admitting Liability.**

**76. Amount not to be mentioned to Jury—Ord. 22, r. 22.**—Where money is paid into Court with an admission of liability, the amount ought not to be mentioned to the jury.

**JACQUES v. SOUTH ESSEX WATERWORKS CO.**, [1904] 20 T. L. R. 563—Lord Alverstone, C.J.

**77. Lump Sum—Liability admitted as to part of Claim, and denied as to Remainder—Plaintiff Successful on some Issues—Issues not going to the whole cause of Action—Costs—R. S. C., Ord. 22, rr. 1, 6.**—The plaintiff claimed from his employers three months' full pay and nine months' half-pay upon his dismissal. The employers admitted liability for three months' full pay and six months' half-pay. They paid a sum of money into Court, and denied further liability. On appeal from a verdict and judgment in favour of the plaintiff the Court of Appeal decided in his favour upon the issue of nine (as against six) months' half-pay; but upon another point (the date at which a valid notice to quit was given) they decided against him, and held that he was entitled to less than the sum paid into Court.

**HELD**—that the defendants, though entitled to the general costs of the action, must pay the costs of the issue decided against them, although it did not go to the whole cause of action.

**Wagstaffe v. Bentley** ([1902] 1 K. B. 124; 71 L. J. K. B. 55; 85 L. T. 744—C. A., No. 83, *infra*) applied.

**Payment into Court—Continued.**

*Semble*, a defendant cannot, as a defence, rely upon payment into Court of a lump unapportioned sum coupled with a denial of liability as to part of the claim.

HUBBACK v. BRITISH NORTH BORNEO CO., [1904] 2 K. B. 473; 73 L. J. K. B. 654; 53 W. R. 70, 91 L. T. 672—C. A.

**78. Substantial Counter-claim — Money ordered to be retained in Court—R. S. C. (Ireland), Ord. 22, r. 6.**—Defendants, sued for £320 balance of freight by plaintiffs resident out of the jurisdiction, but who had given security for costs, admitted liability and paid the money into Court. They counter-claimed for £860 in respect of damage to the particular cargo.

HELD—that the money should be retained in Court until the counter-claim was disposed of.

FABRE & CO. v. HALL & CO., [1905] 2 Ir. R. 132 [—K. B. D.

**(c) Denying Liability.**

**79. Order for Particulars of the Items Making up the Sum—Discretion of Court.**—Underwriters brought an action against a firm of shipowners and other persons alleging that for a series of years manipulated accounts had been made up and laid before average adjusters, in consequence of which the underwriters had paid sums largely in excess of the amounts actually expended in repairing the vessels insured by them.

The defendant firm pleaded that they had only recently discovered that excessive amounts had been claimed, and that they had placed all their books, &c., at the underwriters' disposal; they also brought into Court a sum of £1,500 with a denial of liability.

HELD—that the nature of the contract imposed upon the defendants the duty of full disclosure; that they must have based their figures upon entries in the documents; and that the Court, in its discretion, would order them to give the best particulars they could of the admitted overcharges making up the £1,500

BOULTON AND OTHERS v. HOULDER BROS. & CO. [AND OTHERS, (1903) 19 T. L. R. 635, 9 Com. Cas. 75—C. A.

**80. Price of Peace — Admission — Counter-claim — Injunction — Damages — R. S. C., 1883, Ord. 22, rr. 1, 6, 7.**—The object of payment into Court, where all liability is denied, is to enable a defendant to deny a plaintiff's right to sue, yet to offer a sum as the price of peace and for the prevention of future litigation. Such an offer is not an admission of the plaintiff's title, and cannot be converted into such by the plaintiff accepting the sum paid in.

If the entire claim or cause of action is satisfied by payment into Court, it would seem that the proceedings are not available for a plea of *res judicata*, but if either party were to attempt to reopen the matter, the appropriate defence of the other would be an application to the Court

to stay proceedings either under r. 6 of Ord. 22, or as an abuse of the process of the Court.

Decision of Stirling, J. ([1899] 2 Ch. 93; 68 L. J. Ch. 508; 47 W. R. 489; 80 L. T. 697) affirmed.

COOTE v. FORD, [1899] 2 Ch. 93; 68 L. J. Ch. 508, 47 W. R. 548; 80 L. T. 697; 15 T. L. R. 379—C. A.

**81. Separate Defences—Payment into Court by One Defendant — Negligence — Employment of Contractor—Contractor's Negligence—Obligation of District Council—Verdict for less than Sum paid in—Costs.**—A district council employed a contractor to make up a road, which was being used by the public, under sect. 150 of the Public Health Act, 1875. In the course of the work the contractor negligently left a heap of earth unfenced and unlighted on the road, over which one of the public, while passing along the road at night, fell and was injured. In an action against the district council and the contractor to recover damages for the personal injuries so sustained :—

HELD—that as the work which the contractor was employed to do would, unless precautions were taken, cause danger to the public passing along the road, an obligation was thrown upon the district council to see that the necessary precautions were taken, and they were, therefore, liable for the negligence of their contractor in not taking proper precautions, such negligence not being merely a casual or collateral act of negligence.

The defendants delivered separate defences, both denying liability. The contractor, with a denial of liability, paid £75 into Court. The district council did not pay money into Court, but pleaded that their co-defendant, while denying liability, had paid £75 into Court, and that sum was sufficient to satisfy the plaintiff's claim. The jury found a verdict for the plaintiff for £50.

HELD—that as the district council had not paid money into Court, the plaintiff was entitled to judgment against them; but as the £50 had been recovered from their co-defendant, the judgment must be limited to costs.

Judgment of Bruce, J. ([1898] 2 Q. B. 212; 67 L. J. Q. B. 754; 62 J. P. 582, 73 L. T. 748; 14 T. L. R. 477) affirmed.

PENNY v. WIMBLEDON URBAN DISTRICT COUNCIL, [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 63 J. P. 406; 47 W. R. 565; 80 L. T. 615; 15 T. L. R. 348—C. A.

**82. Verdict for Amount Paid in — Costs of Issues—R. S. C., Ord. 65, r. 1**—In a running down action the plaintiff recovered £50. The defendants had paid that sum into Court, denying liability; and in their defence had denied negligence.

HELD—that the defendants must pay to the plaintiff his cost of the issue as to negligence.

POWELL v. VICARS, SONS AND MAXIM, LD. (No. 85, *infra*) followed.

FITZGERALD v. THOMAS TILLING, LD., (1907) [96 L. T. 718—C. A.

**Payment into Court—Continued.**

**83. Verdict for a Less Amount than that paid in—Costs of Issues found in Plaintiff's Favour—***Ord. 22, rr. 1, 6.*—The plaintiffs brought an action founded on the negligence of the defendants. The defence denied any negligence, alleged contributory negligence, and, alternatively, the defendants, while denying liability, brought into Court £80 as sufficient to cover any claim of the plaintiffs. The plaintiffs did not take that sum out of Court in satisfaction, and the trial resulted in a verdict for the plaintiffs for £35. Judgment was entered for the defendants with costs.

**HELD**—that the plaintiffs were entitled to have the costs incurred with relation to the issues of negligence and contributory negligence taxed in their favour.

**WAGSTAFFE v. BENTLEY**, [1902] 1 K. B. 124; [71 L. J. K. B. 55, 85 L. T. 744—C. A.]

**84. Verdict for Amount less than that paid in—Costs of Issues on which Plaintiff succeeded—Costs before Payment into Court**—The plaintiff brought an action for damages for trespass and wrongful conversion of the plaintiff's goods, chattels and household furniture. The proceedings arose out of a wrongful distress. Lincoln was the bailiff and Furnace and Wickman were his men. While denying liability, Lincoln, on behalf of himself and Furnace and Wickman, paid into Court the sum of £5, and said that that sum was sufficient to satisfy the plaintiff's claim against the three. Furnace and Wickman also each paid into Court the sum of 5s. on his own account personally. The jury found in favour of Wickman, but for the plaintiff against Furnace and assessed the damages against him at one farthing. They also found for the plaintiff against Lincoln, and assessed the damages against him at £5.

**HELD**—that Wickman was entitled to judgment against the plaintiff, with costs; that, as against Lincoln and Furnace, the plaintiff was entitled to the costs of action up to the time of the payment into Court by them; that from that time the defendants were to have the costs of the action, but the costs of the issues raised by Lincoln and Furnace found against them the plaintiff was entitled to, and that the Master was to deal with those issues on taxation.

**Wheeler v. United Telephone Co.** ((1884) 13 Q. B. D. 597; 53 L. J. Q. B. 466; 33 W. R. 295; 50 L. T. 749—C. A.) and **Wagstaffe v. Bentley** ([1902] 1 K. B. 124; 71 L. J. K. B. 55; 85 L. T. 744—C. A., *supra*) followed.

**RIDOUT v. GREEN AND OTHERS** (1902) 87 L. T. [679; 18 T. L. R. 709—Bruce, J.]

**85. Verdict for a Less Amount than that paid in—Costs of Issues on which Plaintiff Succeeded—Payment out of Money in Court—Discretion—***R. S. C., Ord. 22, r. 6 (c).*—Where the defendant with a denial of liability pays money into Court as sufficient to satisfy the plaintiff's claim, and the plaintiff does not take the money out in satisfaction, but proceeds with the action

and recovers a sum not exceeding the amount so paid in, the plaintiff is entitled to the costs of the action up to the time of the payment into Court, and to the subsequent costs of the issues on which he has succeeded, and the defendant is entitled to the general costs of the action after the time of payment in.

In such a case *prima facie* so much of the money in Court as will satisfy the plaintiff's claim ought to be paid out to him, but he is not entitled as of right to an order of payment out, and the judge has a discretion in a proper case and upon proper evidence to order the money to remain in Court.

Where, therefore, judgment was entered for the plaintiff for the costs of the action up to the time of payment into Court, and for the subsequent costs of the issues on which he had succeeded, and for the defendants for the general costs of the action after the payment into Court, the costs to be set off against each other, the mere suggestion by the defendants that when the costs were taxed and set off against each other a sum might be found to be due to them in respect thereof was held not enough to justify an order that the money should remain in Court until further order.

**POWELL v. VICKERS, SONS, AND MAXIM, LD.**, [1907] 1 K. B. 71; 76 L. J. K. B. 122; 95 L. T. 774; 23 T. L. R. 78—C. A.]

**(d) Generally.**

**86. Fact of Payment in Communicated to the Jury—***R. S. C., Ord. 22, r. 22.*—In opening the plaintiff's case the plaintiff's counsel mentioned the fact that payment into Court had been made by the defendant. On objection being taken, the Chief Justice remarked that in his opinion *Ord. 22, r. 22* was a very foolish one and worked very inconveniently, and then suggested that the actual amount paid in should be stated, which was done and the hearing of the case thereupon continued.

**KLAMBOROWSKI v. COOKE** (1898) 14 T. L. R. 88—[Lord Russell, C. J.]

**87. New Trial—Money paid into Court by Defendant pending his Application—Order that such be paid out to him.**—The Court having granted the defendant's application for a new trial, ordered that money, paid by him into a bank pending the application, should be paid out to him, although the plaintiff was instituting an appeal to the House of Lords from the order directing a new trial.

**SEATON v. BURNAND**, (1900) 15 T. L. R. 342—[C. A.]

[This case is here noted on a point of practice only, which does not seem to be affected by the subsequent decision of the House of Lords on the merits. See **INSURANCE**, No. 27.]

**88. Separate causes of Action—Particulars of cause of Action in respect of which Money paid in—***R. S. C., Ord. 22, rr. 1, 2, 6.*—The plaintiffs, who were shipowners, claimed against the defendants who were the charterers of one of the plaintiff's ships—(1) the balance of freight under the

**Payment into Court—Continued.**

charterparty; (2) a sum alleged to have been overpaid to the defendants' stevedores, who were employed by the plaintiffs at the port of loading in pursuance of the charterparty upon the faith that they charged no more than other stevedores of good standing at those ports; and (3) damages for demurrage. The defendants, while denying liability, brought into Court £250 as sufficient to satisfy the plaintiffs' claim. The plaintiffs applied for an order for particulars of the payment into Court.

**HELD**—that, as the three claims were in respect of separate causes of action, the plaintiffs were entitled to particulars stating how much was paid into Court in respect of each head of claim.

**THE JAMES TUCKER STEAMSHIP CO., LD. v. LAMPORT AND HOLT**, [1906] 23 T. L. R. 10—C. A.

**89. Several Plaintiffs—Separate Causes of Action**—*R. S. C., Ord. 22, r. 2.*—Several plaintiffs, being a mortgagor and his mortgagees in possession respectively of certain houses, brought an action against the defendants to recover damages for injuries done to the houses in consequence of a flood caused by the negligence of the defendants. The defendants did not deny liability, and paid £100 into Court without apportioning the amount between the claims of the several plaintiffs. The action was referred to the official referee, who awarded each of the plaintiffs a small sum, amounting in all to £79 10s., and gave the defendants the costs of the action after the date of the payment into Court. The plaintiffs contended that the plea of payment into Court was bad under Ord. 22, r. 2, inasmuch as it did not apportion the amount paid in among the several plaintiffs, and that therefore they were entitled to the costs of the action.

**HELD**—that the plea was good, and that, if the plaintiffs considered the plea to be embarrassing, they ought to have applied at chambers to have the sum paid into Court apportioned among the various claims.

**BENNING AND OTHERS v. ILFORD GAS CO.**, [LD., [1907] 2 K. B. 290; 76 L. J. K. B. 681; 97 L. T. 102; 23 T. L. R. 485—Div. Ct.

**(e) Libel Action.**

**90. Newspaper—Libel Act, 1843** (6 & 7 Vict. c. 96), s. 2—8 & 9 Vict. c. 75—*R. S. C., Ord. 22, r. 1.*—Where in a libel action money has been paid into Court simply as part of a plea under Lord Campbell's Act, it cannot be treated by the defendant, after the trial of the action, as a payment into Court under Ord. 22, r. 1.

**OXLEY v. WILKS**, [1898] 2 Q. B. 56; 67 L. J. Q. B. 678; 78 L. T. 728; 14 T. L. R. 402—C. A.

**91. Death of Defendant Pending Action—Liability not Denied—Jurisdiction to order Money to be Paid out**—*R. S. C., Ord. 22, r. 5.*—In an action for libel the defendant, without denying liability, paid money into Court as sufficient to

satisfy the plaintiff's claim. The plaintiff proceeded with the action, and did not take the money out of Court. Before trial the defendant died, and the action, therefore, abated. His executors thereupon applied for an order that the money should be paid out to them.

**HELD**—that the Court had power under its general jurisdiction to make an order as to the disposal of the money in Court; and that, though the money did not become the plaintiff's money when paid into Court, *prima facie*, the proper order to make was to order the money to be paid out to him.

**BROWN v. FEENEY**, [1906] 1 K. B. 563; 75 [L. J. K. B. 494; 54 W. R. 445; 94 L. T. 460; 22 T. L. R. 393—C. A.

**92. Death of Plaintiff—No Denial of Liability—Abatement of Action—Jurisdiction to Order Payment out to Plaintiff's Executor**—*R. S. C., Ord. 22, rr. 1, 5.*—The defendant in an action of libel paid a sum of money into Court without a denial of liability. The plaintiff did not take the money out, and he died before the case came on for trial, and the action thereby abated.

**HELD**—that the Court had jurisdiction to order that the money in Court be paid out to the plaintiff's executor.

*Brown v. Feeney* ([1906] 1 K. B. 563; 75 L. J. K. B. 494; 54 W. R. 445; 94 L. T. 460; 22 T. L. R. 393—C. A., No. 91, *supra*) applied.

**MAXWELL v. VISCOUNT WOLSELEY**, [1907] [1 K. B. 274; 76 L. J. K. B. 163; 96 L. T. 4; 23 T. L. R. 157—C. A.

**(f) Trustees.**

**93. Purchase-money of Shares—Payment away in Good Faith—Insufficient Statement.**—A trustee, in answer to a motion that he should pay into Court money arising from the sale of shares forming part of the trust property, swore that he in good faith paid away the purchase-money in the belief that he was entitled thereto, and no part thereof was then in his hands and he had no power over the shares.

**HELD**—that, as the terms of the affidavit did not show that the trustee had no control over the purchase-money, he must bring the sum into Court.

**IN RE BENSON, ELLETON v. PILLERS**, [1899] [1 Ch. 39; 68 L. J. Ch. 5; 47 W. R. 264; 79 L. T. 590—North, J.

**94. Writ ne exeat regno—Non-compliance by Trustee with Order to Pay Money into Court—Evidence of Actual Receipt—Debtors Act, 1869** (32 & 33 Vict. c. 62), s. 4 (3).—The circumstances under which the Court will allow a writ *ne exeat regno* to issue must be such as would justify the issue of a writ of attachment, and in addition the evidence as to the intention of the defendant to leave the country must be direct and unequivocal. An affidavit by a solicitor as to his belief founded on information given to him by persons unwilling to have their names mentioned was held insufficient.

**Payment into Court—Continued.**

Decision of Joyce, J. affirmed.

IN RE UNDERWOOD, IN RE BOWLES, U. v. W.,  
[1903] 51 W. R. 335—C. A.

**VII. PAYMENT OUT OF FUND IN COURT.**

**95. Administration Action—Fund to the Credit of an Estate—Procedure—Petition—R. S. C., Ord. 55, r. 2 (1).—**R. 2 (1) of Ord 55, which provides that applications for payment out of Court can be made in chambers "where the title depends only upon proof of the identity or the birth, marriage, or death of any person," applies only to cases where the fund is carried over to the separate account of a particular person. So, where a fund has been carried over in an action to the credit of a separate account entitled "Residuary estate of John Birkin, deceased," it was held that payment out could only be made on petition.

IN RE BIRKIN, [1901] W. N. 33—Farwell, J.

**96. Defective Title—Petition—Distribution of Fund in Court—Assignment of Share—Subsequent Acquisition of good Title.]—**Where a person purports to convey one-sixth of a fund in Court representing real estate, though only entitled to one-ninth share, and afterwards becomes entitled to one-sixth, the Court will make the good title subsequently acquired available to make the assignment effectual.

*Nool v. Bewley* ((1829) 3 Sim. 103) followed.

A complete distribution of a fund paid into Court depending on the solution of such a question as the above can be determined on petition, and the Court would be extremely unwilling to put the parties to the expense and delay of an action.

IN RE HOFFE'S ESTATE ACT, 1885, 48 W. R.  
[507; 82 L. T. 556—Kekewich, J.

**97. Interest under Will—Making Trustees Respondents.]—**Where a petition was presented for payment out of a fund in Court standing to the "Account of M. (widow) with remainder over," being the interest of M. under a will.—

**HELD**—that in order to bring any incumbrances of which the trustees had notice before the Court the trustees should be made respondents.

ALLNUTT v. ALLNUTT, [1907] 122 L. T. Jo 367  
[—Joyce, J.

**98. Married Woman Petitioner—Marriage Settlement—Funds in Court not affected by Settlement—Certificate of Counsel.]—**A certificate of counsel is necessary to prove that funds in Court, for payment out of which a married woman is a petitioner, are not (so far as concerns her share) affected by the trusts of her marriage settlement.

RE SMITH, SMITH v. NEW, (1907) 51 Sol. Jo. 673  
—Warrington, J.

**99. Nominee of Persons entitled.]—**A number of persons entitled to a fund in Court petitioned for payment out to two persons as nominees who were not entitled as trustees. At first no power of attorney was produced, but at the second hearing it was produced and accepted as sufficient.

**HELD**—that it is not the practice of the Court to pay to persons other than the persons actually entitled except on the usual power of attorney required by the Paymaster-General. The only exceptions are (1) in the case of corporations where the petition is sealed with the corporate seal; (2) in the case of the Mayor, &c., of London, on whose unsealed petition payment may be made to the City Chamberlain.

IN RE BETTINGHAM, MELHADO v. WOODCOCK,  
[1904] W. N. 168—Farwell, J.

**100. Payment to Persons not entitled—Stop Order—Default of Paymaster-General—Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), s. 5.]—**A person who is interested in a fund in Court, who never obtains any stop order, and never requires any notice to be given to him, cannot complain of any default as against him on the part of the Paymaster-General, e.g., payment of the fund to persons not entitled to receive it.

*Jones v. Jones* ((1879) unreported—Lord Cairns, L.C.) followed.

Decision of Kekewich, J. ([1901] 1 Ch. 460; 70 L. J. Ch. 270; 49 W. R. 341; 84 L. T. 107) affirmed.

BATH v. BATH, (1902) 71 L. J. Ch. 500; 50  
[W. R. 535—C. A.

**101. Personality—Affidavit of no Incumbrance.]—**The rule requiring an affidavit of no incumbrance does not apply to personal estate. There may be cases in which such an affidavit would be required.

EDWARDS v. GROVE, (1907) 51 Sol. Jo. 27—  
[Kekewich, J.

**102. Person Entitled to take out Letters of Administration—Fund under £20.]—**Where a person entitled to a fund in Court has died intestate, the Court will not allow the fund to be paid out to the person entitled to take out letters of administration to the estate of the intestate, but who has not done so, even although the fund is under £20.

FROGLEY v. PHILLIPS, (1902) 50 W. R. 184—  
[Byrne, J.

**103. Petition affecting Fund—"Account of A. B. with Remainder Over"—Notice to Trustees.]—**On the hearing of a petition for payment out of Court of a fund standing to the "account of A. B. with remainder over," the trustees must be served, inasmuch as they might have received notice of assignments or dealings with the fund.

PRACTICE NOTE, [1907] W. N. 44—Joyce, J.

**104. Petition by Tenant for Life—Reversion assigned by Wife—Affidavit of no Settlement.]—**



**Payment out of Fund in Court—Continued.**

On a petition for payment out of Court by a tenant for life of a fund who had taken assignments of all the reversionary interests, one of the reversioners, who was a married woman, and her husband refused to make an affidavit of no settlement.

**HELD**—that the fund might be ordered to be paid out on an affidavit of no settlement by a person likely to be well informed.

*Rowland v. Oakley* ((1850) 14 Jur. (N.S.) 845) followed.

*TIMOTHY v. CROWN*, (1900) 82 L. T. 142—[Cozens-Hardy, J.]

**105. Presumption of Death—Evidence.**—Where an application is made for the payment out of Court of funds by persons claiming as upon the presumption of death by reason of seven years' absence of the person to whose credit the funds stand, and the Court is satisfied with the evidence, it is not in accordance with modern practice for the Court to require security to refund before making the order for payment out.

*IN RE B'S TRUSTS*, (1905) 53 W. R. 491—[Warrington, J.]

**106. Service of Petition—Assignment under Mortgagee's Power of Sale—Dispensing with Service on Mortgagor.**—Where there was a mortgage of the reversionary interest of a fund in Court with a power of sale which had been properly exercised, and there was no question about the title of the mortgagee, and it was found impossible to ascertain the whereabouts of the mortgagor.

**HELD**—on a petition for payment out, that service of the petition on the mortgagor might be dispensed with.

*CATTERSON v. CLARK* (1), [1905] W. N. 173.

**VIII. ACTION FOR DECLARATION.**

**107. Intended to Assist Plaintiffs in Action Abroad.**—The plaintiffs were first mortgagees of *The Manar*, and as such took possession in March, 1902; they then chartered her for a voyage from C. to St. Nazaire. On her arrival there she was arrested by the defendants, who had obtained an English judgment for necessaries, and had made it "executory" in France. The plaintiffs, in order to obtain the release of the vessel, had to give bail; and they intervened in the French proceedings: they then issued writs in England against the mortgagors and the creditors, claiming a declaration of their rights to the vessel and her freight as against the creditors. Both defendants applied to stay the proceedings.

**HELD**—that the action against the creditors should proceed, for it had not been clearly established that the declaration asked for by the plaintiffs would not assist them before the French tribunal;

But, that, as the mortgagors had not yet attempted to dispute the mortgage, the action against them should be stayed.

*Brooking v. Maudslay, Son & Field* ((1888) 38 Ch. D. 636; 57 L. J. Ch. 1001; 36 W. R. 664; 82 L. T. 378—dictum of Stirling, J.) followed.

"*THE MANAR*," [1903] P. 95; 72 L. J. P. 41; [51 W. R. 687; 89 L. T. 218; 9 Asp. M. C. 482—Bucknill, J.]

The action subsequently came on for hearing; and a declaration was made that according to English law the plaintiffs were in March, 1902, entitled to take possession, and, upon doing so, to retain the freights subsequently earned by the vessel.

"*THE MANAR*," (1903) 72 L. J. P. 64; 89 L. T. [26; 19 T. L. R. 617—Bucknill, J.]

**108. Limits—R. S. C., Ord. 25, r. 5.**—The right to bring an action for a declaration alone under Ord. 25, r. 5, is not unrestricted, and is subject to the discretion of the Court.

*NORTH EASTERN MARINE ENGINEERING CO., [Ld. v. LEEDS FORGE CO., LD.]*, [1906] 1 Ch. 324; 75 L. J. Ch. 178; 54 W. R. 370; 94 L. T. 56; 22 T. L. R. 178—Joyce, J.]

**109. When Maintainable—R. S. C., Ord. 25, r. 5.**—The mere fact that a highway authority have disputed a plaintiff's right to a piece of roadside waste does not entitle him to bring an action for a declaratory judgment

*OFFIN v. ROCHFORD RURAL DISTRICT COUNCIL* [1906] 1 Ch. 342, 70 J. P. 97, 54 W. R. 244—Warrington, J.]

**IX. DISCONTINUANCE.**

**110. Auxiliary Proceedings—Incidental Costs—Costs of Adjournment—R. S. C., Ord. 26, r. 1—R. S. C., Ord. 55, rr. 15, 15A.**—The right of every sutor in the Chancery Division to have any question determined by the judge personally is beyond question, and an adjournment to the judge is not in the nature of an appeal. All orders in the Chancery Division are made by the Court or by a judge, either personally or through a Master.

All orders made in chambers are orders of the judge, though taken without the parties actually going before him.

Some orders must, under the rules, be made by the judge in person (see Ord. 55, rr. 15, 15A), and matters in which such orders are sought for are brought before the judge as a matter of course. If orders, not being of the nature last referred to, are applied for, and when, before the Master, he is prepared to make for the judge a proper order, if at the instance of the party resisting such order, the matter is adjourned to the judge, whether in Chambers or in Court, the costs of the adjournment are in the discretion of the judge.

Especial care should be taken in reference to the costs of the adjournment in cases where, from the nature of the application, it is clear that the proper necessary costs of the application must be borne by the applicant.

Judges are careful not to check reasonable and proper adjournments to themselves by visiting

**Discontinuance—Continued.**

the party at whose instance the adjournment is taken with costs simply because he is unsuccessful.

A plaintiff seeking to discontinue an action upon terms of paying the defendant's costs in that action, will not be compelled as part of his bargain to pay the costs incurred by the defendant in auxiliary proceedings taken by the plaintiff before another tribunal arising out of the same case, and the result of which caused the plaintiff to discontinue his action.

LLOYD'S BANK, LD. v. PRINCESS ROYAL COLLIERY Co., (1900) 48 W. R. 427, 460; 82 L. T. 559—Byrne, J.

111. *Nonsuit—R. S. C., Ord. 26, rr. 1—4*—A plaintiff can no longer elect to be nonsuited. Should he wish to discontinue the action at the trial, he must do so under Ord. 24, r. 1, by leave of the judge.

Decision of C. A. ([1898] 1 Q. B. 636; 67 L. J. Q. B. 454; 46 W. R. 340; 78 L. T. 311; 14 T. L. R. 280) affirmed.

FOX v. STAR NEWSPAPER Co., [1900] A. C. [19; 69 L. J. Q. B. 117; 48 W. R. 321; 81 L. T. 562; 16 T. L. R. 97—H. L. (E.).

112. *Notice of Discontinuance after Close of Pleadings—Validity—R. S. C., Ord. 26, r. 1.*—By Ord. 26, r. 1, a plaintiff may give notice of discontinuance before receipt of defence, or after receipt thereof before taking any other proceeding in the action (save an interlocutory application).

The fact that a plaintiff, after receipt of defence, does nothing, but allows the pleadings to be closed automatically, and the defendant to give notice of trial, does not prevent him from subsequently giving a valid notice of discontinuance.

DE JONG v. UNITED MOTOR Co., (1903) 20 [R. P. C. 472—Kekewich, J.

113. *Notice to Proceed—Defendant not appearing to Writ of Summons—No Proceedings for a Year—Personal Service—R. S. C., Ord. 64, r. 13.*—Where a defendant has been duly served and has not appeared, and there has been no proceedings for a year against him, the filing of a month's notice to proceed is a sufficient compliance with Ord. 64, r. 13, and personal service is unnecessary.

Jamaica Ry. Co. v. Colonial Bank ([1905] 1 Ch. 577, No. 1, *supra*) approved.

MORRISON v. TELFER, [1906] W. N. 31; 120 [L. T. Jo. 383; 41 L. J. (N.C.) 105—Eady, J.

113a. *Discontinuance—Terms as to a Second Action.*—Where a plaintiff applies for leave to discontinue an action, the Court will consider whether they should not make it a condition that he should not be at liberty to bring another action.

HESS v. LABOUCHERE, (1898) 14 T. L. R. 350—[C. A.

**X. TRIAL.****(a) Miscellaneous.**

114. *Affidavit by One of the Jury at the Trial—Inadmissibility on Application for New Trial.*—A jurymen cannot be heard to complain of a verdict to which he has been a party after he has left the jury-box. He must protest in the jury-room or in the Court. Two days after the verdict of the jury was pronounced in Court, one of the jury wrote to the Lord Chief Justice, who tried the case, stating that he had not agreed to the verdict as pronounced. This jurymen had since made an affidavit.

HELD—that the affidavit was not admissible on an application for a new trial.

NESBITT v. PARRETT AND ANOTHER, (1902) [18 T. L. R. 510—C. A.

115. *Certificate for a Special Jury.*—An application for a certificate for a special jury should be made immediately upon the conclusion of the trial.

GRIFFITHS v. GRIFFITHS (QUEEN'S PROCTOR [showing cause], (1898) 14 T. L. R. 184.—Barnes, J.

116. *Citation of Reports—"Weekly Notes."*—The "Weekly Notes" should only be cited on points of practice, or as interim reports of cases pending publication in the Law Reports.

IN RE SMITH'S SETTLEMENT; WILLIAMS v. [SMITH, [1903] 1 Ch. 373—Eady, J.

117. *Hearing in camera—Interests of Justice.*—Whenever it is reasonably clear that justice cannot properly be done unless a case is heard *in camera*, every Court has an inherent jurisdiction to so hear it.

The necessity for this course may arise in different classes of cases: e.g., patent cases, cases connected with wards of Court, and matrimonial cases of such a type that real investigation of the facts is impossible before a mixed audience.

DRUCE v. DRUCE AND GIBBS, [1903] P. 144; [72 L. J. P. 51; 88 L. T. 573; 19 T. L. R. 387—Jeune, P.

118. *Jury expressing Opinion in favour of Plaintiff after hearing Plaintiff's Case only—Right of Defendant to New Trial.*—The mere communication by the jury who are trying an action for an opinion in favour of the plaintiff during or at the close of the plaintiff's case before the defendant's evidence is heard is not of itself such misconduct on the part of the jury as will justify counsel for the defendant in refusing to go on with the case before that jury and entitle the defendant to a new trial.

CAMPBELL v. THE HACKNEY FURNISHING [Co., LD., (1906) 22 T. L. R. 318—Div. Ct.

119. *Right of Reply—Two Defendants—One Defendant not calling Witnesses.*—At the trial of an action for libel against two defendants, one defendant called witnesses who gave

**Trial—Continued.**

evidence material to the cases of both defendants, and the other defendant called no evidence.

**HELD**—that the defendant who had not called witnesses had the right to address the jury after the plaintiff's concluding speech.

**RYLAND v. JACKSON AND BRODIE**, (1902) 18 [T. L. R. 574—Bruce, J.]

**(b) Notice of Trial.**

**120 Summons for Directions—Assizes—Ten Days' Notice—R. S. C., Ord 30, rr. 1, 2—Ord 36, rr. 14, 18, 18A** ]—It is competent for a judge, when a case comes before him on a summons for directions, under Ord 30, r. 1, to order that notice of trial may be given for the next assizes, but that the case shall not come on for trial till such time as will give the defendant ten days' notice of trial.

**Laskier v. Teheran** ((1892) 67 L. T. 121—Div. Ct.) distinguished

**BAXTER v. HOLDSWORTH**, [1899] 1 Q. B. 266; [68 L. J. Q. B. 154; 47 W. R. 179; 15 T. L. R. 84—C. A.]

**121 Summons for Directions—Setting down for Trial as Short Cause—Length of Notice—R. S. C., Ords. 16, r. 21; 30, r. 2; 36, r. 14; 40, r. 1, 52, r. 5.** ]—Upon a summons for directions the Master ordered a debenture holder's action to be set down for trial without pleadings to be heard as a short cause judgment to be applied for on minutes, evidence to be taken by affidavit.

**HELD**—that the order should have given the plaintiff leave to serve notice of trial, and that ten days' notice would be necessary.

**RE PRINGLE & Co., LD; PAWNALL v. PRINGLE & Co.**, (1904) 89 L. T. 743—Buckley, J.

**(c) Place of Trial.**

**122. Change of Venue—Assizes—Discretion.** ]—The Court of Appeal ought always to require an overwhelmingly strong case before they interfere with the discretion of a judge at chambers as to the place where an action should be tried. In an action of ejectment with regard to land in Cornwall, *prima facie* Cornwall is the right place in which to try it; and circuit cases should be tried on circuit. If, however, it can be shown that there is a great balance of convenience in favour of trying the case elsewhere, that would be a ground for asking for an order for a change of venue.

Decision of Day, J. affirmed.

**FOXWELL v. VAN GRUTTEN**, (1898) 14 T. L. R. [145]

**123. Discretion of Judge in Chambers—Appeal—R. S. C., Ord. 36, r. 1.** ]—The Court of Appeal will not interfere with an order of a judge at chambers fixing the place of trial of an action, unless a clear case is made out against it.

**THOROGOOD v. NEWMAN AND OTHERS**, (1906) [23 T. L. R. 97; 51 Sol. Jo. 81.—C. A.]

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**124. Transfer of Action—Selection of Tribunal—Attorney-General's Discretion.** ]—In the above case the Attorney-General never intended to exercise any prerogative right, and did not wish to interfere with the discretion of the Court in any way.

It has never been the practice of the Attorney-General to exercise in such manner the prerogative of the Crown, assuming him to have it. All that he does is by his *fiat* to authorise the relators to go on with the matter involving public interest, so long as he thinks it right that they should be permitted to go on. He does not clothe them with the prerogative of the Crown. He has no intention of doing so.

Decision of Kekewich, J. ((1900) 49 W. R. 152; 83 L. T. 569) reversed.

**ATTORNEY-GENERAL v. WILSON**, (1901) 70 L. J. [Ch. 234; 49 W. R. 195; 83 L. T. 647—C. A.]

**(d) Right to Jury.**

**125. Counter-claiming Defendant—Action for Specific Performance commenced in Chancery Division—Counter-claim by Defendant for Relief in respect of Slander, Libel and Malicious Prosecution—Application for Transfer of whole Action and Counter-claim to King's Bench Division to be Tried with a Jury—Trial in that Form of Particular Issues raised by Counter-claim—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100—Ord. 19, rr. 3—Ord. 27, r. 11—Ord. 36, rr. 2-7.** ]—On the true construction of rule 2 of Ord. 36, "action" does not include a counter-claim, and "plaintiff" does not include a defendant who is seeking relief by means of a counter-claim.

Where, therefore, the defendant to an action seeks by a counter-claim relief in respect of any of the matters specified in that rule (e.g. libel), he is not entitled as of right to have the whole action and counter-claim tried by a judge with a jury, but there is strong ground for an application to the judge to exercise the wide discretion given to him by rule 7 (a) of the same order to allow particular issues raised in the counter-claim to be so tried.

Decision of Warrington, J. affirmed.

**KINNAIRD v. FIELD** (No 2), [1905] 2 Ch. 361; [74 L. J. Ch. 692, 54 W. R. 85; 93 L. T. 190; 21 T. L. R. 682—C. A.]

**126. Ireland—Action in Chancery Division—Damages for Conspiracy and Injunction—Discretion of Court below—Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 48.** ]—The plaintiff brought an action in the Irish Chancery Division for damages for conspiracy, and an injunction against boycotting and similar matters. The Vice-Chancellor rejected the defendants' contention that they were entitled as of right to a jury, and refused an order for one, but it was not clear whether the question of discretion (as distinct from right) was argued before him.

The C. A. in the exercise of their discretion ordered a trial before the Vice-Chancellor and a jury.

**HELD** (Earl of Halsbury, L.C., dissenting)—

**Trial—Continued.**

that the order of the C. A. ought not to be disturbed.

Per the L.C., the V.-C. had exercised his discretion, and therefore the C. A. should not have interfered with his order.

LORD DE FREYNE *v.* JOHNSTON, (1904) 20 [T. L. R. 454—H. L. (Ir.).]

**127. Leave to Defend given without any Condition or Direction as to Mode of Trial—Right of Defendant to Trial with a Jury—***R. S. C.*, 1883, *Ord.* 14, *rr.* 6, 8—*Ord.* 36, *r.* 6.]—Where on a summons under *Ord.* 14 an order has been made giving the defendant leave to defend without any condition or direction as to the mode of trial, the judge at chambers cannot on a subsequent summons deprive the defendant of his right under *Ord.* 36, *r.* 6, to have the action tried with a jury.

WOOLFE *v.* DE BRAAM, (1899) 48 W. R. 161; [81 L. T. 533; 16 T. L. R. 61—C. A.]

**XI. MOTION FOR NEW TRIAL.****(a) Costs.**

**128. Misdirection—Costs of First Trial and Application for New Trial.**—Where a new trial is granted on the ground of misdirection, the Court, as a general rule, will order the costs of the first trial and of the application for a new trial to abide the event of the new trial.

JONES *v.* RICHARDS, (1899) 15 T. L. R. 398—[C. A.]

**129. Successful Application.**—In the absence of special circumstances the costs of a successful application for a new trial should be borne by the party opposing such application.

HAMILTON *v.* SEAL, [1904] 2 K. B. 262; 73 [L. J. K. B. 560; 52 W. R. 581; 90 L. T. 592—C. A.]

**(b) Grounds for Ordering New Trial.**

**130. Excessive Damages—Prospective Loss of Income—Professional Earnings.**—The Court will not order a new trial merely because the damages awarded are larger than the Court would have given. The verdict must stand unless the damages are so excessive that twelve reasonable men could not have given them, or unless it can be seen that the jury have disregarded some direction of the judge, or have considered topics which they ought not to have considered.

A jury in awarding damages for loss of earnings ought not to merely capitalise the income, but should allow for accidents, &c.

A young engineer with prospects of a good appointment was incapacitated by a railway accident from following his profession, and a jury awarded him £3,000.

**HELD**—that a new trial ought not to be ordered.

*Praed v. Graham* ((1890) 24 Q. B. D. 53, and

*Phillips v. L. & S. W. Ry. Co.*, (1879) 5 Q. B. D. 78) applied.

JOHNSTON *v.* G. W. RY. CO., [1904] 2 K. B. 250; [73 L. J. K. B. 568, 50 W. R. 612; 91 L. T. 157; 20 T. L. R. 455—C. A.]

**131. Excessive Damages—Order for New Trial unless Smaller Damages accepted—Jurisdiction.**—In an action of tort, if the C. A. consider the damages awarded excessive, there is no jurisdiction without the defendant's consent to order that there should be a new trial unless the plaintiff agree to accept a lesser sum fixed by the Court.

Opinion of C. A. in *Belt v. Lawes* ((1884) 12 Q. B. D. 356; 53 L. J. Q. B. 249; 32 W. R. 607; 50 L. T. 441) overruled.

Per Lord Halsbury, L. C. Even in mitigation of damages you cannot go into evidence which, if proved, would constitute a justification.

A new trial has been granted because counsel for the plaintiff read to the jury the amount of damages claimed.

WATT *v.* WATT, [1905] A. C. 115; 74 L. J. K. B. [438; 69 J. P. 249, 53 W. R. 547; 92 L. T. 480; 21 T. L. R. 386—H. L. (E.).]

**132. Inconsistent Findings**—In an action brought by the respondent (who sued both in person and as tutor to his minor son) against the appellants for causing the death of his wife and his son's mother by negligently supplying tartar emetic instead of bismuth, the jury found—(1) that the wife's death was accelerated, but not to any appreciable extent, by her taking a dose of tartar emetic in mistake for bismuth, (2) that the respondent had not suffered any damage by reason of his wife's death; but (3) that the child had suffered damage to the extent of one thousand dollars.

**HELD**—that the second and third findings were not inconsistent, but that it was for the Court to say whether on all the facts the respondent could recover the damages from the appellants, and as the jury had found that the death of the wife was not accelerated by the poison to any appreciable extent, it followed as a legal consequence that the damage attributable to the appellants was inappreciable, and that it could not be appreciable for the boy any more than for his father, and that the order of the Court of Queen's Bench for Lower Canada granting a new trial must be reversed.

KERRY *v.* ENGLAND, [1898] A. C. 742; 67 [L. J. P. C. 150—P. C.]

**133. Misdirection—Omission of Counsel to suggest Questions to Judge at Trial.**—At the end of his summing up the judge asked counsel whether they wished any other questions put to the jury. Counsel on either side answered in the negative. On an application for a new trial, it was objected that the defendant could not raise the question of misdirection, as his counsel had suggested no further question.

**HELD**—that there had been no misdirection, but (per Vaughan Williams, L.J. that the fact

**Motion for New Trial—Continued.**

that the judge asks counsel whether they have any further questions, and they reply in the negative, cannot prevent it being said on a motion for a new trial that there was some other important question which ought to have been submitted to the jury.

WEISER v. SEGAR, [1904] W. N. 93; 117 L. T. [Jo. 8, 48 Sol. Jo. 457; 39 L. J. N. C. 237—C. A.]

**134. New Evidence discovered—Conclusiveness—Verdict of Jury**—The rule as to granting a new trial in order to enable a party to adduce new evidence after an action has once been decided by a jury is that a new trial may be granted if new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial, would have been conclusive, so that the verdict must have been otherwise than it was.

YOUNG v. KERSHAW, BURTON v. KERSHAW, [1899] 81 L. T. 531; 16 T. L. R. 52—C. A.

**135. Setting Aside Verdict against Evidence—Malicious Prosecution**—Before setting aside the verdict of a jury the Court must be satisfied that upon the evidence it was unreasonable and almost perverse for a jury to find such a verdict when properly instructed by the judge.

A plaintiff obtained a verdict for damages for having been adjudged bankrupt maliciously and without reasonable and probable cause. It appeared that, even assuming that he was not intentionally avoiding his creditors, yet there was evidence on which a reasonable man might conclude that he was doing so.

HELD—that (the onus being on the plaintiff) the verdict was rightly set aside.

COX v. ENGLISH, SCOTTISH, AND AUSTRALIAN [BANK, LD., [1905] A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483—P. C.]

**136. Verdict against Evidence.**—Where a question of fact is left to the jury, and they have answered it reasonably, their verdict cannot be disturbed. But where the verdict is one that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, or if the Court is not satisfied that the real question to be determined was so left to them that their verdict was given upon the determination of that question, the Court may set aside the verdict and order a new trial.

Judgment of C. A. reversed.

JONES v. SPENCER, (1898) 77 L. T. 536; 14 [T. L. R. 41—H. L. (E.).]

**(c) Time for Serving Notice.**

**137. Claim of Time for Appeal under Ord. 58—R. S. C., Ord. 39, r. 4; Ord. 58, r. 15.**—A litigant in person had allowed the time to expire within which he ought to have brought an appeal from judge and jury under Ord. 39, r. 4. He claimed the right to the longer period of three

months in which to appeal as provided by Ord. 58, r. 15. On objection by counsel for the respondent,—

HELD—that he was out of time, such appeals being governed by Ord. 39 alone.

FRYER v. CHURCH AGENCY, LD., (1903) 47 [Sol. Jo. 361—C. A.]

**138. Findings of Jury—Reference for Report as to Amount Due—Judgment at a Later Date—R. S. C., Ord. 39, r. 4.**—At the trial of an action the jury answered certain questions in favour of the plaintiff, and the judge directed that the amount to be paid by the defendant to the plaintiff should be referred for assessment to a referee, who should report to the judge. The referee having reported, the judge gave judgment for the plaintiff for the amount assessed. The defendant then gave notice of motion for a new trial.

HELD—that the notice was too late, as the time specified in Ord. 39, r. 4, ran from the date of the findings of the jury and not from the judgment of the judge.

GREENE v. CROOME, (1907) 24 T. L. R. 89—[C. A.]

**XII. ENTRY OF JUDGMENT.**

**139. Consent to Perpetual Injunction—Method of giving Consent in Chancery Division—R. S. C., Ord. 41, rr. 9, 10.**—In an action for an injunction, the defendants appeared to the writ by a solicitor. On the plaintiffs applying for an interlocutory order, the defendants did not appear, but signed a consent to a perpetual injunction which was attested by their solicitor. By Ord. 41, rr. 9, 10, an order for judgment by consent cannot be made unless the defendant either attends before the judge and gives his consent in writing, or unless his written consent is attested by a solicitor.

HELD—that according to the practice in the Chancery Division, an order could not be made unless the defendant attended in person and signs the registrar's book.

ELLIMAN v. SEQUAH, [1903] W. N. 187—[Farwell, J.]

**140. Undertaking—Breach of Undertaking embodied in Order—Service of Order—Committal or Attachment—R. S. C., 1883, Ord. 42, r. 7; Ord. 44, rr. 1, 2.**—Where defendants in an action committed a breach of an undertaking given by them and embodied in an order of the Court which was not served on them personally, plaintiffs asked for leave to issue a writ of attachment.

HELD—that the order might be enforced by committal without service, and that the proper remedy for the breach of an undertaking is by committal, and not by attachment.

D v. A. & Co., [1900] 1 Ch. 484; 69 L. J. Ch. [382; 48 W. R. 429; 82 L. T. 47—Cozens-Hardy, J.]

**141. Undertaking to execute Indenture—Breach—Attachment—Rules of Court, 1883,**

**Entry of Judgment—Continued.**

*Ord. 41, r. 5.*—By a judgment all further proceedings in an action were stayed, the defendants undertaking forthwith to execute a certain indenture. On a motion by the plaintiff that he might have leave to issue a writ of attachment against the defendants for breach of their undertaking—

**HELD**—that in the case of an undertaking of this kind there ought either to be service in accordance with *Ord. 41, r. 5*, or an order in the nature of a four-day order. The use of the word “forthwith” dispenses with the necessity for fixing a time.

**HALFORD v. HARDY**, (1900) 81 L. T. 721—  
[Kekewich, J.]

**142. Undertaking to Pay Money—Partnership Action—Breach of Undertaking—Committal—Debtors Act, 1869** (32 & 33 Vict. c. 62), s. 4.]—An undertaking in a partnership action to pay money into Court, or into a banking account, cannot be enforced by attachment or committal, as it does not fall within the exceptions in sect. 4 of the Debtors Act, 1869.

**CARTER v. ROBERTS**, [1903] 2 Ch. 312; 72 L. J. Ch. 655; 89 L. T. 239—Byrne, J.

**XIII. EXECUTION.****(a) Discovery in Aid.**

**143. Appeal for Costs—Discretion of Judge—Examination of Debtor as to Means—Garnishee Order—Costs—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 49—*R. S. C.*, 1883, *Ord. 42, rr. 32, 34; Ord. 45, r. 9.*—There is no appeal from the decision of a judge, without his leave, refusing to order the costs incident to the examination of a judgment debtor as to his means under *Ord. 42, r. 32*, and the costs incident to the application for a garnishee order under *Ord. 45* to be paid by the debtor, such costs being in the discretion of the judge.

The Court of Appeal cannot give leave to appeal in such a case.

*Semble*, there is no reason why the examination of a judgment debtor as to means should be considered as a luxury, the costs of which must be paid by the creditor in any event.

**ADLINGTON v. CONINGHAM**, [1898] 2 Q. B. 492, [67 L. J. Q. B. 926; 79 L. T. 292—C. A.]

**144. Judgment against Company—Power to examine Retired Officer—R. S. C., Ord. 42, r. 32.—Where judgment has been signed against a company there is power under *Ord. 42, r. 32*, to examine an officer of the company, who has retired, as to its assets and book debts, &c.**

**SOCIÉTÉ GÉNÉRALE DU COMMERCE ET DE L'INDUSTRIE EN FRANCE v. JOHANN MARIA FARINA & Co.**, [1904] 1 K. B. 794; 73 L. J. K. B. 355; 52 W. R. 404; 90 L. T. 472; 20 T. L. R. 367—C. A.]

**(b) Scotch Judgment.**

**145. Decree of Court of Session—Certificate registered in High Court—Equitable Execution**

—*Receiver—Judgments Extension Act, 1868* (31 & 32 Vict. c. 54), ss. 3, 4.]—When a certificate of a Court of Session decree has been registered in the High Court in accordance with the Judgments Extension Act, 1868, there is power to appoint a receiver of the debtor's life interest in settled funds, by way of equitable execution.

**THOMPSON AND ANOTHER v. GILL**, [1903] 1 K. B. 760; 72 L. J. K. B. 411; 51 W. R. 484; 88 L. T. 714; 19 T. L. R. 366—C. A.]

**(c) Sequestration.**

**146. Local Authority causing Nuisance from Sewage—Injunction—Disobedience—Application to Sequester—Costs—Costs as between solicitor and client may sometimes be given to the party moving, by way of indemnity, instead of committing the respondent.**

In July, 1901, an injunction was granted restraining a sanitary authority from allowing sewage to flow into a certain stream so as to be a nuisance to the plaintiff. In July, 1902, the latter applied for leave to sue out a writ of sequestration on the ground of the authority's disobedience, and the Court directed an expert to report upon their sewage works. On the presentation of this report the Court made an order for sequestration, but directed the writ to lie in the office for six months on the authority undertaking to carry out the works recommended by the expert, and on their paying the costs of and incidental to the motion, including the fees of the plaintiff's expert and of the expert appointed by the Court.

**LEE v. AYLESBURY URBAN DISTRICT COUNCIL**, [(1903) 19 T. L. R. 106—Buckley, J.]

**146a. Breach of Undertaking by Company—Application to Commit Directors—R. S. C., Ord. 52, r. 31.—Where there was a breach of an undertaking by the defendant company to make up a road given at the hearing of an action, an application was made to commit two of the directors under *Ord. 52, r. 31*.**

**HELD**—that having regard to the fact that this was an undertaking, though the directors were not morally justified in not carrying it out, the Court could not make an order under *Ord. 42, r. 31*. There would, however, be an order that the company do the work within three months.

**ATTORNEY-GENERAL v. S. WHEATLEY & SONS**, [(1903) 116 L. T. Jo 153—Joyce, J.]

**147. Notice of Writ of Sequestration—Effect on Chose in Action in hands of Third Party—Banker.—Mere notice of a writ of sequestration does not bind a chose in action in the hands of a third party.**

A defendant in an administration action was ordered to pay a sum of £136 odd into Court to the credit of the action. Failing to do so, a writ of sequestration was issued against him on May 20th, 1902. The sequestrators attended at the defendant's bank on the same day and gave notice of the writ; and demanded payment to themselves of the amount (which consisted of £204 odd)

**Execution—Continued.**

standing to defendant's credit at that date. The bank undertook not to deal with defendant's account pending consultation with their solicitors. Notwithstanding the undertaking, the defendant was permitted to draw on his account, and on May 22nd his balance was reduced to £137 odd. On May 22nd the sequestrators gave formal notice in writing of the writ to the bank, and took out a summons asking that the bank might be ordered to pay to them the amount standing to defendant's credit in the books of the bank on May 20th, 1902.

**HELD**—that an order could not be made for the full sum of £204 standing to defendant's credit in the books of the bank on May 20th, but an order was made, without costs, for the amount standing to defendant's credit at the bank on May 22nd, 1902.

**IN RE POLLARD, POLLARD v. POLLARD, (1902)**  
[51 W. R. 111, 87 L. T. 61; 18 T. L. R. 717—Joyce, J.]

**148. Order for payment of Costs—Service—R. S. C., Ord. 41, r. 5—Ord. 43, rr. 6, 7.**—Ord. 41, r. 5, and Ord. 43, r. 6, do not apply to the case of an application for leave to issue a sequestration to enforce payment of costs. Ord. 43, r. 7, is the rule applicable to such a case. An order for a sequestration to issue for costs can be made on special application to the judge without any four-day order having been made. The judge should be satisfied that the order for payment of costs had come to the knowledge of the person against whom the application was made, and that the failure to comply with the order was contumacious.

*In re Lumley, Ex parte Cutcart* ([1894] 2 Ch. 271, 63 L. J. Ch. 435; 42 W. R. 401; 70 L. T. 780; 7 R. 179—C. A.) followed.

**IN RE DEAKIN, EX PARTE CATHCART, [1900] 2**  
[Q. B. 478; 69 L. J. Q. B. 797; 83 L. T. 39—C. A.]

**149. Wilful Disobedience of Order of Court—Submission after Notice of Motion—R. S. C., Ord. 42, r. 31.**—Upon an application for sequestration the only question for the Court is whether a contempt has been committed. The defendants submitted to an injunction restraining them from infringing the plaintiff's patent, and subsequently committed an alleged infringement in circumstances which were held not to amount to an intentional disobedience of the injunction.

**HELD**—that the Court could not make any declaration as to whether the facts alleged amounted to an infringement of the patent.

**METERS, LD. v. METROPOLITAN GAS METERS, [LD., (1907) 51 Sol. Jo. 499—Joyce, J.]**

**(d) Stay.**

**150. Judgment in High Court—Order in County Court for payment of judgment debt by instalments—Subsequent proceedings to levy execution—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.**—The effect of sect. 5 of the Debtors

Act, 1869, is that, if a plaintiff, who has obtained judgment in an action in the High Court, goes to the County Court, and accepts an order there for payment of the judgment debt by instalments, he thereby consents to have the judgment of the High Court modified to the extent of that order, and he is not entitled to afterwards issue execution upon the judgment in the High Court, without at any rate getting the order made by the County Court discharged.

*Jones v Jenner* (25 L. J. Ex. 319), approved and followed.

Dictum of Cave, J. in *Re Ices; Ex parte Addington* (16 Q. B. D. 665, at pp. 670, 671) dissented from.

Decision of Darling, J. affirmed.

**MONTGOMERY & CO. v. DE BULNES, [1898] 2**  
[Q. B. 420; 67 L. J. Q. B. 768; 78 L. T. 671; 47 W. R. 22—C. A.]

**(e) Writ of Possession.**

**151. Receiver—Order to deliver Possession—No Time Limited—No Power to issue Writ of Possession—R. S. C., Ord. 41, r. 5; 47, r. 2.**—Where in an order for delivery of possession of premises to a receiver by error no time was limited—

**HELD**—that, without obtaining a "four days" order, the receiver was not entitled to sue out a writ of possession.

**SAVAGE v. BENTLEY, (1904) 90 L. T. 641—**  
[Farwell, J.]

**152. Right to Costs—Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5**—Where a landlord has recovered judgment for possession of premises and has issued a writ of possession, the Court or a judge has jurisdiction under sect. 5 of the Judicature Act, 1890, to order the defendant to pay the taxed costs of the writ of possession as being costs of and incident to a proceeding in the Supreme Court.

**THE DARTFORD BREWERY CO., LD. v. MOSELY, [1906] 1 K. B. 462, 75 L. J. K. B. 279;**  
54 W. R. 333; 94 L. T. 263; 22 T. L. R. 304—C. A.]

**XIV. ATTACHMENT OF DEBTS.**

**153. Action upon Garnishee Order—Judgment—Winding-up—R. S. C., 1883, Ord. 42, r. 24; Ord. 45, rr. 1, 2, 7, Form 40**—Though a garnisher who has not received payment from the garnishees, a limited company, is not thereby entitled to petition for a winding-up, he can bring an action under Ord. 14 on the garnishee order, and obtain a judgment against the garnishees, which may be made the foundation of winding-up proceedings.

*In re Combined Weighing and Advertising Machine Co.* ((1889) 43 Ch. D. 99; 59 L. J. Ch. 26; 38 W. R. 67; 61 L. T. 582) discussed.

**PRITCHETT v. ENGLISH AND COLONIAL SYNDI-**  
[CATE, [1899] 2 Q. B. 428; 68 L. J. Q. B. 801; 47 W. R. 577, 81 L. T. 206—C. A.]

**Attachment of Debts—Continued.**

**154. Apportionment — Rent — Garnishee Order.**—It is not possible even since the Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2, to attach rent under the garnishee order before it is payable.

**BARNETT v. EASTMAN**, (1898) 67 L. J. Q. B. 517  
[—Day, J.]

**155. "Debt"—Garnishee Order—Money of Debtor in Hands of Public Official—Relation of Debtor and Creditor—Proceeding to obtain Payment—Surplus Assets of Company in Liquidation—Companies Liquidation Account—R. S. C., Ord. 45, r. 1—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), ss 11, 15.**—It was sought by a judgment creditor to attach a sum of money which constituted part of the surplus assets of a company in liquidation. The company's assets were more than sufficient for the payment of their debts, and therefore the surplus became distributable amongst the shareholders. One of the shareholders was the judgment debtor, and the liquidator in due course gave him notice that the sum of money was payable to him. He paid no attention to the notice, and, under the provisions of sect. 15, sub-sect. 3, of the Companies (Winding-up) Act, 1890, this sum due to him was paid by the liquidator to the companies liquidation account at the Bank of England. A garnishee order absolute was obtained by the judgment creditor against the inspector-general in companies liquidation. On appeal by the latter:—

**HELD**—that the only proceeding open to obtain payment of the money in question was that provided by sub-sect. 3 of sect. 15 of the Companies (Winding-up) Act, 1890, and therefore there was no "debt" due, either from the Board of Trade or from any of their officials, to the judgment debtor, and that Ord. 45, r. 1, did not apply.

**SPENCE v. COLEMAN**, [1901] 2 K. B. 199; 70 [L. J. K. B. 632; 49 W. R. 516; 84 L. T. 703; 17 T. L. R. 469—C. A.]

**156 Debts Owning or Accruing—Assignment of Choses in Action, Executed by Assignor only, Validated by subsequent Execution by Assignee—Assignment of Choses in Action Void against Creditors—13 Eliz. c. 5—Effect of Assignment to Defeat Individual Creditor—Right of Garnishee to make Payment after Notice of Garnishee Order nisi—Obligation to Stop Payment of Cheque.**—The fees of a public vaccination officer, under a contract specifying that he shall perform certain ministerial acts prior to becoming entitled to payment, and fees for registering births and deaths under the Registration Act, 1836, which prescribes verification of the accounts of the fees by the superintendent registrar, are debts accruing due so as to be attachable as soon as the work is performed, and although the time for payment may not have arrived.

An assignment by a judgment debtor may be valid in garnishee proceedings against the claim of the judgment creditor, although at the time

of the garnishee proceedings, the assignment has not yet been executed by the assignee, provided that he afterwards assents to and executes the same, when its validity relates back to the date of its execution by the assignor.

Since choses in action became attachable by sects. 60 *et seq.* of the Common Law Procedure Act, 1854, an assignment of them may be void under 13 Eliz. c. 5, as tending to defeat, hinder, or delay creditors.

If the effect, not necessarily the object, of the assignment is to defeat, hinder, or delay one particular creditor only, the assignment will be void under the statute.

A garnishee is not on notice of a garnishee order *nisi* bound to stop payment of a cheque already given by him to the judgment debtor, but after notice of the order he cannot make payment to the judgment debtor of any monies in his hands covered by the order, although exceeding the sum attachable.

**EDMUNDS v. EDMUNDS**, ST. JAMES, WEST-MINSTER UNION (GARNISHEES), [1904] P. 362; 73 L. J. P. 97, 91 L. T. 568—Barnes, J.

**157. Garnishee Issue—Practice—Parties—Property.**—The right of a judgment creditor obtaining a garnishee order against the fund attached is similar to that of an assignee taking subject to all equities against the assignor; it is therefore not necessary that the judgment debtor should be a party to an issue stated to determine whether the judgment creditor or the person seeking to enforce such an equity has the better right to the fund in dispute.

**LEVENE v. MATON**, (1907) 51 Sol. Jo. 532—[Joyce, J.]

**158. Garnishee Order Absolute—Power to set aside for Mistake**—The Court has power to set aside a garnishee order absolute, even though it has been acted upon, where it appears that the evidence on which it was made was mistaken.

**Moore v. Peachey** (No. 2) ((1892) 66 L. T. 198—Div. Ct.) followed.

**MARSHALL v. JAMES**, [1905] 1 Ch. 432; 74 [L. J. Ch. 279; 53 W. R. 363; 92 L. T. 681—Joyce, J.]

**159 Incomplete Discharge of Garnishee—Liability to be sued by Judgment Debtor—Discretion of Court—R. S. C., Ord. 45, r. 1.**—The Court in its discretion will refuse to make a garnishee order when such order will not amount to a valid discharge to the garnishee, and will leave him liable to an action in respect of the money attached.

The defendant, a German, residing in Berlin, appealed to the House of Lords against a judgment, and for the purpose of the appeal he had to find a person to enter into a recognizance, for £500. A Berlin bank, which had an office in London, entered into the recognizance, through their London branch, upon the defendant paying to them in Berlin the sum of £500. The defendant's appeal was unsuccessful, and



**Attachment of Debts—Continued.**

£300 was required for payment of the costs, and there remained a balance of £200 due from the bank to the defendant. The plaintiff in the action applied for a garnishee order attaching the sum of £200 to answer the judgment.

**HELD**—that the judgment creditor had not a right to the order *ex debito justitiæ*, and that, as the bank would still remain liable to be sued by the defendant in Berlin to recover the £200 notwithstanding the order, the Court would not make a garnishee order for payment of the £200 by the bank to the plaintiff.

**MARTIN v. NADEL, THE DRESDENER BANK** [(GARNISHEES), [1906] 2 K. B. 26; 75 L. J. K. B. 620; 54 W. R. 525; 95 L. T. 16; 22 T. L. R. 561—C. A.]

**160. Ireland—Judgment obtained in England—Garnishee Order—Judgments Extension Act, 1868** (31 & 32 Vict. c. 54).—A garnishee order may be made in respect of an English judgment registered in Ireland under the Judgments Extension Act, 1868.

**JOHNSTONE v. BUCKNALL**, [1898] 2 Ir. R. 499 [—Gibson, J.]

**XV. CHARGING ORDERS.**

*And see FRAUDULENT AND VOLUNTARY CONVEYANCES.*

**161. Application to Enforce by Sale—Fresh Action Necessary.**—A charging order upon shares in this country cannot be enforced by an order for sale in the original action. A fresh action for the purpose is necessary, and leave cannot be given to serve the writ therein out of the jurisdiction.

**Leggitt v. Western** ((1884) 12 Q. B. D. 287; 53 L. J. Q. B. 316; 32 W. R. 460) followed.

**KOLCHMANN v. MEURICE**, [1903] 1 K. B. 534; [72 L. J. K. B. 289; 51 W. R. 356; 88 L. T. 369; 19 T. L. R. 254—C. A.]

**162. Death of Judgment Debtor—Leave to issue Execution against Executor—Judgments Act, 1838** (1 & 2 Vict. c. 110), ss. 14, 15—*R. S. C. Ord. 28, r. 11; Ord. 42, r. 23; Ord. 46, r. 1.*—The effect of obtaining leave to issue execution against an executor under Ord. 42, r. 23, is to dispense with the necessity of obtaining a judgment against the executor, but is not equivalent to obtaining a judgment against him. A charging order under Ord. 46, r. 1, has only such effect as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1. Under these Acts a charging order can only be made against a person against whom a judgment has been obtained.

It follows, therefore, that a creditor who has obtained judgment against a debtor cannot, after the death of the debtor, obtain a charging order *against* the executor of the deceased judgment debtor without first obtaining judgment against the executor.

**Haly v. Barry** ((1868) L. R. 3 Ch. 452; 37 L. J. Ch. 723; 16 W. R. 654; 18 L. T. (N.S.) 491) and **Finney v. Hinde** ((1879) 4 Q. B. D. 102; 48

L. J. Q. B. 275; 27 W. R. 413; 40 L. T. 193) commented on.

Decision of **Stirling, J.** ([1900] 1 Ch. 386; 69 L. J. Ch. 174; 48 W. R. 233; 81 L. T. 807), affirmed.

**STEWART v. RHODES**, [1900] 1 Ch. 386; 69 [L. J. Ch. 174; 48 W. R. 354; 82 L. T. 337; 16 T. L. R. 203—C. A.]

**163. Ireland—Equitable Execution—Appointing Plaintiff Receiver—Stop Order—Priority.**—On September 16th, 1897, A., who had recovered judgment against B., obtained an order in the Queen's Bench Division, appointing himself receiver by way of equitable execution, on entering into security before the Master, over the beneficial interest of B. in a sum of £250 Consols, standing to the credit of this suit pending in the Court of the Vice-Chancellor, and, on December 17th, 1897, A. obtained a stop order from the Vice-Chancellor, but he omitted to perfect his security until 1901.

On November 2nd, 1897, C., another judgment creditor of B., obtained, in the Queen's Bench Division, an order charging the interest of B. in the £250 Consols to the credit of the present action, and, on December 8th, 1897, entered notice of the order in the books of the Accountant-General.

**HELD**, affirming the decision of the Vice-Chancellor, that C. was entitled to be paid his debt, out of the share of B. in the Consols in priority to A.

**FAHEY v. TOBIN**, [1901] 1 Ir. R. 511—A. C.

**164. Interest in Stock—Debtor entitled to a Share of Invested Capital in Six Years' Time—Judgments Acts, 1838 and 1840** (1 & 2 Vict. c. 110), s. 14, (3 & 4 Vict. c. 82), s. 1.—An American lady by her will directed her executor-trustees to collect all her assets in England, both capital and income, and to invest, re-invest and manage the whole fund; the income was to be accumulated for six years. At the end of that period one-third of the capital then in their custody was to be paid to, and become the absolute property of C.

A judgment creditor of C. applied before the end of six years for a charging order on C.'s interest in the Transvaal Government Stock, in which the funds were invested.

**HELD**—that, as the trustees were not bound to sell, and C. might demand his share of the stock *in specie*, he had "an interest in the stock," and that a charging order should be made.

**Dixon v. Wrench** ((1869) L. R. 4 Ex. 164; 38 L. J. Ex. 113; 20 L. T. 492; 17 W. R. 591) distinguished.

Such order would not interfere with the exercise by the trustees of their discretionary power of reinvesting.

**BOLLAND v. YOUNG**, [1904] 2 K. B. 824; 73 [L. J. K. B. 1030; 53 W. R. 67; 91 L. T. 746—C. A.]

**165. Notice of Motion—Form of Title—Motion to restrain Dealing with Fund—Court of Chancery Act, 1841** (5 Vict. c. 5), s. 4.—A

**Charging Orders—Continued.**

notice of motion under the Court of Chancery Act, 1841, s. 4, to restrain the bank until the hearing of an originating summons from transferring or paying dividends on a fund standing in the names of the testatrix and her niece should be entitled "In the matter of the Court of Chancery Act, 1841, and in the matter of the trusts of the will of—"

IN RE PIKE, [1902] W. N. 42; 37 L. J. (N.C.) 110; 112 L. T. Jo. 383—Byrne, J.

**166. Receiver appointed previously—Priority.**—A residuary legatee under a will brought an action to administer the estate. She had incurred her interest under the will up to its full value. The personal estate was realised, and the proceeds paid into Court. Before the administration action was commenced, one of the incumbrancers who had recovered judgment obtained a receivership order by way of equitable execution and gave notice thereof on the same day to the executor of the will. Subsequently some of the other incumbrancers obtained stop orders and charging orders on the fund in Court.

HELD—that the creditor who had obtained the receivership order had priority over the other incumbrancers.

IN RE MARQUIS OF ANGLESEY, DE GALVE v. [GARNER, [1903] 2 Ch. 727; 72 L. J. Ch. 782, 19 T. L. R. 719—Eady, J.

**167. "Stock or Shares"—No Power to charge Debentures—R. S. C., Ord. 46, r. 1—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14.**—Debentures issued by a company are not "stocks" or "shares" within the meaning of R. S. C., Ord. 46, r. 1, or sect. 14 of the Judgments Act, 1838, and therefore a charging order cannot be made in respect of them under the Order in question.

SELLAR v. CHARLES BRIGHT & Co., LD., [1904] 2 K. B. 446; 73 L. J. K. B. 643; 52 W. R. 563, 91 L. T. 9; 20 T. L. R. 586—C. A.

**XVI. EQUITABLE EXECUTION.**

**168. Ex parte Injunction—Receivers—R. S. C., Ord. 50, r. 15 (a), App. K., Form 61 (a).**—Upon the issue of a summons for the appointment of a receiver by way of equitable execution, an order was made *ex parte* restraining the judgment debtors from dealing with the property before the hearing of the summons.

HELD—that such an order should only be made upon some proof that there was a danger of the property being made away with.

LLOYDS BANK, LD. v. MEDWAY UPPER [NAVIGATION Co., [1905] 2 K. B. 359; 74 L. J. K. B. 851; 54 W. R. 41; 93 L. T. 224—C. A.

**169. Judgment Debtor a Foreigner Abroad—Debts owing to Judgment Debtor in England—Receiver—R. S. C., Ord. 45, r. 1; Ord. 50, r. 16; Appendix B., Form 25—Judicature Act, 1873**

(36 & 37 Vict. c. 66), s. 25, sub-s. 8]—The plaintiff recovered judgment against the defendants, who were a limited company incorporated and carrying on business in Germany, for an account of the commission due to him as the sole agent of the defendants in the United Kingdom. The costs having been taxed, the plaintiff applied for the appointment of a receiver of the debts due and to become due to the defendants from their customers in England, and he made an affidavit in support of the application which stated that the defendants had no place of business in this country and no assets or property which could be taken by any ordinary process of execution; that the only assets which they had here were the debts due and to become due from the persons to whom they had supplied goods, that he was informed by several of those persons that the defendants' representative had since the judgment called upon them to obtain payment of their accounts, and he believed that the defendants intended to collect all the moneys due to them in England, and thus prevent the plaintiff from obtaining the fruits of his judgment. Though the plaintiff knew who the customers of the defendants in this country were, he did not know whether any debts were due from them, or the amounts of the debts, if any, and therefore could not take garnishee proceedings.

HELD—that there were special circumstances in the case which rendered it just or convenient to appoint a receiver.

GOLDSCHMIDT v. OBERRHEINISCHE METALLWERKE, [1906] 1 K. B. 373; 75 L. J. K. B. 300; 54 W. R. 255; 94 L. T. 303; 22 T. L. R. 285—C. A.

**170. No Appearance entered—Judgment signed—Service of Summons for the Appointment of Receiver—R. S. C., Ord. 67, rr. 4, 5.**—Where the defendant has not entered an appearance to the writ in the action, and judgment has been signed for default, a summons for the appointment of a receiver cannot be served upon him by filing it at the Central Office, under Ord. 67, r. 4, but must be served personally, or an order obtained for substituted service.

TILLING, LD. v. BLYTHE, [1899] 1 Q. B. 557; [68 L. J. Q. B. 350, 47 W. R. 273; 80 L. T. 44; 15 T. L. R. 205—C. A.

**171. Pension—Royal Irish Constabulary—Receiver.**—The Court has power to appoint a receiver over the pension of a retired officer of the Royal Irish Constabulary. The proper form of such an order settled.

MANNING v. MULLINS, [1898] 2 Ir. R. 34—[C. A.

**XVII. ACTIONS BY AND AGAINST FIRMS.**

**172. Dissolution—Receiver—Execution of Judgment against Firm—Charging Order—Ord. 48A, r. 8.**—A partnership was dissolved by a consent judgment in an action in the Chancery Division, and a receiver of the partnership assets was appointed by

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the Court. After the dissolution an action was brought in the King's Bench Division against the partnership in the firm name, and judgment was recovered, upon bills of exchange accepted by the firm before dissolution, but falling due after. Some of the partners had not been served with the writ and had not entered an appearance personally. The judgment creditor thereupon obtained, in the partnership action in the Chancery Division, a charging order against the partnership assets in the hands of the receiver. The partners who had not been served with the writ in the action in the King's Bench Division moved to discharge this order.

**HELD**—that it had been rightly made against the partnership assets under Ord. 48A, r. 8.

**BRAND v. SANDGROUND**, (1901) 85 L. T. 517; [18 T. L. R. 96—Farwell, J.]

**173. Execution—Judgment against Firm—Application to Issue Execution against Partner—Issue whether a Person "was, or has held himself out to be, a Partner"**—*R. S. C., Ord. 48A, r. 8.*—A writ was issued against a firm, and served upon a manager at their place of business, appearance was entered for "H. H. sued as H. & Co." Judgment having been signed, the plaintiff applied under Ord. 48A, r. 8, against one S. M. H., and the Master ordered an issue to determine "whether the said S. M. H. was, or has held himself out as, a partner in the defendant firm."

**HELD**—that no valid objection could be taken to the terms of the issue as ordered by the Master.

**DAVIS v. HYMAN & Co.**, [1903] 1 K. B. 854; 72 [L. J. K. B. 426, 51 W. R. 598, 88 L. T. 284; 19 T. L. R. 348—C. A.]

**174. Parties—Names of Parties—Action brought in name of Firm—Affidavit disclosing Names of Partners—Conclusiveness of Affidavit**—*R. S. C., Ord. 48A, rr. 1, 2.*—Where an action has been brought in the name of a firm; and the plaintiffs have in accordance with Ord. 48A stated upon affidavit the names of the partners composing the firm, the statement is conclusive; there is no power to cross-examine the deponent, or to direct an issue to determine what partners in fact constitute the firm.

**ABRAHAMS & Co. v. DUNLOP PNEUMATIC TYRE [Co., LD. AND OTHERS]**, (1904) 91 L. T. 11, [1905] 1 K. B. 46; 74 L. J. K. B. 14—C. A.]

**175. Partners Sued in Firm's Name—Death of a Partner after Appearance—Defence of Sole Surviving Partner**—*R. S. C., Ord. 48A, r. 5.*—Two partners were sued in the name of their firm. After appearance and before defence delivered one of the partners died, and the surviving partner, R. C. Nesbitt, delivered a defence headed with the title of the action, followed by the words, "Defence of the defendant, R. C. Nesbitt."

**HELD**—that the defence was wrong in form, as it was not a defence of the firm, but of the

surviving partner in his individual capacity, in which capacity he was not sued

**ELLIS v. WADESON**, [1899] 1 Q. B. 714; 68 [L. J. Q. B. 604, 47 W. R. 420; 80 L. T. 508; 15 T. L. R. 274—C. A.]

**176. Writ of Summons—Service on Manager—Motion to set aside Service**—*R. S. C., Ord. 48A, rr. 1, 3, 11.*—The writ in an infringement action against the defendant company was served on C as its manager. K. moved to set aside the service on the ground that the business was that of K, an individual trading in Germany as a firm, and that K. did not carry on business in England, C. being only an agent to collect orders.

**HELD**—that though C. might have no right to hold himself and his firm out as the defendant company, yet, as he had done so, he had been properly served; and that further, as K. was not a party to the proceedings, his motion was misconceived.

**MORGAN CRUCIBLE CO. v. VULCAN CRUCIBLE [Co.]**, (1906) 23 R. P. C. 229—Kekewich, J.]

**XVIII. TRANSFER OF ACTIONS.**

**177. Action in Queen's Bench Division under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93)—Decree limiting Liability in Admiralty Division—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503—Ord. 49, r. 3.**—An action was brought by the plaintiff against shipowners in the Queen's Bench Division, under Lord Campbell's Act, to recover damages for the loss of her husband. The plaintiff desired to have her damages assessed by a jury, as provided by sect. 2 of that Act. The defendants brought an action in the Admiralty Division for the limitation in accordance with sect. 503 of the Merchant Shipping Act, 1894, of their liability in respect of claims made or to be made against them, and they obtained a decree limiting their liability. The defendants applied for an order transferring the plaintiff's action to the Admiralty Division.

**HELD**—that a jury was the proper tribunal for assessing the damages, and not the registrar and merchants.

*The "Nereid"* ((1889) 14 P. D. 78; 58 L. J. P. 51, 37 W. R. 688; 61 L. T. 339) followed

**ROCHE v. LONDON AND SOUTH WESTERN RAILWAY**, [1899] 2 Q. B. 502, 68 L. J. Q. B. 1041; 48 W. R. 1; 81 L. T. 315; 15 T. L. R. 514; 8 Asp. M. C. C. 588—C. A.]

**178. Chancery Division—Action to set aside Promissory Note retained in.**—An action for the cancellation of promissory notes is an action for the cancellation of a written agreement within the Judicature Act, and was therefore retained in the Chancery Division.

**COLLYER-BRISTOW v. LESLIE**, [1907] L. T. Jo. [343—Eady, J.]

**179. Commercial Cause—Order for Entry of Cause in the Commercial List—Right of Appeal.**—There is a right of appeal against an order for

**Transfer of Actions—Continued.**

the entry of a cause in the commercial list if the cause is not really a commercial cause.

*Barry v. Peruvian Corporation* ([1896] 1 Q. B. 208; 65 L. J. Q. B. 191; 44 W. R. 487; 73 L. T. 678; 12 T. L. R. 133; 1 Com. Cas. 269—C. A.) followed.

*SEA INSURANCE Co v. CARR*, [1901] 1 K. B. 7; [69 L. J. K. B. 954; 49 W. R. 55; 83 L. T. 517; 17 T. L. R. 6; 6 Com. Cas. 11—C. A.]

**XIX. MOTIONS.**

**180. Abandoned Motion—Right of Counsel to save Motion.**—Where counsel has been duly instructed to move on the day mentioned in a notice of motion, he may save the motion by mentioning it at any time before the rising of the Court, although the judge may have finished the hearing of motions

Statement to the contrary in *In re Compton-Smith* (1857) 23 Beav. 284) not followed.

*GAPP v. WILLIAMS*, [1901] W. N. 91; 86 L. J. (N.C.) 239—Byrne, J.

**181. Breach of Injunction—Attachment—Oral Evidence—Oral Evidence as to Breaches not mentioned in Affidavits—Admissibility—Surprise—R. S. C., Ord. 52, r. 4.**—On a motion to sue out a writ of sequestration against the defendant company for breach of an injunction to restrain them from causing a nuisance, owing to the conflicting nature of the affidavits, the motion was, by consent, ordered to be heard with witnesses. At the hearing, the plaintiffs sought to adduce evidence of breaches and injuries other than those specified in their affidavits. The defendants, relying on Ord. 52, r. 4, objected that the plaintiffs could only substantiate what they had alleged in their affidavits

**HELD**—that the evidence was admissible, the rule in question having no application where a motion launched on affidavit evidence, is ordered to be heard with witnesses, and that the defendants could have obtained all necessary information by applying for particulars; but that, if they were taken by surprise an adjournment might be granted.

*CHESTER (DEAN, & CO., OF) v. SMELTING CORPORATION*, [1902] W. N. 5; 112 L. T. Jo. 311; 46 Sol. Jo. 196—Farwell, J.

**182. Copy of Petition for use of the Court—Quality of Paper—Costs.**—Where the copy of a petition supplied for the use of the Court was typewritten on such thin paper that the letters on the second page could be seen through the first, one third of the costs of the copy were disallowed, and it was intimated that in future all costs would be disallowed in such a case.

*POWELL v. HELLICAR*, [1903] W. N. 154—[Byrne, J.]

**183. Motion for Attachment—Affidavit in support—Exhibits.**—Copies of exhibits to the affidavit in support of a motion for attachment

must be served on the defendant with the notice of motion and affidavit.

*ROSENBAUM v. BELSON*, [1901] W. N. 124; 86 [L. J. (N.C.) 308; 111 L. T. 157—Byrne, J.]

**184. Motion to Commit—Exhibits to Affidavits—Service of Copies upon Respondent—R. S. C., Ord. 52, r. 4.**—An exhibit to an affidavit is not part of the affidavit within the terms of Ord. 52, r. 4, and that rule does not require copies of exhibits to be served upon the respondent to a motion for committal. But the respondent ought to have notice of the evidence intended to be used against him, and if the party moving omits to furnish him with copies of such exhibits as are necessary to enable him to know fairly the nature of this evidence, the motion may be ordered to stand over, and in some cases the application may be dismissed at once.

*CARTER v. ROBERTS*, [1903] 2 Ch. 312; 51 W. R. [520; 89 L. T. 239—Byrne, J.]

**185. Registration—Motion for Leave to Rectify Register of Debentures—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15.**—A motion for leave to file debentures outside the twenty-one days provided by the Companies Act, 1900, s. 14, must be assigned to a particular judge by ballot. It should not be made to the senior judge of the Chancery Division.

*IN RE LEGAL AND GENERAL INVESTMENT CO.*, [1901] W. N. 72—Farwell, J.

**186. Short Notice of Motion—R. S. C., Ord. 52, r. 5.**—A short notice of motion, served by special leave, should state that leave was obtained to serve the notice on a certain day for a certain day. So where a plaintiff obtained leave on June 8th to serve the defendant with short notice of motion for the 10th, the following notice (dated June 8th) was held bad: "Take notice that special leave has been this day obtained to serve you with this notice for the 10th inst."

*ALEXANDER v. MCGOWSKI*, [1898] 105 L. T. Jo. [154—North, J.]

**XX. ORIGINATING SUMMONS.**

**187. Application for Sale—Judgment Debt—Summons—R. S. C., Ord. 55, r. 9B.**—According to R. S. C., Ord. 55, r. 9B, the application by a judgment creditor for a sale under sect. 4 of the Judgments Act, 1864, for the recovery of his debt, should be made by summons, not by petition

*IN RE HARRISON AND BOTTOMLEY*, [1899] 1 [Ch. 465—North, J.]

**188. Common Account—Breach of Trust—Improper Investment by Trustee.**—By an order made on an originating summons, an account was directed of the capital of the personal estate of a testator and the proceeds of a sale of real estate. The Master disallowed, as against the surviving trustee, a sum of £500 invested on second mortgage. The surviving trustee asked that the certificate might be varied by allowing the £500 as a payment. It was contended that

**Originating Summons—Continued.**

investment on second mortgage was not necessarily a breach of trust and that in proceedings under a common account, the question whether a payment was a breach of trust could not be considered.

HELD—that the investment was a breach of trust and that upon a common account it is the duty of the trustee not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show that he had done with the money received. The summons was therefore refused.

Dictum of Stirling, J., in *Smith v. Stuart* ((1896) 74 L. T. 546), followed.

RE NEWLAND, BUSH v. SUMMERS, [1904] W. N. [181, 117 L. T. Jo. 598; 49 Sol. Jo. 14; 39 L. J. (N. c.) 563—Kekewich, J.

**189. Construction of "Deed, Will or Other Instrument"**—*R. S. C., Ord. 54A.*—Under the power reserved to the Court by Ord. 54A to determine on originating summons any question of construction arising under a deed, &c., it was decided that a series of letters passing between a lessor and his lessee did not amount to an agreement by the lessee to take a further lease.

BOSSERT v. JONES, (1904) 117 L. T. Jo. 285; 48 [Sol. Jo. 636—Joyce, J.

**190. Construction of Instrument—Person Interested—Right of Repurchase—Trustee in Bankruptcy**—*R. S. C., Ord. 54A, rr. 1, 4.*—By Ord. 54A, r. 1, any person claiming to be interested, under a deed, will, or other written instrument, may apply for the determination of any question of construction arising under the instrument.

HELD—that the word "instrument" was meant to receive a wide construction, and that it would apply to any written document under which any right or liability, whether legal or equitable, exists, *e.g.*, mercantile instruments, and that a written contract for the sale of a lease is such an instrument.

HELD, also, that the word "interested" was a wide one, and ought to extend to the claim of any person who has an interest of any sort, whether vested or contingent, absolute or defeasible, in possession or reversion.

The trustee of a bankrupt claimed an interest under a contract for the sale of certain real estate, and to exercise the right of repurchase conferred on the bankrupt, and took out a summons, asking questions as to rights which involved the construction of the contract.

HELD—that the trustee had an interest within the meaning of the rule, *Buckland v. Papillon* ((1866) L. R. 2 Ch. 67; 36 L. J. Ch. 81; 15 W. R. 92, 15 L. T. (N.S.) 378; 12 Jur. (N.S.) 992); that the rule or order was not limited to cases where an action might be brought in respect of the instrument, and that the conveyance by a formal deed in pursuance of the contract did not put an end to the right of repurchase conferred by the contract itself. *Palmer v. Johnson*

((1884) 13 Q. B. D. 351; 53 L. J. Q. B. 348. 33 W. R. 36; 15 L. T. 211—C. A.).

MASON v. SHUPPISSE, (1899) 81 L. T. 147— [Stirling, J.

**191. Construction of "Written Instrument"—Articles of Association—Preference Shareholders as a Class**—*R. S. C., 1883, Ord. 16, r. 32 (b); Ord. 54A, rr. 1, 2.*—An originating summons was issued under Ord. 54A, r. 1, against the defendant only, as "a holder of preference shares issued by the plaintiff company, sued on behalf of himself and all others the holders of similar preference shares," for the determination of, amongst other questions, the question whether, in ascertaining the amount by which the issue of preference shares ranking *pari passu* with the original preference shares issued by the company might be increased under the articles of association on the purchase of any new or additional property, the company was entitled to take into account all or any part of the moneys expended upon the construction and completion of new buildings upon vacant land.

HELD—that the Court could only decide the questions as between the company and the present defendant; and that if the Court was asked to bind all preference shareholders, a meeting of them must first be called, and they could nominate some one to act for them whom the Court would nominate to represent them on the hearing of the summons.

MORGAN'S BREWERY CO. v. CROSSKILL, [1902] [1 Ch. 898; 71 L. J. Ch. 585; 10 Manson, 235—Buckley, J.

**192. Costs—Trustee and cestui que Trust—Rules for Guidance of Court.**—Where trustees apply by originating summons to the Court to construe an instrument for their guidance, and in order to ascertain the interests of the beneficiaries or to have determined some question arising in the administration of the trust, the costs are incurred for the benefit of the estate, and the Court will, as a general rule, direct them to be taxed as between solicitor and client and paid out of the estate. Again, where the application is of the same character, but is made by some of the beneficiaries, and not by the trustees, because such a course is considered more convenient, the same rule as to costs applies. But where the application is made by a beneficiary in respect of a claim which is adverse to other beneficiaries, and the applicant takes advantage of the procedure by originating summons to get determined a question which, but for that procedure, would properly form the subject of an action and fall within the term litigation, the Court will order the unsuccessful party to pay the costs.

IN RE BUCKTON, BUCKTON v. BUCKTON, [1907] [2 Ch. 406; 76 L. J. Ch. 584; 97 L. T. 332; 23 T. L. R. 692—Kekewich, J.

**193. Parties—Trustee and Beneficiary Represented by the same Counsel—Separate Representation Necessary.**—On an originating summons to decide whether a certain bonus paid to the trustees of a will was capital or income, a trustee

**Originating Summons—Continued.**

who had no interest and the life tenant were represented by the same counsel.

**HELD**—that this was irregular, inasmuch as the trustee's counsel was bound to assist the Court, and could not argue for a beneficiary.

**RE BURTON**, [1901] W. N. 202; 112 L. T. Jo. 33  
[—Farwell, J.]

**194. Questions both of Law and Fact involved**—*Procedure—R. S. C., Ord. 54A, rr. 1, 4.*—An originating summons under Ord. 54A is not the proper mode of procedure when questions both of law and of fact are involved, and when a decision of the questions in law will not (whatever the decision) end the litigation.

**LEWIS v. GREEN**, [1905] 2 Ch. 340; 74 L. J. Ch. 682; 54 W. R. 93; 93 L. T. 303—Warrington, J.

**XXI. CHAMBERS IN CHANCERY DIVISION.**

**195. Account—Master's Certificate—Summons to Vary—Judge's Jurisdiction to Vary**—Upon a summons to vary a certificate of a Master it is open to the judge in Court to reconsider what he or another judge has done, and he may arrive at a different decision as much as if a motion were made to vary or discharge an order made by a judge in chambers, upon an ordinary summons.

**HEWLINGS v. GRAHAM**, (1901) 70 L. J. Ch. 568; [84 L. T. 497—Joyce, J.]

**196. Administration Action—Creditors' Deed—Action for Account—Discretion of Court—R. S. C., 1883, Ord. 55, r. 10**—The Court will in the exercise of its discretion under Ord. 55, r. 10, not order an account of the dealings and transactions of the trustee under a creditor's deed of arrangement, where it can determine the questions between the parties without such order, and where such order would have mischievous results, notwithstanding that the trustee may have been guilty of some misconduct in his duties.

**CAMPBELL v. GILLESPIE**, [1900] 1 Ch. 225; 69 L. J. Ch. 223; 48 W. R. 150; 81 L. T. 514—Cozens-Hardy, J.

**197. Discharge or Variation of Order—Motion to Discharge Order**—An order made by a Master in chambers cannot be varied or discharged by motion in Court.

**HARRINGTON v. RAMAGE**, (1907) 51 Sol. Jo. 514  
[—Kekewich, J.]

**198. Further Consideration—Evidence to be used before the Judge**—Where, upon a further consideration in the Chancery Division, there is a dispute between the parties, evidence not before the Master ought not to be used, first, without notice, and, secondly, without the consent of the Court.

**RE WATSON**, (1904) 49 Sol. Jo. 54; 118 L. T. Jo. 87—Kekewich, J.]

**XXII. APPEALS.****(a) Appeals to Court of Appeal.**

**199. Appeal from Inferior Court—Right to Appeal from Inferior Court to Court of Appeal—Jurisdiction to give Leave to Appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45—Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 5.**—Where a Divisional Court, after deciding an appeal from an inferior Court, refuses leave to appeal, the Court of Appeal has jurisdiction to grant leave to appeal.

**GODMAN v. MOSES**, (1900) 69 L. J. Q. B. 823; [48 W. R. 689; 83 L. T. 46; 16 T. L. R. 534—C. A.]

**200. Appeal from Inferior Court—"Right of Appeal"—Appeal from Divisional Court to Court of Appeal by Leave—Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1 (5).**—In a case where a county court judge gives leave to appeal (such leave being necessary), he creates a "right of appeal" within the meaning of sect. 1 (5) of the Judicature Act, 1894; therefore the conditions of a further appeal are governed by that section, and the Court of Appeal can give leave for such further appeal after the Divisional Court has refused it.

**MOORE NETTLEFOLD & CO. v. SINGER MANUFACTURING CO.**, [1904] 1 K. B. 820; 73 L. J. K. B. 457; 68 J. P. 369; 52 W. R. 385; 20 T. L. R. 366—C. A.]

**201. Appeal turning on question of Fact—Action tried without a Jury—Rehearing—Credibility of Witnesses.**—The practice in regard to appeals from a judge sitting without a jury, where the appeal turns on a question of fact, explained.

**COGHLAN v. CUMBERLAND**, [1898] 1 Ch. 704; [67 L. J. Ch. 402; 78 L. T. 540—C. A.]

**202. Case stated under Baine's Act—The Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.**—An appeal lies to the Court of Appeal from a decision of the Divisional Court upon a special case stated under sect. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), and this right of appeal is not affected by judgment being entered under that section, at quarter sessions, in accordance with the decision of the Divisional Court.

*The Corporation of Peterborough v. The Overseers of Wiltshire* (12 Q. B. D. 1) and *The Guardians of Holborn Union v. The Guardians of Chertsey Union* (15 Q. B. D. 76) followed.

**LODGE v. HUDDERSFIELD CORPORATION**, [1898] 1 Q. B. 859; 62 J. P. 515; 67 L. J. Q. B. 571; 78 L. T. 582—C. A.]

**203. Copies of Judge's Notes.**—On appeal to the Court of Appeal copies of the judge's notes must be provided for the use of the Court. Costs thrown away by an omission to supply the notes may have to be paid by appellants' solicitors.

**LEWIS v. CORY**, [1906] W. N. 95; 121 L. T. Jo. 39—C. A.]

**Appeals—Continued.**

**204. Copies of Material Documents for the use of the Court—Affidavits—Costs—R. S. C., Ord. 58, r. 8.]**—Where an appeal is brought, office copies of affidavits are *prima facie* sufficient, and, if on any appeal further copies are made for the use of the learned judges of the Court of Appeal, that Court should be asked at the time to allow them, and unless the Court is asked to, and does allow such copies, the taxing Master properly disallows the costs thereof.

Decision of Kekewich, J. affirmed.

RE ROLLASON'S DESIGN, (1898) 78 L. T. 511;  
[15 R. P. C. 231—C. A.]

**205. Leave to appeal.]**—Applications to the Court of Appeal for leave to appeal from the Divisional Court should be made *ex parte*.

DORSET COUNTY COUNCIL v. PETHICK BROS.,  
[1898] 14 T. L. R. 183—C. A.]

**206. Opinion of Assessor—Reasons for Opinion—Admissibility on Hearing of Appeal—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 28—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 56.]**—Where a trial takes place before a judge, assisted by an assessor, and the assessor has given his opinion to the judge, upon an appeal from the decision of the judge, the Court of Appeal has power to consider the opinion given by the assessor, and the reasons, if any, stated by him for that opinion.

HATTERSLEY & SONS, LD v. GEORGE HODGSON,  
[LD, (1905) 21 T. L. R. 178—C. A.]

**207. Shorthand Notes—Use of in Court of Appeal—Agreement in Court below with Consent of the Judge—Supplying Judge's Notes on Appeal.]**—Where at the trial of an action the parties agree, with the consent of the judge, that a shorthand note shall be taken in place of notes by the judge, the Court of Appeal may be referred to the shorthand notes alone, but where the judge has himself taken a note of the evidence, the parties cannot, upon an appeal, agree to use shorthand notes alone, and so to deprive the Court of the advantage of seeing the judge's notes.

YORKSHIRE LAUNDRIES v. PICKLES, [1901]  
[W. N. 28; 36 L. J. (N. C.) 72; 110 L. T. Jo.  
57—C. A.]

**208. Stay of Execution—Jurisdiction of Court of Appeal—R. S. C., Ord. 58, rr. 16, 17.]**—An appeal having been entered in the list for hearing, an application was made to the Court of Appeal for a stay of execution, no application having been previously made to the judge who tried the case, he being away on circuit.

HELD—that the Court of Appeal had jurisdiction to hear the application

BROWN v. BROOK, (1902) 18 T. L. R. 388—C. A.]

**(b) Appeals to House of Lords.**

**209. Costs—Stay of Execution—Undertaking by Respondents' Solicitors to Return Costs—**

**"Special Circumstances."]**—Plaintiff, who had been unsuccessful in the Court below and the Court of Appeal, applied for a stay of execution, unless the defendants' solicitors would give an undertaking to return costs paid or to be paid, in the event of an appeal to the House of Lords being successful.

HELD—that there is no general rule as to giving or not giving an undertaking, each case depending on its own special circumstances. The plaintiff not showing special circumstances the application must be dismissed.

SCHWEPPE, LD. v. GIBBENS, [1904] W. N. 208;  
[118 L. T. Jo. 177; 39 L. J. (N. C.) 702—C. A.]  
(Reported on other points, 22 R. P. C. 113)

**210 Costs—Verdict not Warranted by Evidence—Appeal by Plaintiffs—No Cross-appeal by Defendant—Judgment entered for Defendant.]**—Where there is a verdict which is certainly not warranted by the evidence, and no evidence to go to the jury and no cross-appeal in the House of Lords, but only an appeal by the plaintiffs, an order ought to be made that judgment should be entered for the defendant, and that the plaintiffs should pay to the defendant the costs in the House of Lords and below.

IBO SYNDICATE, LD. v. WYLER, (1902) 87 L. T.  
[83; 51 W. R. 320—H. L. (E.).]

**211. Irish Common Law Court—Interlocutory Order—Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 3, 12—Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 86.]**—There was not any power to bring up an interlocutory order of a common law Court by way of appeal to the House of Lords; the mode in which it can be done at present is by specific legislation, viz., the Appellate Jurisdiction Act, 1876, sects. 3, 12, in respect to England. There is no such specific legislation with regard to Ireland, and, therefore, as regards Ireland, the law remains as it was.

EARL OF GOSFORD v. IRISH LAND COMMISSION,  
[1899] A. C. 435; 68 L. J. P. C. 69; 81 L. T.  
330; 15 T. L. R. 429—H. L. (Ir.).]

**212. Irish Common Law Court—Certiorari—Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 3, 12—Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 86.]**—The manifest intention of sect. 86 of the Irish Judicature Act, 1877, is that in future there should be no appeal to the House of Lords in cases in which up to that time and under the then practice there was no appeal.

Earl of Gosford v. Irish Land Commission  
([1899] A. C. 435; 68 L. J. P. C. 69; 81 L. T.  
330; 15 T. L. R. 429—H. L. (Ir.), *supra*) followed.  
REG. v. BARTON, [1902] A. C. 268; 71 L. J. P. C.  
[80; 87 L. T. 82; 18 T. L. R. 574—H. L. (Ir.).]

**(c) Arbitration Appeals.**

**213. Action referred to Master by Consent—Appeal from his Decision—R. S. C., Ord. 14,**

**Appeals—Continued.**

*v. 7*; 40, *rr* 6, 6A; 59, *r. 3*—*Arbitration Act*, 1889 (52 & 53 Vict. *c.* 49), *ss.* 14, 15.]—Where an action is by consent referred to a Master for trial under Ord. 14, *r. 7*, an appeal from his decision lies to the Divisional Court

Decision of Div. Ct. ([1904] 2 K. B. 245; 73 L. J. K. B. 816; 53 W. R. 47; 90 L. T. 709; 20 T. L. R. 437—Div. Ct.) reversed.

FRASER *v.* FRASER, [1905] 1 K. B. 368; 74 L. J. [K. B. 183; 53 W. R. 310; 92 L. T. 341; 21 T. L. R. 186—C. A.]

**214.** *Award by Arbitrator appointed by County Court Judge—Master and Servant—Accident—Compensation—No Appeal direct to Court of Appeal—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched.* 2, *cl.* (2), (3), and (4).]—An appeal will not lie direct to the Court of Appeal from the award of an arbitrator appointed by a county court judge under the Workmen's Compensation Act, 1897, *Sched.* 2, *cl.* 2.

GIBSON *v.* WORMALD AND WALKER, LD., [1904] 2 K. B. 40, 73 L. J. K. B. 491; 68 J. P. 382, 52 W. R. 661; 91 L. T. 7; 20 T. L. R. 452—C. A.]

**215.** *Case Stated by Arbitrator—Jurisdiction—Arbitration Act*, 1889 (52 & 53 Vict. *c.* 49), *s.* 19.]—No appeal lies from a decision upon a special case stated by an arbitrator with respect to a question of law arising in the course of the reference under sect. 19 of the Arbitration Act, 1889.

*In re Knight and Tabernacle Permanent Building Society* ([1892] 2 Q. B. 613; 62 L. J. Q. B. 33, 67 L. T. 403; 41 W. R. 35; 8 T. L. R. 788—C. A.) followed.

SHREWSBURY *v.* SHREWSBURY, (1907) 23 T. L. R. [224—C. A.]

**216.** *Case Stated by Arbitrators—Alternative Award—Matter to go back to Arbitrator in one Event—Consultative Jurisdiction of Court—Arbitration Act*, 1889 (52 & 53 Vict. *c.* 49), *ss.* 7, 19.]—An arbitrator, to whom certain differences were referred, stated a special case, which he headed "Award in form of special case," and he asked the Court whether his construction of certain contracts on two points was correct, and the case stated that if both points were correctly decided the award was to stand, but if either point was wrongly decided the matter was to be remitted to him to give effect to the true construction of the contracts in his final award. The High Court held that the arbitrator had decided both points correctly. Upon appeal:—

HELD—that as the arbitrator had not stated the case so that, whichever way the question was answered, the rights of the parties would have been finally determined, but had reserved the matter for himself in the event of the question being answered in one particular way, the case was not an award in the form of a special case within sect. 7 of the Arbitration Act, 1889, but was a special case stated under

sect. 19, and the jurisdiction of the High Court was consultative only, and was not subject to appeal.

IN RE THE HOLLAND STEAMSHIP CO., THE [NATIONAL STEAMSHIP CO., AND THE BRISTOL STEAM NAVIGATION CO., (1906) 23 T. L. R. 59; 95 L. T. 769—C. A.]

**217.** *Enforcing Award—Appeal Direct to Court of Appeal—Arbitration Act*, 1889 (52 & 53 Vict. *c.* 49), *ss.* 1, 12, *Judicature Act*, 1894 (57 & 58 Vict. *c.* 16), *s.* 1, *sub-s.* 4.]—An application to enforce an award under sect. 12 of the Arbitration Act, 1889, is a matter of practice and procedure within the meaning of sect. 1, sub-sect. 4, of the Judicature Act, 1894, and an appeal from an order made thereon by a judge at chambers lies direct to the Court of Appeal.

IN RE COLMAN AND WATSON, (1907) 24 T. L. R. [39—C. A.]

**218.** *Order to Arbitrator to State a Case—Arbitration Act*, 1889 (52 & 53 Vict. *c.* 49), *s.* 19—*Judicature Act*, 1894 (57 & 58 Vict. *c.* 16), *s.* 1, *sub-s.* 4.]—Proceedings in an action in the High Court were stayed upon the ground that there was a submission of the matters in dispute to arbitration, and the matters were accordingly referred; in the course of the reference an order was made in chambers under sect. 19 of the Arbitration Act, 1889, directing the arbitrator to state a case for the opinion of the Court upon certain questions of law which arose in the course of the reference.

HELD—that this was not a matter of practice and procedure within sect. 1, sub-sect. 4 of the Judicature Act, 1894, and that therefore an appeal did not lie to the Court of Appeal.

IN RE FRERE AND STAVELEY TAYLOR & CO. AND [THE NORTH SHORE MILL CO., LD., [1905] 1 K. B. 366, 74 L. J. K. B. 208; 53 W. R. 242; 92 L. T. 194; 21 T. L. R. 188—C. A.]

**(d) Divisional Court.**

**219.** *Appeal from Judge at Chambers—Prohibition to County Court Judge—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 Vict. *c.* 16), *s.* 1, *sub-s.* 4.]—An application for a writ of prohibition to restrain an inferior Court from exceeding its jurisdiction is not a matter of practice or procedure within the meaning of sect. 1, sub-sect. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal from an order of a judge at chambers is to the Divisional Court of the Queen's Bench Division, and not to the Court of Appeal in the first instance.

WATSON *v.* PETTS, [1899] 1 Q. B. 54; 67 L. J. [Q. B. 970; 47 W. R. 68; 79 L. T. 330; 15 T. L. R. 31—C. A.]

**220.** *Appeal from Judge at Chambers—"Practice and Procedure"—Claim for Compensation under the Lands Clauses Act, 1845—Order for Trial in High Court—Regulation of Railways Act*, 1863 (31 & 32 Vict. *c.* 119) *s.* 41—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 &



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58 Vict. c. 16), s. 1, sub-s. 4.]—The defendants applied under sect. 41 of the Regulation of Railways Act, 1868, to the judge in chambers for an order for the trial in the High Court of a claim for compensation under the Lands Clauses Consolidation Act, 1845. The judge made the order and the claimant appealed.

**HELD**—that the appeal should be made to the Divisional Court and not to the Appeal Court, on the ground that when the application was made to the judge in chambers there was no cause or matter in the High Court to which it could relate, and therefore it was not "practice or procedure" in a cause or matter in the High Court within sect. 1, sub-sect. 4, of the Judicature Act, 1894.

*Watson v. Petts* ([1899] 1 Q. B. 54; 67 L. J. Q. B. 970; 47 W. R. 68; 79 L. T. 330; 15 T. L. R. 31—C. A., No. 219, *supra*) followed.

*LONG v. GREAT NORTHERN AND CITY RY.*, [1902] 1 K. B. 813; 71 L. J. K. B. 598; 50 W. R. 402, 86 L. T. 440, 18 T. L. R. 478—C. A.

**221. "Criminal Cause or Matter"—Order for Demolition of Building—General Line of Buildings—London Building Act, 1894** (57 & 58 Vict. c. cxxii.), s. 22—*Judicature Act, 1873* (36 & 37 Vict. c. 66), s. 47.]—A magistrate, upon a summons charging a person with having erected a new building beyond the general line of buildings in a street contrary to the London Building Act, 1894, having made an order for the demolition of the building, the Divisional Court refused to grant a rule *nisi* calling upon him to state a case for the opinion of the Court.

**HELD**—that the decision of the Divisional Court was in a "criminal cause or matter" within sect. 47 of the Judicature Act, 1873, and no appeal lay.

*REX v. D'EYNCOURT*, (1901) 85 L. T. 501; 18 T. L. R. 53—C. A.

**222. Divisional Court Specially Constituted—Power to Review Decisions**]—A specially constituted Divisional Court appointed by the Lord Chief Justice of England has power, in cases where there is no appeal from Divisional Courts, to review previous decisions of Divisional Courts upon the same subject.

*KRUSE v. JOHNSON*, [1898] 2 Q. B. 91; 62 J. P. [469; 67 L. J. Q. B. 782; 78 L. T. 647, 14 T. L. R. 416; 46 W. R. 631—Div. Ct.

**(e) Final and Interlocutory Orders.**

**223 Final or Interlocutory Order—Application for Solicitors to deliver Lists of Securities, &c.—Appeal from Dismissal of Order—Length of Notice of Appeal—R. S. C., Ords. 52, r. 25; 58, r. 3.**]—On an application for an order under Ord. 52, r. 25, to direct the defendants, a firm of solicitors, to deliver a list of securities and to bring them into Court, and to deliver a cash account to the plaintiffs, the Master refused to make an order, and the judge affirmed his decision. On

appeal to the Court of Appeal, a four-day notice was given as if the order was interlocutory. It was objected that the order was really final, and that pursuant to Ord. 58, r. 3, fourteen days' notice should have been given.

**HELD**—following *Re Herbert Reeves*, [1902] 1 Ch. 29, that the order was final. The time for appealing would be extended.

*HAYDON v. CARTWRIGHT*, [1902] W. N. 163; [13 L. T. Jo. 353; 37 L. J. 420—C. A.

**224 Final or Interlocutory Order—Order Disposing finally of Action.**]—An order is a final order if it finally disposes of the rights of the parties; if it does not it is interlocutory—per Lord Alverstone, C. J.

Where an order has been made in an action that the question of liability only be tried first, the question of damages (if any) to go to a referee, and the judge, who tries the question of liability, finds against the plaintiff, this order dismissing the action is a final and not an interlocutory order.

*Shubrook v. Tufnell* ((1882) 9 Q. B. D. 621; 30 W. R. 740) followed, *Salaman v. Warner* ([1891] 1 Q. B. 734; 60 L. J. Q. B. 624; 39 W. R. 547—C. A.) not followed.

*BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL*, [1903] 1 K. B. 547; 72 L. J. K. B. 271, 67 J. P. 397, 51 W. R. 337; 19 T. L. R. 266; 1 L. G. R. 639—C. A.

**225. Final or Interlocutory Order—Order setting aside an Award**]—An award was stated in the form of a special case; but before such case was argued a successful application was made to a Divisional Court to set aside the award on the ground of some technical misconduct on the part of the arbitrator.

**HELD**—that such order of the Divisional Court was an "interlocutory" and not a "final" order.

*IN RE CROASDELL AND CAMELL, LAIRD & CO.*, [1906] 2 K. B. 569, 75 L. J. K. B. 769; 54 W. R. 620; 95 L. T. 441; 22 T. L. R. 759—C. A.

**226. Final or Interlocutory Order—Summons to Review Taxation of Solicitor's Bill—Refusal to Review—Judicature (Procedure) Act, 1894** (57 & 58 Vict. c. 16), s. 1.]—An order dismissing a summons to review taxation of a solicitor's bill, under the Solicitors Act, 1843, is an interlocutory order. Leave to appeal therefrom is consequently necessary under sect. 1 of the Judicature (Procedure) Act, 1894.

*IN RE JEROME*, [1907] 2 Ch. 145, 76 L. J. Ch. [432, 96 L. T. 866—C. A.

**227 Interlocutory Order—Leave to Appeal—Striking out Claim as Frivolous and Vexatious—Claim for an Injunction—Judicature Act, 1894** (57 & 58 Vict. c. 16), s. 1, sub-s. (1) (b)]—An order striking out a statement of claim as disclosing no reasonable cause of action and dismissing the action as frivolous and vexatious, is an interlocutory order, and leave to appeal is

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necessary, and this is so though an injunction is claimed.

CHARLES BRIGHT & Co, LD *v* RIVER PLATE  
[CONSTRUCTION Co., LD, (1901) 17 T. L. R.  
708—C. A.]

**228. Interlocutory Order—Leave to Appeal—Liberty of the Subject—Refusal to Commit—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (b), (1).]**—Leave to appeal from the refusal of a judge to order the committal of the defendants for an alleged breach of an undertaking given by them to the Court was refused by the judge.

HELD—that the liberty of the subject was not concerned in the matter, and therefore leave to appeal was required, and that the Court of Appeal saw no reason for giving leave.

BOWDEN *v*. YOXALL, [1901] 1 Ch. 1; 70 L. J.  
[Ch. 5; 49 W. R. 247; 83 L. T. 419; 17  
T. L. R. 43—C. A.]

**229. Summons for Delivery and Taxation of Solicitor's Bill of Costs—R. S. C., Ord. 58, rr. 3, 9, 15.]**—A client took out an originating summons in the common form, asking that a solicitor who had acted for him in that capacity might be ordered to deliver a bill of costs, and that the same might be taxed.

HELD—that, whether the summons was dismissed or granted, there was a final order, and a fourteen days' notice of appeal was necessary.

IN RE HERBERT REEVES & Co, (1901) 85 L. T.  
[495, [1902] 1 Ch. 29; 71 L. J. Ch. 70, 50  
W. R. 252—C. A.]

**(f) Miscellaneous.**

**230. Action of Review—Attempt to Review Charging Order—Error in Law upon Face of Judgment.]**—The Court has still jurisdiction to deal by a fresh action with some matters which would have formerly been the subject of a bill of review, *e.g.*, where a judgment has been obtained by fraud, or where material evidence, not procurable before, has been obtained since judgment.

But the old jurisdiction to discharge by bill of review an order on the ground of error appearing upon its face no longer exists. The remedy is by appeal; and, if the time for appealing has expired, the Court may in a proper case extend it.

Decision of Wright, J. (19 T. L. R. 623) affirmed on different grounds.

CHARLES BRIGHT & Co., LD. *v* SELLAR, (1903)  
[72 L. J. Ch. 921; 89 L. T. 431; 20 T. L. R.  
12; [1904] 1 K. B. 6, 52 W. R. 148—C. A.]

**231. Illegality in Proceedings—Power of Court to take notice of Illegality—New Trial—Questions not raised in Court Below.]**—It is the right and duty of the Court at any stage of a cause to consider, and, if it be proved, to act upon, an illegality which may be fatal to the contention of either party to the litigation, so as

to prevent the process of the Court from being used to establish a claim which ought not to be enforced.

But in a case in which a Court of Appeal, after argument and before judgment, raised of its own motion the question of the illegality of the contract upon which the action was brought, which had not been raised in argument before them, the Judicial Committee, though considering the circumstances very suspicious, declined to give judgment upon questions which had not been raised in the Court below, and sent the case back for a new trial.

CONNOLLY AND ANOTHER *v*. CONSUMERS CORD-  
[AGE Co., (1903) 89 L. T. 317—P. C.]

**232. Interest on Judgment Debt—Decision affirmed—Inferior Court subsequently ordering Payment of Interest on Judgment Debt—Jurisdiction—Discretion.]**—The plaintiffs had obtained a colonial judgment, affirmed by the Privy Council, ordering the defendant to repay to them a certain sum of money. In this action the statement of claim included no prayer for interest, and the question of interest was not raised at any stage of it.

Subsequently, on further directions, the Court of Appeal, affirming the Court of first instance, directed payment of interest.

HELD—that the Court had discretion to do so in a proper case;

But that any mention of interest had been intentionally omitted from the original order of the Privy Council with a due regard to the merits of the case, and that therefore interest should only run from the date of the original decision of the Court of Appeal, and not from the date when the liability arose.

BURLAND *v*. EARLE & SONS, [1905] A. C. 590;  
[93 L. T. 313—P. C.]

**233. Interest where Judgment Reversed—Claim for Damages—Action dismissed at Trial—Judgment entered for Plaintiff on Appeal—Time from which Interest runs—Antedating Judgment—Ord. 41, r. 3; Ord. 58, rr. 1, 4.]**—The plaintiff brought an action to recover unliquidated damages for injury to a cargo of meat arising from a breach of contract. At the trial judgment was given for the defendants. Upon appeal the judgment was reversed and entered for the plaintiff for an amount of damages to be assessed by a referee. The parties having subsequently agreed upon the amount of the damages, the plaintiff claimed interest upon that amount from the date of the original judgment at the trial.

HELD—that the judgment of the Court of Appeal pronouncing the plaintiff entitled to damages must be regarded as of the date on which it was pronounced and not as of the date upon which the judgment at the trial was pronounced; that though the Court had power, under Ord. 41, r. 3, to antedate its judgment, no ground had been shown, such as a wrongful withholding of the damages, for antedating it; and that, therefore, the plaintiff was only entitled

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to interest from the date of the judgment of the Court of Appeal.

**BORTHWICK v. ELDERSLIE STEAMSHIP CO.**, [LD., [1905] 2 K. B. 516; 74 L. J. K. B. 772; 53 W. R. 643; 93 L. T. 387; 21 T. L. R. 630; 10 Asp. M. C. 121—C. A.

**234. Notice of Appeal—Personal Service—Whereabouts of Respondent unknown—Substituted Service.**—Where it is impossible to effect personal service of a notice of appeal to the Court of Appeal, service by registered letter to the last known address will be allowed. Where such a letter was returned through the dead letter office, publication in *Lloyd's Weekly Newspaper* was held sufficient.

**IN RE LONDON COUNTY COUNCIL**, [1901] W. N. [7; 110 L. T. Jo. 264, 36 L. J. M. C. 31—C. A.

**234a. Offer by Defendants—Refusal without more—Costs since date of Offer.**—Where defendants, who were sued for an injunction to restrain them using a certain firm name, after writ issued offered an undertaking not to continue the acts complained of, each party to bear their own costs, but the plaintiff refused the offer and continued the action, the defendants at the hearing gave a perpetual undertaking.

**HELD**, on the question of costs, that the plaintiff, having acted oppressively and unreasonably in declining the offer without more, should pay the defendants their costs as from the date of the offer. Plaintiffs to have costs up to that date.

**WRIGHT v. RANSOM**, (1902) 47 Sol. Jo. 92.

**235. Setting aside Judgment on the Ground of Perjury.**—Mere proof that a judgment has been obtained by perjury is not sufficient to induce the Court to set that judgment aside in an action subsequently brought for that purpose.

**BAKER v. WADSWORTH**, (1898) 67 L. J. Q. B. [301—Div. Ct.

**236. Special Leave to Appeal—Terms Imposed.**—Special leave given to the petitioners to appeal upon the condition of their submitting to pay to the respondent his costs of the appeal in any event, if so directed on the determination of the appeal.

**MONTREAL GAS CO. v. CADIEUX, Ex PARTE** [MONTREAL GAS CO., [1898] A. C. 718; (1898) 67 L. J. P. C. 115—P. C.

**(g) Official Referee.**

**237. Action referred by Judge of Chancery Division to Official Referee—Appeal from Referee—To what Court.**—When an action in the Chancery Division has been referred by the judge to an official referee for trial, and judgment has been entered in accordance with the referee's direction, an appeal from his decision (whether on law or on the facts) lies to the judge who referred the action, and not direct to the Court of Appeal.

**B.D.—VOL. III.**

**Daglish v. Barton** ([1900] 1 Q. B. 284; 68 L. J. Q. B. 1044; 48 W. R. 50; 81 L. T. 551—C. A., *infra*) disapproved.

**WYNNE-FINCH v. CHAYTOR**, [1903] 2 Ch. 475; [72 L. J. Ch. 723; 52 W. R. 24; 89 L. T. 123; 19 T. L. R. 631—C. A.

**238. "Right of Appeal to the High Court from any Court or Person"**—*Application to Set Aside or Vary the Findings of an Official Referee—Judicature Act, 1894* (57 & 58 Vict. c. 16), s. 1, sub-s. 5.]—Where an action has been tried before an official referee, and an application is made to a Divisional Court to set aside or vary the findings of the official referee, the decision of the Divisional Court is final; and there is no appeal to the Court of Appeal without leave.

**DAGLISH v. BARTON**, [1900] 1 Q. B. 284; 68 [L. J. Q. B. 1044; 48 W. R. 50; 81 L. T. 551—C. A.

Disapproved in *Wynne-Finch v. Chaytor*, *supra*.

**(h) Security for Costs.**

**239. Company Appealing—Companies Act, 1862** (25 & 26 Vict. c. 89), s. 69.]—A company appealing in an action, which it has defended unsuccessfully, is not a "plaintiff or pursuer in an action," &c., within the meaning of sect. 69 of the Companies Act, 1862, and cannot be ordered under that section to give security for the costs of the appeal.

**SINCLAIR v. GLASGOW AND LONDON CONTRACT** [CORPORATION, LD., (1905) 6 F. 818—Ct. of Sess.

**240. Company opposing Appeal—Companies Act, 1862** (24 & 25 Vict. c. 89), s. 69.]—Where a company is successful in an action, and an appeal is lodged, the company is not "plaintiff or pursuer" within the meaning of sect. 69 of the Companies Act, 1862, so as to be required to give security for costs.

**STAR FIRE AND BURGLARY INSURANCE CO. v.** [DAVIDSON, (1903) 4 F. 997—Ct. of Sess.

**240a. Default of Appearance—Application to Restore—Plaintiff Next Friend of Infants—Terms of Order to Restore—R. S. C., Ord. 27, r. 15.**—Where the plaintiff's solicitor in an action was ignorant of the fact that the case had been transferred to the list of another judge, the defendant obtained judgment by default of appearance. The plaintiff was the next friend of certain infants, on which ground it was urged, on an application to restore, that he should be ordered to give security for costs.

**HELD** (following *Cockle v. Joyce*, 37 L. T. 428)—that on the payment within seven days of the costs thrown away, and of the costs of the application, the case should be restored.

**FOAKES v. MILLER**, (1900) 108 L. T. Jo. 346—[Cozens-Hardy, J.

**241. Motion for New Trial—Divorce Petition—Same Rule applied in K. B. D. and P. D. A. D.—Judicature Act, 1890** (53 & 54 Vict. c. 44),

**Appeals—Continued.**

s. 1, *R. S. C., Ord. 58, r. 15.*—The rule laid down in *Hecksher v. Crossley*, [1891] 1 Q. B. 244, namely, that since the Judicature Act, 1890, security will not be ordered for the costs of a motion in the Court of Appeal for a new trial of an action in the Queen's Bench Division, also applies to the case of a motion for a new trial of a divorce petition.

RICKABY v. RICKABY, [1901] W. N. 45—C. A.

**242. Motion for New Trial—*R. S. C., Ord. 58, r. 15.***—The Court will now order security for the costs of a motion for a new trial in the same circumstances as security for the costs of any other appeal will be ordered.

Rule in *Hecksher v. Crossley* ([1891] 1 Q. B. 224; 60 L. J. Q. B. 75; 39 W. R. 211—C. A.) no longer binding.

WIGHTWICK v. POPE, [1902] 2 K. B. 99; 71 [L. J. Ch. 709; 50 W. R. 531; 86 L. T. 750; 18 T. L. R. 639—Div. Ct.

**243. Official Referee—Appeal from.**—There is power to order security for costs to be given by a person who appeals from an official referee to the King's Bench Division.

BILLINGTON, LD. v. BILLINGTON, [1907] 2 K. B. [106; 76 L. J. K. B. 664; 96 L. T. 665; 23 T. L. R. 473—Div. Ct.

**244. Practice the same in both Chancery and King's Bench Divisions.**—The practice with regard to orders for security for the costs of appeals from the King's Bench Division, as to directing that the security be approved, will in future be the practice with regard to appeals from the Chancery Division—viz., to the satisfaction of the judge in chambers.

HOPE v. HOPE, (1902) 86 L. T. 363—C. A.

**245. Workmen's Compensation—Appeal from County Court—*Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37).**—A county court judge held that the father of a young man killed by an accident was not a "dependant" within the meaning of Sched. I. to the Workmen's Compensation Act, 1897. The father appealed, and the employer applied that the appellant might be ordered to give security for the costs of the appeal.

HELD—that security to the amount of £15 must be given, as the appeal was not in the nature of a motion for a new trial.

IN RE HARWOOD AND ABRAHAMS, [1901] 2 [K. B. 804; 70 L. J. K. B. 746; 84 L. T. 857—C. A.

**246. Workmen's Compensation—Rule as to requiring Security for Costs.**—The general rules as to ordering security for costs apply to an appeal against an award of compensation under the Workmen's Compensation Act, 1897; it does not, therefore, follow that security will not be ordered because a stay of execution has been granted by the county court judge

*Hubball v. Everitt & Sons, Ltd.* ((1900) 16 T. L. R. 168, see MASTER AND SERVANT, 272) explained.

See MASTER AND SERVANT, No. 272.

SHEA v. DROLENVAUX AND ANOTHER, (1903) [88 L. T. 679; 19 T. L. R. 473—C. A.

**247. Workmen's Compensation—Necessity for Previous Request for Security—Appeal under Workmen's Compensation Act, 1897.**—Before applying to the Court for security for the costs of an appeal under the Workmen's Compensation Act upon the ground of the appellant's poverty the respondent ought first to apply to the appellant for security.

STANLAND v. THE NORTH-EASTERN STEEL CO., [LD., (1906) 23 T. L. R. 1—C. A.

**(i) Time for Appeal.**

**248 "Any other Matter not being an Action"—*R. S. C., Ord. 58, r. 9.***—An appeal from an order made on a summons under the Vendor and Purchaser Act, 1874, s. 9, for the rescission of a contract and for the return of deposit comes under the head of "any other matter not being an action" within the meaning of Ord. 58, r. 9, and that rule as to time for appeal applies accordingly.

WALKER v. OAKSHOTT, [1902] W. N. 147; 37 [L. J. N. C. 388—C. A.

**249. Final Order in Matter not being an Action—Decision of Divisional Court on Case stated by Magistrate under Merchant Shipping Act, 1894—*R. S. C., Ord. 58, r. 15.***—An order of a Divisional Court affirming the decision of an alderman of the City of London upon a summons for the recovery of wages taken out by a seaman under sect. 164 of the Merchant Shipping Act, 1894, is a "final order in a matter not being an action" within the meaning of Ord. 58, r. 15, and therefore no appeal to the Court of Appeal from such an order can be brought after the expiration of fourteen days.

AUSTIN FRIARS STEAM SHIPPING CO., LD. v. [STRACK, [1906] 2 K. B. 499; 75 L. J. K. B. 558; 70 J. P. 528; 94 L. T. 875; 22 T. L. R. 701—C. A.

**250. Infant Appellant—Extension of Time—Subsequent Expression of a Different View by other Judges—*R. S. C., Ord. 18, r. 15.***—An infant sought leave to appeal from a decision of Kekewich, J., although out of time, on the grounds that (a) the applicant was an infant; (b) there was £20,000 at stake; and (c) that other judges had dissented from the views expressed by Kekewich, J.

HELD—that the discretion given to the Court by Ord. 18, r. 15, should only be exercised on the principles stated by Cotton, L.J., in *In re Manchester Economic Building Society*, (1883) 24 Ch. D. 488; and that none of the grounds stated in the application were "special grounds" which would influence the Court to exercise its discretion.

IN RE BRADSHAW, BRADSHAW v. BRADSHAW, [1906] W. N. 86; 120 L. T. Jo. 591; 50 Sol. Jo. 439, 41 L. J. N. C. 294—C. A.

**Appeals—Continued.**

**251. Mistake—Extension of Time—Discretion of Court.**—The judgment in this action was delivered on March 19th, 1902, and the judge granted a stay of execution on the terms of the money being brought into Court. The defendants took up a position of observation, and did not pay the money into Court. They gave notice of appeal on the last available day, and it was not set down in time owing to some discussion between the town and country solicitors. The period during which the appeal had to be set down was interrupted by certain holidays. The defendants applied to extend the time for setting down the appeal.

**HELD**—that as the defendants refused, or were unable to offer any immediate prospect of bringing the money and the taxed costs into Court, the application must be refused.

**ILLINGWORTH v. MELBOURNE PARISH COUNCIL,** [(1902) 18 T. L. R. 775—C. A.]

**252. Mistake of Counsel—Extension of Time—Special Leave to Appeal—R. S. C., Ord. 58, r. 15.**—The fact that, owing to a mistake on the part of counsel, notice of appeal was not served within the proper time is not a ground upon which the Court of Appeal will give special leave to appeal under Ord. 58, r. 15.

*In re Helsby* [(1894) 1 Q. B. 742; 63 L. J. Q. B. 265; 42 W. R. 218, 70 L. T. 144, 1 Manson, 4—C. A.] followed.

**IN RE COLES AND RAVENSHEAR,** [1907] 1 K. B. [1; 76 L. J. K. B. 27; 95 L. T. 750, 23 T. L. R. 32—C. A.]

**253. Mistake of Legal Adviser—Extension of Time—Ord. 58, r. 15.**—The fact that the legal adviser of a workman was at the time of opinion that it was impossible in the circumstances successfully to appeal against a certain order made under the Workmen's Compensation Act, 1897, is no ground for subsequently extending the time for appealing from that order.

**NICHOLSON v. PIPEER,** (1907) 24 T. L. R. 16—[C. A.]

**XXIII COSTS.**

*And see BARRISTERS, 2—14.*

**(a) Appeal.**

**254. Action of Review—Judgment by Consent obtained by False Statement in Affidavit—Costs of First Action—Costs of Action of Review.**—L. sued S. for money lent, and applied for summary judgment under Ord. 14, and in support of his application made certain statements in an affidavit. Relying on these statements, S. consented to an order, and judgment was signed. S. afterwards discovered that the statements were false, and brought an action of review to set aside the consent order and the judgment. Had the truth been disclosed in the action L. would have had to pay S. his costs in that action as between party and party.

**HELD**—that S. ought to be placed in the same position as if the first action had been brought

to its legitimate conclusion, and that he was entitled to recover the party and party costs of such action and also the costs of the action of review.

**STURROCK v. LITTLEJOHN,** (1899) 68 L. J. Q. B. [165—Div. Ct.]

**255. Appeal as to Costs—Discretion of Judge.**—In an action by the assignee of an equitable life estate in a freehold farm, the plaintiff sought to be let into possession or receipt of the rents. The Court made the order desired, subject to conditions, but directed that the plaintiff must pay the costs of the trustees and the remaindermen.

**HELD**, on appeal as to costs, that the judge of first instance had exercised his discretion and that there was no right of appeal from his decision in that respect.

**IN RE HUNT,** [1901] W. N. 144; 45 Sol. Jo. [652—C. A.]

**256. House of Lords—Set-off—R. S. C., Ord. 65, r. 14—Application of in House of Lords.**—Under Ord. 65, r. 14, a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. This rule does not apply to the House of Lords. After a final judgment in the House of Lords, the Appeal Committee will not set off costs due by an appellant against costs due to him in the Court of Appeal.

**RUSSELL v. RUSSELL,** [1898] A. C. 307; 67 [L. J. P. 69—H. L. (E.)]

**257. Official Referee—Discretion as to Costs—Leave to Appeal as to Costs—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49—R. S. C., Ord. 36, r. 55, (B); Ord. 65, r. 1.**—An action was referred to the official referee for trial, with all the powers of certifying and amending of a judge of the High Court. He decided as to the costs, but gave no leave to appeal from his order as to costs. The plaintiffs appealed.

**HELD**—that where there is no right to costs, and they are in the discretion of the persons who have to award them, there is no appeal except by leave, and that therefore the appeal did not lie.

**MINISTER & CO. v. APPERLY,** [1902] 1 K. B. [643, 71 L. J. K. B. 452; 50 W. R. 510; 86 L. T. 625—Div. Ct.]

**258. Portion of Judgment reversed—Repayment of Portion of Costs.**—Where a party who has been ordered to pay, and has paid, the costs of a trial appeals successfully against one portion of the decision, the Court of Appeal may itself examine the taxed bill, and fix the amount to be repaid to the appellant in respect of the point wrongly decided against him.

**IN RE GEIPEL'S PATENT,** [1904] 1 Ch. 239—[C. A.]

**259. Repayment of Costs on successful Appeal—Interest upon such Costs—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 17.**—An action having

**Costs—Continued.**

been dismissed with costs, the plaintiff in March, 1902, paid to the defendants £1,042, their taxed costs.

In July, 1902, his appeal was allowed and the defendants repaid the £1,042 with interest thereon.

In November, 1903, the House of Lords restored the original order.

**HELD**—that the plaintiff must repay the amount paid to him in July, 1902, together with interest from July, 1902, to November, 1903.

**ASHWORTH v. ENGLISH CARD CLOTHING CO.**, [L.D. (2), [1904] 1 Ch. 704; 73 L. J. Ch. 282; 90 L. T. 263; 21 R. P. C. 355—Joyce, J.

**(b) Apportionment.**

**260. Chancery Division—R. S. C., Ord. 65, r. 2.**—Ord. 65, r. 2, as amended in 1902, still leaves unaltered the practice as to taxation of costs in the Chancery Division, laid down in *Jenkins v. Jackson*, [1891] 1 Ch. 89; 60 L. J. Ch. 206; 39 W. R. 242; 63 L. T. 688—C. A.

If the plaintiff is given his costs of one part of the claim, and the defendant his costs of another, . . . the taxing Master divides the general costs into moieties, but gives to each party such part of every affidavit or document as relates to that part of the claim on which he succeeded, disallowing the rest.

The addition to Ord. 65, r. 2, was intended to sanction the practice of ordering one party to bear a fractional part of the entire costs in order to avoid the expense of an exact apportionment.

In an action for trespass and an injunction, the plaintiffs accepted the damages paid into Court, and it was ordered that the defendants should pay the plaintiffs their costs of the action so far as related to the claim for trespass, and that the rest of the plaintiffs' action be dismissed without costs.

**HELD**—that the taxing Master ought to allow to the plaintiffs only one moiety of the costs common to both issues in the action, and not the whole of the general costs.

Decision of Farwell, J. (1903) 51 W. R. 333; 87 L. T. 710) affirmed.

**TODD AND ANOTHER v. NORTH EASTERN RY.** [Co., (1903) 88 L. T. 112—C. A.]

**261. Proportionate Method of Apportionment—Practice.**—In cases where a party is liable to pay a large portion of the costs of an action but is not liable to pay the whole, it is often convenient, with a view to saving expense, and possible to say that the party who is to pay costs shall pay a certain proportion of the whole.

**IN RE POLLARD, POLLARD v. POLLARD**, [1902] [W. N. 49; 46 Sol. Jo. 290—Kekewich, J.]

**(c) Discretion of Judge.**

**262. Depriving Successful Defendant of Costs—“Good Cause”.—Plea of Gaming Acts—**

*Ord. 65, r. 1.*—The fact that a man, when sued in respect of betting transactions, pleads and relies on the Gaming Acts is no “good cause,” within the meaning of R. S. C., Ord. 65, r. 1, for depriving him of his costs.

Decision of Ridley, J., reversed.

**GRANVILLE v. FRITH**, (1903) 72 L. J. K. B. [152; 88 L. T. 9; 19 T. L. R. 213]

**263. Depriving Successful Defendant of Costs—Jurisdiction—Appeal—R. S. C., Ord. 65, r. 1.**—A successful defendant cannot be deprived of costs on the ground of improper conduct (*e.g.*, misrepresentation to the public) not connected with the issue between the parties.

The plaintiffs claimed an injunction to restrain the defendants from selling dried soup preparations not of the plaintiffs' manufacture in packets only colourably differing from those used by plaintiffs, and from passing off their goods as and for the plaintiffs' goods. The plaintiffs' packets contained references to exhibition awards gained by the plaintiffs for their soups. The defendants' packets contained references to gold medals awarded to them, which were anterior in date to the time when they commenced to sell soup preparations, and were in fact awarded for other goods. Kekewich, J., gave judgment for the defendants, but he deprived them of costs upon the ground that the reference to the medals on the defendants' packets was such as to lead to the inference that they had been gained in respect of the soup preparations.

Upon appeal, the Court affirmed the judgment for the defendants, but held that, even if the defendants had made a misleading statement on their packets about the medals, it was not a ground upon which they could be deprived of costs; and further, that the statement on the packets as to the medals was not misleading.

**KING & CO., LD. v. GILLARD & CO., LD.**, [1905] [2 Ch. 7; 74 L. J. Ch. 421; 53 W. R. 598; 92 L. T. 605; 21 T. L. R. 398—C. A.]

**264. Depriving Successful Defendant of Costs—Judge acting on Irrelevant Materials—Leave of Judge to Appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49.**—Where a judge who tries an action without a jury deprives the successful party of costs without having really exercised his judicial discretion at all in the matter, as, for instance, where there are no materials before him upon which he can exercise his discretion, an appeal will lie to the Court of Appeal without leave.

In an action of waste against a tenant who had converted part of a dwelling-house into a shop and built a stable at the back of the premises, the judge, who tried the action without a jury, gave judgment for the defendant; but he deprived her of costs upon the ground that, in his opinion, before doing what she had done she ought to have approached her landlord upon the matter.

**HELD**—that this was a matter which was irrelevant to the question to be adjudicated upon in the action, and that the judge had no

**Costs—Continued.**

power upon that ground to deprive the defendant of costs.

EDMUND AND OTHERS *v.* MARTELL, (1907) 24 [T. L. R. 25—C. A.]

**265. Depriving Successful Plaintiff of Costs—Misconduct—Exaggeration by Witnesses**—Though a plaintiff, who is successful, may be deprived of costs for some misconduct directly connected with the subject-matter of the action, the fact that some of his witnesses have been guilty of exaggeration is not sufficient reason for exercising this power.

LIPMAN *v.* PULMAN & SONS, LD., (1904) 91 L. T. [132—Kekewich, J.]

**266. Depriving Successful Plaintiff of Costs—"Good Cause"**—*R. S. C., Ord. 65, r. 1.*—In an action for breach of promise of marriage the jury, who were invited by counsel for the plaintiff and by the judge to award moderate damages, found a verdict for the plaintiff for £10. The judge deprived the plaintiff of costs. There was no suggestion of any oppression or misconduct on the part of the plaintiff in bringing the action or in the conduct of it.

Held—that there was no "good cause" for depriving the plaintiff of costs.

TIPPING *v.* JEPSON, (1906) 22 T. L. R. 743—[C. A.]

**267. Separate Issues—"Event"—Judgment**—*R. S. C., Ord. 65, r. 1.*—In an action, tried with a jury, for damages for trespass to land and for cutting down and removing a tree, the jury awarded damages for trespass, but found that the tree was not on the plaintiffs' land. The judge directed judgment to be entered for the plaintiffs for the damages and the general costs of the action, and upon being asked to direct judgment for the defendants upon the issue as to the tree on which they had succeeded, he said that he would make no order. Before the judgment was drawn up the defendants appealed, contending that, unless judgment was directed for them upon the issue as to the tree, they would not get the costs of that issue upon taxation.

Held—that upon the certificate of the associate, setting out the findings of the jury and the judgment directed by the judge, being taken to the office, inasmuch as the judge had not made any order depriving the defendants of the costs of the issue as to the tree, the costs would follow the event, and the proper form of judgment to be drawn up would be one giving the defendants the costs of that issue, and that, therefore, the appeal was unnecessary.

HOYES *v.* TATE, [1907] 1 K. B. 656; 76 L. J. [K. B. 408; 96 L. T. 419; 23 T. L. R. 291—C. A.]

**268. Trial by Judge alone—Appeal**—*R. S. C., Ord. 65, r. 1—Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.*—Where a judge, who tries a case without a jury, deprives a successful litigant of his costs, the Court of Appeal will interfere

if it appears that the judge in so doing exercised no discretion or had no materials before him upon which he could exercise his discretion.

The fact that a party insists upon trying a case, instead of leaving the matter in the hands of the judge as arbitrator, is no ground for not allowing him his costs.

CIVIL SERVICE CO-OPERATIVE SOCIETY *v.* [GENERAL STEAM NAVIGATION CO., [1903] 2 K. B. 756; 72 L. J. K. B. 933; 52 W. R. 181; 89 L. T. 429, 20 T. L. R. 10—C. A.]

**269. Appeal—Costs, Charges and Expenses**—*Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49—R. S. C., Ord. 65, r. 1.*—Though the costs may be in the discretion of the Court, yet, if it appears that the discretion was not exercised, but the Court applied a rule instead of exercising its discretion, the case is appealable without leave.

*The City of Manchester* ((1880) 5 P. D. 221; 49 L. J. P. 81; 27 W. R. 697; 42 L. T. 521—C. A.) followed.

An appeal without leave does not lie as to costs only if there is nothing wrong with the order as to charges and expenses.

*Charles v. Jones* ((1886) 33 Ch. D. 80; 56 L. J. Ch. 161; 35 W. R. 88; 55 L. T. 331—C. A.) followed.

*In re Chennell* ((1878) 8 Ch. D. 492; 47 L. J. Ch. 80; 26 W. R. 595; 38 L. T. 494—Hall, V.-C.) not followed.

BEW *v.* BEW, [1899] 2 Ch. 467; 68 L. J. Ch. [657, 48 W. R. 124, 81 L. T. 284—C. A.]

**(d) Documents.**

**270. Copies of Documents for the Judge—Taxation.**—Where the Court is asked to construe the terms of a document, a copy should be provided for its use, and the costs of such copy should be allowed on taxation.

IN RE HOUSTON'S SETTLEMENT, SPARKES *v.* [HUTCHELL, (1904) 52 W. R. 61; 89 L. T. 469—Farwell, J.]

**271. Shorthand Notes—Dispute as to Liability to Pay for—Power of Court to decide Dispute.**—Where there is a dispute as to the liability of parties to pay the costs of a shorthand note, the Court can only deal with the matter by taking evidence as to what the agreement really was, and will not order the costs to be costs in the action.

EAST LONDON RY. CO. *v.* THAMES CONSERVATORS, (1904) 39 L. J. N. C. 262; 117 L. T. Jo. 59; 48 Sol. Jo. 492—Farwell, J.]

**272. Shorthand Notes—Transcript—Taxation—Discretion of Taxing Master.**—Shorthand notes are an unusual expense, and will not, as a general rule, be allowed even on a solicitor and client taxation against a fund or estate, but the taxing Masters have a discretion, though it is exercised very sparingly.

RE DE NICOLS, DE NICOLS *v.* CURLIER, (1907) [51 Sol. Jo. 47—Kekewich, J.]

**Costs—Continued.****(e) Independent Proceedings.**

**273** *Costs before Action—Threat of Proceedings—Costs Incurred upon Receipt of—R. S. C., Ord. 65 r. 27 (29).*—A defendant, who is threatened with an action in respect of a fraud disclosed in a previous action to which he was a party, and who, in order to defend such threatened action, obtains at once a complete transcript of the proceedings in the first action, does so at his own risk. If the threatened action is launched and dismissed with costs, he will only be allowed on taxation the cost of so much of the evidence and judgment as related to the issue in the second action.

**BRIGHT'S TRUSTEE v. SELLAR**, [1904] 1 Ch. 369; 73 L. J. Ch. 245; 90 L. T. 155; 20 T. L. R. 210—Bady, J.

**274. Set-off—Equitable Jurisdiction of Court—R. S. C., Ord. 65, rr. 14, 27 (21).**—The plaintiff recovered judgment in the High Court by default against A and B., and in the county (after remission) against C., in respect of a debt due from an unincorporated club and guaranteed by them. He then tried in the High Court to garnishee money due from the club to A., and standing at a bank in the names of A., C., and others as trustees, but failed, and was ordered to pay the costs of C.

Upon an application by the plaintiff to set off these costs against the costs due to him under his judgment—

**HELD**—that there was no power to allow such a set-off, for

(1) Ord 65, r. 14, does not apply to costs in distinct and independent proceedings (see *Edwards v. Hope* (1885) 14 Q. B. D. 922—Div. Ct.)

(2) Ord. 65, r. 27 (21), is similarly restricted in its application (see *Burker v. Hemming* (1880) 5 Q. B. 609—C. A.).

And (3) The equitable jurisdiction of the Court to allow a set-off is limited to the case of parties suing or being sued in their own right.

**DAVID v. REES AND OTHERS**, [1904] 2 K. B. 435; [73 L. J. K. B. 729, 52 W. R. 579; 91 L. T. 244; 20 T. L. R. 577—C. A.

**275. Set-off—Effect of Consolidation Order—R. S. C., Ord. 65, rr. 14, 27 (21).**—The provisions of Ord. 65, rr. 14, 27 (21), as to set off of costs do not apply to costs in independent proceedings.

*David v. Rees* ([1904] 2 K. B. 435; 73 L. J. K. B. 729; 52 W. R. 579, 91 L. T. 244; 20 T. L. R. 577—C. A.) followed.

The plaintiff obtained a foreclosure order nisi in respect of five charges. He subsequently applied by motion for a sixth charge to be included, but his application was dismissed with costs. He then commenced new foreclosure proceedings in respect of all six charges; the defendant took out a summons to stay such proceedings on the ground of *res judicata*, this application was dismissed with costs, and the plaintiff's two proceedings were consolidated by order of a Master, which directed taxation of the costs.

The plaintiff then applied for an order that the costs payable to him upon the defendant's summons should be set off against those payable by him on his unsuccessful motion.

**HELD**—that his application must be dismissed with costs, since (notwithstanding the consolidation order) the proceedings were independent ones; but that these last-mentioned costs might be set off against the costs under the consolidation order.

**BAKE v. FRENCH**, [1907] 1 Ch. 428; 76 L. J. Ch. 299; 96 L. T. 196—Parker, J.

**(f) Miscellaneous.**

**276 Action Settled—Effect on Orders as to Costs previously made in Interlocutory Proceedings.**—An action was settled on the terms: "Record withdrawn No costs on either side."

**HELD**—that the defendants were entitled to taxation and payment of costs ordered in various interlocutory proceedings to be paid to them by the plaintiff.

**WALTER v. BEWICKE, MOREING & CO**, (1901) [90 L. T. 409—C. A.

**277 Disagreement of Jury—Action for Negligence—Charge of Fraud abandoned—Costs—Judgment.**—Where in an action for damages for negligence and fraud the charge of fraud is abandoned, and the jury disagree as to their verdict and are discharged, the defendant is entitled to the costs occasioned by the charge of fraud, but not to judgment in respect thereof.

**DANBY v. P**, (1907) 51 Sol. Jo. 307—Lord [Alverstone, C.J.

**278. Claim and Counter-claim—Judgment for Defendant on Claim and for Plaintiff on Counter-claim—General Costs of Action.**—A plaintiff who has to pay or to receive the general costs of an action cannot throw on his opponent or have thrown on himself any part of such costs.

Whether both parties fail, or whether both succeed, or whether one fails and the other succeeds, makes no difference in principle.

In an action for damages for libel the defendant counter-claimed for damages for libel on himself by the plaintiff. The action was tried with a jury, and judgment was entered for the defendant on the claim with costs, and for the plaintiff on the counter-claim with costs. The taxing Master apportioned some of the costs of the action between the plaintiff and the defendant.

**HELD**—that in considering what were the costs of the action, the counter-claim as distinguished from the defence ought to be disregarded and the costs taxed as if there were no counter-claim, and that the plaintiff was only entitled to such extra costs as were actually occasioned by the counter-claim.

*Saner v. Bilton* (40 L. T. 314; 11 Ch. D. 416) and *Shrapnel v. Laing* (58 L. T. 705; 20 Q. B. D. 334) considered.

**ATLAS METAL CO. v. MILLER**, [1898] 2 Q. B. 500; 67 L. J. Q. B. 815; 79 L. T. 5; 46 W. R. 657—C. A.



**Costs—Continued.**

**279. Costs Reserved—Motion for Judgment—Judgment by Default—Power of Court.**—The Court has power to make orders as to costs reserved, as, e.g., costs of an application for an interim injunction, even although such costs are not mentioned in the statement of claim.

BECKLEY v. COLLEY, [1904] 48 Sol. Jo. 261—  
[Byrne, J.]

**280. General Costs—Costs of Particular Issue.**—In an action for damages for the obstruction of a right of way, claimed alternatively as a public and as a private right of way, the jury found in favour of the plaintiffs in respect of the claim founded on the public right of way, judgment being directed for the defendant in respect of the claim founded on the alleged private right of way.

HELD—that the plaintiffs were entitled to the general costs of the action, and the defendant only to the costs of the issue on which he succeeded.

SMYTH v. WILSON, [1904] 2 Ir. 40—K. B. Div.

**281. Notices after Summons for Directions—R. S. C., 1883, App. N., item 51—Ord. 65, r. 38.**—The R. S. C., App. N., item 51, apply to notices taken out after a summons for directions has been issued.

MACGUARE v. MILLIGAN, (1902) 51 W. R. 74;  
[19 T. L. R. 44—Eady, J.]

**282. Recovery—Order of County Court to Pay—Action in High Court to Recover.**—An action cannot be maintained in the High Court upon an order of a county court for the payment of costs.

FURBER v. TAYLOR, [1900] 2 Q. B. 719; 69  
[L. J. Q. B. 898; 48 W. R. 689; 83 L. T. 308—C. A.]

**(g) Security for Costs.**

**283. Action for Libel against a Newspaper—Previous unsuccessful Action against other Newspaper—Bankruptcy of Plaintiff—No Ground for ordering Security.**—In an action for libel against a newspaper, it is no ground for departing from the ordinary rule and ordering security for costs that the plaintiff has failed in a previous action in respect of the same, or similar, words against another paper, and has become bankrupt without paying the costs of such action.

LE MESURIER v. FERGUSON AND ANOTHER,  
[1904] 20 T. L. R. 32—C. A.]

**284. Action referred to Official Referee—Application for Further Security—How made—R. S. C., Ord. 30, rr. 2, 5; Ord. 65, r. 6.**—An action in which the plaintiff had given security for costs was referred to an official referee to report on certain transactions and accounts. Thereupon the defendants applied by notice under the summons for directions for further security to be given.

HELD—that in a proper case such an application might be entertained upon a summons under

Ord. 65, r. 6; but that the summons for directions had ceased to be of any effect after the action had come on for trial and had been referred to the referee, and that therefore a notice of application under it was ineffectual.

BROWN v. HAIG, [1905] 2 Ch. 379; 74 L. J. Ch.  
[591; 54 W. R. 26; 93 L. T. 99—Kekewich, J.]

**285. Bond of Foreign Company—Ord. 65, r. 7.**—There is no general rule that the bond of a foreign company will not be accepted as security for costs. In each case it is a matter for discretion, taking all the circumstances into account.

ALDRICH v. BRITISH GRIFFEN CHILLED IRON  
[AND STEEL CO., LD., [1904] 2 K. B. 850; 74  
L. J. K. B. 23; 53 W. R. 1; 91 L. T. 729; 21  
T. L. R. 1—C. A.]

**286. Insolvent suing as nominal Plaintiff for the Benefit of Third Person.**—Security for costs is required in the case of an insolvent who is suing as a mere nominal plaintiff for the benefit of third party.

The plaintiff, being insolvent, had executed an assignment of all his property, with one apparently insignificant exception, including specifically the subject-matter of the action, in these words: "All the beneficial interest and property of the debtor of and in an action commenced by him against the Hatherly Station Brick Co., Ltd., but the right, property, or interest of the trustee therein shall not arise until judgment has been obtained by the debtor or the debtor has effected terms of settlement."

HELD—that the plaintiff was merely a nominal plaintiff who had no beneficial interest in the result of the action himself, and he was suing a third party; that he was suing for the benefit of the trustee, or rather for that of the creditors; and that he must give security for costs.

LLOYD v. HATHERLY STATION BRICK CO., LD.,  
[1901] 85 L. T. 158—C. A.]

**287. Shorthand Notes of Evidence—Time for making Application.**—An application for the costs of a transcript of the shorthand notes of the evidence taken at the trial must be made before the judgment or order of the Court has been drawn up.

THE TURRET COURT, (1901) 84 L. T. 331; 17  
[T. L. R. 339; 9 Asp. M. C. 162—Jeune, P.]

**288. Limited Company—Plaintiffs in Action—"Sufficient Security"—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69.**—The security for costs required to be given by a plaintiff company, under sect. 69 of the Companies Act, 1862, must, as that section provides, be "sufficient"—neither illusory nor oppressive—having regard to the probable costs likely to be incurred by the defendant.

DOMINION BREWERY, LD. v. FOSTER, (1898)  
[77 L. T. 507—C. A.]

**289. Ordinary Inquiry as to Fund in Court—Claimant a Foreigner resident Abroad.**—A person claiming under an ordinary inquiry under

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ordinary circumstances cannot be ordered to give security for costs.

Where solicitors had been ordered to pay into Court a sum of money in their hands belonging to their client—a Mrs. G.—upon which S., who was resident abroad, alleged he had a charge.—

**HELD**—that in substance S. was in the position of a plaintiff, and not of a defendant, and as S. was resident out of the jurisdiction, he must give security for costs.

**IN RE MILWARD & Co.**, [1900] 1 Ch. 405; 69 [L. J. Ch. 247; 82 L. T. 339—C. A.]

**290. Relator—No Visible Means.**—Where the relator in an action by the Attorney-General for the carrying out of a public trust or settlement of a charitable scheme has no visible means, he will be required to give security for the costs of the action, if it appears that there is some question to be tried.

**ATTORNEY-GENERAL v. ALLMAN AND OTHERS**, [1906] 1 Ir. R. 473—C. A.]

**291. Stay of Proceedings until Security—Costs incurred in preparing Evidence—Company—Voluntary Winding-up—Dissolution—Companies Act, 1862, ss. 142, 143.**—The plaintiff company brought this action for infringement of patent, and gave notice of motion for an injunction for June 18th, 1897.

The motion stood over for a fortnight, and on the same day an order was made that the plaintiffs should give security for costs, and, until security was given, should take no further proceedings against the defendant.

No security was ever in fact given, and on August 5th the action was dismissed with costs for want of prosecution, the costs of the motion for the injunction to be costs in the action.

On the taxation of costs under this order the Master disallowed costs of preparing evidence after the date of the order for security for use on the hearing of the motion, on the ground that the defendant was not justified in incurring any expense after the order until the plaintiff had given security.

The defendant took in objections; the taxing Master's answers were given on January 28th, 1898, and on February 4th, 1898, the defendant took out a summons to review the taxation. Owing to the block in business this summons did not come on for hearing until July 16th.

The plaintiff company had been dissolved on April 14th, a resolution for voluntary winding-up having been passed in May, 1897, the final meeting for passing liquidator's accounts held on January 8th, and the return to the registrar made on January 14th, 1898, as required by sects. 142 and 143 of the Companies Act, 1862.

**HELD**—that the taxing Master was wrong in disallowing all costs incurred by the defendant in preparation of evidence for the motion after the order for security, and the bill must be referred back to him.

**HELD**, also, that the Court had jurisdiction to make the order notwithstanding that the com-

pany had been dissolved pending the proceedings.

*Re Crookhaven Mining Co.* (L. R. 3 Eq. 69) held not to be overruled by *Re Pinto Silver Mining Co.* (8 Ch. Div. 273), *Re London and Caledonian Marine Insurance Co.* (11 Ch. Div. 141), and followed.

**WHITELEY EXERCISER, LD. v. GAMAGE**, [1898] [2 Ch. 405; 79 L. T. 20; 5 Manson. 249—North, J.]

**292. Trustee of Deed for Creditors—Insolvent Plaintiff.**—An insolvent plaintiff, who sues as the trustee of a deed executed by a debtor for the benefit of his creditors to recover a debt due to the debtor, and who is not beneficially interested in the subject-matter of the claim, will be ordered to give security for the costs of the action.

Such a person is not within the exemption recognised in the case of a trustee in bankruptcy, liquidator, or legal personal representative; and he is not beneficially interested merely because the deed empowers him to retain his costs, charges, and expenses out of the assets.

**GREENER v. KAHN & Co., LD.**, [1906] 2 K. B. [374; 75 L. J. K. B. 660; 95 L. T. 481; 22 T. L. R. 694—C. A.]

**(h) Taxation Generally.**

And see **BANKRUPTCY**, 6.

**293. Action referred to Master by Consent—Costs of Reference—Costs of Action—Whether High Court or County Court Scale—Powers of Master—R. S. C., Ord. 14, r. 7—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116.**—Where, upon the hearing of a summons for judgment under Ord. 14, an action is by consent referred to a Master for trial under r. 7, the Master has the same power of awarding and certifying for costs as an ordinary arbitrator; and therefore he can award to a plaintiff costs of the reference and award to be taxed on the High Court scale, although the sum recovered is less than £50 (in an action of contract).

But with regard to the costs of the action in such a case his position is different: a judge alone can extend the time allowed by sect. 116 of the County Courts Act, 1888, and, if the twenty-one days have elapsed between service of the writ and judgment, the Master has no power to give costs of the action on the High Court scale.

*Semble*, the Master may allow a fixed sum for such county court costs; but such sum must be less than that allowed for "fixed costs" on the High Court scale.

**HAYCOCKS, LD. v. MULHOLLAND**, [1904] 1 K. B. [145; 73 L. J. K. B. 125; 52 W. R. 400; 90 L. F. 88—Phillimore, J.]

**294. Assessment of Lump Sum—Duty of Taxing Officer—No Objections carried in—Summons to Review—R. S. C., Ord. 65, r. 27, sub-r. 38A.**—Where a taxing officer assesses a lump sum for costs, in lieu of taxing, under Ord. 65, r. 27, sub-r. 38A, he ought to state explicitly in his

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certificate that he has done so, and his reasons for so doing. His discretion in the matter is a very delicate one, and only to be exercised judicially upon evidence of special circumstances.

A taxing officer purported to tax a bill of costs, but in fact assessed a lump sum under this sub-rule :—

**HELD**—that although no objections had been carried in, yet, as he had not taxed according to the rules, the bill of costs must be sent back for taxation.

**IN RE JOHNSTON, MILLS v. JOHNSTON**, [1904] 1 [Ch. 132; 73 L. J. Ch. 17; 89 L. T. 497—Farwell, J.

**295. "Costs of the Action"—Costs of the Application not dealt with in Order—"Costs reserved"—Costs "in any event"—Costs, Charges, and Expenses of Trustee.**—It is the duty of a taxing Master to include in "the costs of the action" all costs expressly disposed of in that way, and the costs of applications, the costs of which are not expressly reserved by the order. Where costs are expressly reserved by any order (whether costs of a trustee or beneficiary or both), such costs must be expressly dealt with by the judge, and the effect is that the incidence of those costs, not only as between the plaintiff and defendant, is reserved, and it is the duty of the taxing Master to see they are not included in the bill without further direction from the Court.

A trustee who makes an unsuccessful application which is dismissed with costs to the other party "in any event" cannot obtain reimbursement of his own costs under the order giving him costs, charges, and expenses properly incurred; the result being that the trustee must pay personally not only his opponent's costs, but his own.

General observations by the Court on the proper method of dealing with "costs of the action."

**HOW v. WINTERTON (EARL)**, (1905) 91 L. T. 763 [—Kekewich, J.

**296. Guardian ad litem—Official Solicitor—Party and Party Costs—R. S. C., Ord. 65, r. 13.**—An action was brought by a schoolmaster against one of his pupils (an infant), claiming damages for the defendant's wrongful act in setting fire to the plaintiff's house and furniture. The writ was served on the defendant's father, but no appearance was entered by him on behalf of the defendant. On the application of the plaintiff, the official solicitor was assigned as the defendant's guardian ad litem, and he delivered a defence on behalf of the defendant. The jury awarded the plaintiff damages. Judgment was entered accordingly, and it was ordered that the plaintiff should pay the costs of the guardian ad litem, to be taxed by the Master.

**HELD**—that in the absence of a special direction to allow solicitor and client costs, the costs of the guardian ad litem should be taxed on the

party and party footing—i.e., that the costs payable by the plaintiff to the guardian ad litem should be those costs to which the guardian ad litem would on taxation be entitled against the plaintiff, assuming him to be a successful party in the litigation with the plaintiff.

**EADY v. ELSDON**, [1901] 2 K. B. 460; 70 [L. J. K. B. 701; 49 W. R. 595; 84 L. T. 615—Div. Ct.

**297. Higher Scale—Importance, Difficulty or Urgency—Special Ground Allegation of Fraud—R. S. C., 1883, Ord. 65, r. 9.**—The mere fact of an allegation of fraud being made in an action by the unsuccessful party is not a special ground for obtaining costs on the higher scale under Ord. 65, r. 9, even when the amount in dispute is large, and the questions of law and fact raised are difficult. The meaning of the rule is that it is to apply where the nature and importance or the difficulty or urgency of the case necessitate the expenditure of more money.

**ASSETS DEVELOPMENT CO., LD. v. CLOSE [Bros. & Co.]**, [1900] 2 Ch. 717; 69 L. J. Ch. 715; 48 W. R. 699; 83 L. T. 162—Buckley, J.

—*Inquiry under the Lands Clauses Act—Taxation by Chancery Master—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 52—Ord. 65, rr. 18, 27 (25)—R. S. C., January, 1902.*—The R. S. C., January, 1902, have established, under the name of the Supreme Court Taxing Office, one taxing department of the central office, of which both the Masters of the King's Bench Division and the Chancery taxing Masters are officers, each class having power to perform the duties hitherto performed only by the other class, and therefore Chancery taxing Masters have now power to tax the costs of an inquiry under the Lands Clauses Act, 1845, as well as Masters of the King's Bench Division.

**COVINGTON v. METROPOLITAN DISTRICT RY.** [Co., [1903] 1 K. B. 231; 72 L. J. K. B. 93; 50 W. R. 428; 87 L. T. 649; 19 T. L. R. 142—Div. Ct.

**298. Inspection of Property—No Order for such Inspection—Power to allow Costs of—R. S. C., Ord. 50, r. 3.**—A taxing officer may in a proper case allow the costs of an inspection of property (e.g., the machinery forming the subject of a patent action), although there has been no order for such inspection under Ord. 50, r. 3, and no agreement between the parties that such costs shall be costs in the action.

**ASHWORTH v. ENGLISH CARD CLOTHING CO., [LD. (1), [1904] 1 Ch. 702; 73 L. J. Ch. 274; 52 W. R. 507; 90 L. T. 262; 21 R. P. C. 353—Joyce, J.**

**299. Objections.**—The general rule of taxation is that you can only get rid of the taxing Master's certificate if you carry in objections thereto.

**CRASKE v. WADE**, (1899) 80 L. T. 380—C. A.

**Costs—Continued.**

**300 Order for Payment of Costs to Successful Party, except so far as increased by certain Issues—Affidavit relating to both General and Excepted Issues—Rule in Common Law Actions—Chancery Rule**—An order of Byrne, J., contained a direction as to the taxation of costs, and W. C. & Co. were ordered to pay to the R. B. P. Co. all their costs except so far as such costs had been increased by the issues of fact found against the R. B. P. Co.—namely, the issues of user or non-user of the trade mark before 1875 and the abandonment of the trade mark subsequently. The R. B. P. Co. were ordered to pay to W. C. & Co. their costs so far only as they were increased by those particular issues. Upon the taxation of the costs of a witness who had been brought over from America to be cross-examined at the suggestion of W. C. & Co., the R. B. P. Co. objected to the disallowance of those costs on the ground that the affidavit did not relate solely to the excepted issues.

**HELD**—that the decision of the taxing Master was right; and that the rule which is found applicable in common law actions where a witness is called and examined *ex parte* is not to be applied to an affidavit, the costs of which are allowed at so much a folio.

**RE WRIGHT, CROSSLEY & Co., (1902) 86 [L. T. 280—C. A.]**

**301. Order to Tax Costs, including Costs and Remuneration of Receivers and Managers, Balance to be certified—Reference of Costs of Receivers and Managers to Master in Ordinary—Separate Certificate—R. S. C., Ord. 65, r. 27, sub-r 25.**—An order, amongst other things, ordered that "it be referred to the taxing Master to tax the costs of the plaintiffs . . . of this action up to and including judgment, including the costs and remuneration of the receivers and managers . . . to tax the costs of the said defendants . . . to deduct the said costs of the said defendants from the plaintiffs' costs heretofore directed to be taxed and to certify the balance . . ."

The taxing Master did not certify the balance as directed by the judgment, but he issued a separate certificate stating that he had not included the costs and remuneration of the receivers and managers, as he thought it was a proper case to have them ascertained by the Master in Ordinary, and therefore had sent the matter to him, and it was still pending.

**HELD**, by Byrne, J., that the taxing Master's certificate, not being according to the exigency of the order, must be taken off the file, and the amounts thereby certified included in the taxing Master's final certificate to be made in the action.

**HELD**, on appeal, that the order was right.

**SILKSTONE AND HAIGH MOOR COAL CO. v. [BDEY, [1901] 2 Ch. 652; 70 L. J. Ch. 774; 85 L. T. 300—C. A.]**

**302. Originating Summons—Instructions for Originating Summons—R. S. C., January,**

1902, r. 10—*Ord. 65, rr. 8, 27 (29) (37)—App. N., Vol. 65.*—The effect of the alteration made in Ord. 65, r. 27 (29), by r. 10 of R. S. C., January, 1902, is that the taxing Master is no longer restricted to the allowances mentioned in App. N.

On taxing the costs of an originating summons the Master was of opinion that a charge of five guineas was reasonable for taking instructions for the summons, and it was held that he had now a discretion under Ord. 65, r. 27 (29), to allow such charge, and that he was not now limited to the charge of £1 1s fixed by R. S. C., App. N., No 65.

Ord. 65, r. 27 (37), enables the taxing Masters to draw up regulations as a guide to each other in order to assimilate allowances and secure uniformity, but such regulations known as the "Blue Book" cannot fetter the discretion given by r. 27 (29).

*McIver, Ltd. v. Tate Steamers, Ltd.* ([1902] 2 K. B. 184; 71 L. J. K. B. 717, 50 W. R. 642, 87 L. T. 320—C. A., *see* SOLICITORS, 61) followed.

**RE ERMEN, TATHAM v. ERMEN, [1903] 2 Ch. 156; [72 L. J. Ch. 492; 51 W. R. 474; 88 L. T. 352—Farwell, J.]**

**(i) Trustees and Executors.**

**303 Administration Action—Attacked Trustee—Employment of Two Counsel.**—A hostile attack being made in a creditor's administration action against one of two trustees and defendants, the attacked trustee was allowed to appear separately, and, the attack having substantially failed, was given his costs as between solicitor and client. The plaintiff had employed two counsel.

**HELD**—that the attacked trustee was to be allowed his costs of employment of two counsel.

**IN RE MADDOCK, BUTT v. WRIGHT, [1899] 2 [Ch. 588; 68 L. J. Ch. 655; 47 W. R. 684; 81 L. T. 320—Cozens-Hardy, J.]**

**304. Administration Action—Real and Personal Estate—Apportionment of Costs—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 1, 2, sub-s. 3.**—The Land Transfer Act, 1897, by vesting real estate in the personal representative and by directing the real estate to be administered in the same way as personal estate, has made no difference in the former settled practice of the Chancery Division that the costs of an administration action, so far only as they have been increased by the administration of the real estate, are to be borne by that real estate.

*In re Middleton* ((1882) 19 Ch. D. 552; 51 L. J. Ch. 273; 30 W. R. 293; 46 L. T. 359—C. A.) followed.

**IN RE JONES, ELGOOD v. KINDERLEY; ELGOOD v. JONES, [1902] 1 Ch. 92, 71 L. J. Ch. 6; 50 W. R. 215; 85 L. T. 608—Buckley, J.]**

**305. Construction of Will—Appeal—Costs of Appearance of Trustees of Will.**—The trustees of a will were served in the ordinary course with

**Costs—Continued.**

notice of appeal in an action relating to the construction of the will, and no intimation was given to them that their appearance at the hearing would not be expected; they accordingly appeared thereat by separate counsel, who was not, however, in the events which happened, called upon to take any part in the proceedings or to assist the Court in any way

**HELD**—that they were entitled to their costs of appearance.

*Carroll v. Graham* ([1905] 1 Ch. 478, 74 L. J. Ch. 398; 53 W. R. 549; 92 L. T. 66—C. A., see TRUSTS, 105) distinguished.

*CATTERSON v. CLARK*, (1906) 95 L. T. 42—C. A.

**306. *Summons by Executor to determine Question of Construction—Devises—Heir-at-Law—Costs—Land Transfer Act***, 1897 (60 & 61 Vict. c. 65).]—The executors of the will of a testator, who died after the Land Transfer Act, 1897, came into operation, asked for the determination of the question whether, under the terms of the will, a certain piece of freehold land was included in the specific devise, or went to the heir-at-law. The will did not contain any general devise of real estate.

**HELD**—that the piece of land passed to the heir-at-law, and as the devisees had failed to make out their title, they were in the same position as to costs as if they had brought an action under the old law.

*IN RE PEEL, WOODCOCK v. HOLROYD*, (1899) [81 L. T. 504—Kekewich, J.]

**307. *Tender for Costs—Chancery Petition—Service on Trustee—R. S. C., Ord. 65, r. 27 (19)***]—Ord. 65, r. 27 (19), as to a tender for costs on service of a petition, does not apply to a trustee whose duty it is to appear and protect the trust fund, the subject-matter of the petition.

*LOWE v. MOORE*. (1906) 22 T. L. R. 640—[Eady, J.]

**(k) Two Defendants.**

**308. *Alternative Claims for Tort—Power to Order Unsuccessful Defendant to pay all Costs—Joinder of Causes of Action—R. S. C., Ord. 16, rr. 4, 7; Ord. 65, r. 1.***]—In an action in the High Court to recover damages against two defendants either jointly or severally for personal injuries caused in a collision by the alleged negligence of both or either of them in the management of their respective vehicles, the jury found a verdict against one defendant, and in favour of the other. The judge ordered that the costs of the successful defendant should be added to the costs of the unsuccessful defendant, and should be paid by the latter, so as to enable the plaintiff to recover all the costs from the unsuccessful defendant.

**HELD**—(1) that he had power to do so, and also that, as the attitude taken up by the unsuccessful defendant made it reasonable for the plaintiff to join the successful defendant, the order was rightly made.

(2) That on appeal it was too late to raise for the first time an objection to the jurisdiction to try an action alleging several torts against two defendants. In any event, Ord 16, rr 4, 7, applies to actions of tort, as well as of contract.

*Sanderson v. Blyth Theatre Co* ([1903] 2 K. B. 533, 72 L. J. K. B. 761; 52 W. R. 33, 89 L. T. 159; 19 T. L. R. 660—C. A., No. 313, *infra*) applied.

*Sudler v. Great Western Ry Co.* ([1896] A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 51—H. L.) distinguished.

Decision of Bray, J. (22 T. L. R. 244) affirmed. *BULLOCK v. LONDON GENERAL OMNIBUS CO.*, [Ld., [1907] 1 K. B. 264, 76 L. J. K. B. 127, 95 L. T. 905; 23 T. L. R. 62—C. A.]

**309. *Enforcing Contribution.***]—Where an order for costs is made against several co-defendants, and one of them pays the whole of such costs, he can enforce his right to contribution in the action without any necessity for taking independent proceedings.

*NEWRY SALT WORKS CO, LD v. MACDONNELL [AND OTHERS]*, [1903] 2 Ir. R. 454—K. B. Div.]

**310. *Injunction against One of Two Defendants with Costs—Whole of the Costs of the Action allowed.***]—The plaintiffs obtained an injunction against the defendant Gavin with costs in an action to restrain the infringement of a copyright. No relief was granted against the co-defendant corporation, Lloyds', the plaintiffs were not given any costs against them, and were not ordered to pay any costs. An order embodying the judgment was drawn up and the defendant Gavin attended at its drawing up. The taxing Master allowed against the defendant Gavin the whole of the plaintiffs' costs of the action. This was objected to by Gavin. On a summons to review.—

**HELD**—that as the order had been drawn up, passed, and entered, the Court was bound by it as it stood; that the Court could not mould or re-frame the order; and that the taxing Master had taken a correct view of what the order meant.

*KELLY'S DIRECTORIES, LD. v. GAVIN AND [LLOYDS']*, [1901] 2 Ch. 763, 70 L. J. Ch. 736; 85 L. T. 399—Byrne, J.]

**311. *Proceedings stayed by Consent against one Defendant—Order on other Defendant to pay Plaintiff's Costs—Costs incurred against First Defendant—Whether included***]—An action was brought against a company and an individual for infringement of a patent. By consent proceedings against the company were stayed, at the trial the other defendant was ordered to pay the plaintiff's costs.

**HELD**—that in the absence of any special direction in the order the costs incurred by the plaintiff against the company were properly included in the taxation.

*Kelly's Directories v. Gavin and Lloyds'* ([1901]

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2 Ch. 763; 70 L. J. Ch. 786; 85 L. T. 399—Byrne, J., *supra*) followed.

**BADISCHE ANILIN UND SODA FABRIK v. HICK-SON**, (1906) 23 R. P. C. 149—Warrington, J.

**312. Same Solicitor appearing for Two Defendants—Judgment for One Defendant with Costs—Disagreement of Jury as to other Defendant.**—Where in an action on a contract two defendants appear and defend by one solicitor, and judgment with costs is entered for one of such defendants, the jury disagreeing as to the other, the successful defendant is only entitled to an aliquot portion of the general costs of the defence, notwithstanding that the action is undetermined as to the remaining defendant.

**MCGOWAN v. HAMILTON**, [1903] 2 Ir. R. 311—[K. B. Div.]

**313. Second Defendant added in consequence of First Defendant's Defence—Costs of Successful (added) Defendant to be paid by Plaintiff—Power to Order Unsuccessful (original) Defendant to repay those Costs to Plaintiff—Ord. 65, r. 1—Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.**—The plaintiff brought an action against a company to recover the price of work done for them at the request of their agent. The company in their defence denied that they or their agent ordered the work. The plaintiff thereupon joined the agent as a defendant, and claimed against him in the alternative the same sum as damages for breach of warranty of authority. The company amended their defence, alleging that the agent had no authority to employ the plaintiff. At the trial the jury gave a verdict for the plaintiff against the company, and the judge entered judgment for the plaintiff against the company, and for the agent, and ordered the plaintiff to pay the agent's costs, and that the plaintiff should recover his costs against the company, including the costs which the plaintiff was adjudged to pay to the agent.

**HELD**—that the judge had jurisdiction to make the order, as the conduct of the company had necessitated the joinder of the agent as a defendant.

**SANDERSON v. BLYTH THEATRE CO. AND [HOPE]**, [1903] 2 K. B. 533; 72 L. J. K. B. 761; 52 W. R. 33; 89 L. T. 159; 19 T. L. R. 660—C. A.

**314. Unsuccessful Defendant to pay Costs of Successful Defendant—Jurisdiction—Discretion—R. S. C., Ord. 16, r. 4, Ord. 65, r. 1.**—There is jurisdiction to order an unsuccessful defendant to pay the plaintiff the costs of the successful defendant. But the judge has discretion, which he ought to exercise judicially, whether under the circumstances he ought to make such an order.

**MULLEN v. LONDON COUNTY COUNCIL**, (1907) [51 Sol. Jo. 82—Jelf, J.]

**XXIV. STAY OF PROCEEDINGS.**

*And see title ARBITRATION.*

**(a) Actions in Different Courts.**

**315. Action in Foreign Country—Application to stay Action in England.**—There is no authority for staying an action in this country merely on account of there being an action pending in a foreign country in respect of the same subject-matter; and certainly it will not be done when the plaintiffs are not the same in the two actions, and the proceedings are not vexatious or oppressive.

**IN THE GOODS OF BRYAN, BOARD OF EDUCATION v. REUBELL, HAND intervening**, (1904) 20 T. L. R. 290—Jeune, P.

**316. Action in King's Bench Division—Defendant commencing Action in Chancery Division—Cross Actions—Refusal to stay Chancery Proceedings, Reasons for.**—A money-lender issued in the King's Bench Division a specially indorsed writ claiming £450 on a promissory note signed by the defendant.

The borrower admitted the facts, but said that various transactions between him and the money-lender were harsh and unconscionable, and a week after the issue of the writ in the King's Bench Division issued a writ against the money-lender in the Chancery Division asking that these transactions might be reopened and for an account.

On a motion by the money-lender that the Chancery action might be dismissed with costs, as an abuse of the process of the Court, or stayed:—

**HELD**—that the motion failed. Although the money-lender's proceedings in the King's Bench Division came first in point of time, and although the King's Bench Division could decide all other questions between the parties on a counter-claim by the borrower, yet the Chancery Division had the better machinery for taking accounts, which, moreover, was assigned to it by the Judicature Act, 1873, s. 34, sub-s. 3, and as a general rule it was preferable to allow that action to go on in which the burden of proof rested on the plaintiff.

Both actions must continue, unless the King's Bench transferred or stayed the King's Bench action, or until the Court of Appeal, which controlled both divisions, had pronounced judgment.

**Thomson v. South-Eastern Ry. Co.** ((1883) 9 Q. B. D. 320; 57 L. J. Q. B. 322; 30 W. R. 537; 46 L. T. 513—C. A.) approved.

**RECHNITZER v. SAMUEL**, (1906) 75 L. T. 75—[Buckley, J.]

On appeal, the C. A. directed all points to be decided in the King's Bench action, on learning that the borrower had consented to an order for that action to be set down for trial forthwith.

**317. Conflicting Orders—English and Colonial Courts—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24.**—An order was made by the

**Stay of Proceedings—Continued.**

Supreme Court of Natal on September 8th. In ignorance of this order the vacation judge made a conflicting order on September 19th.

**HELD**—that there was no jurisdiction to set aside the second order.

NAVAL, MILITARY, AND CIVIL SERVICE CO-  
[OPERATIVE SOCIETY OF SOUTH AFRICA v.  
SERVICES, LD., (1907) 51 Sol. Jo. 13—  
Warrington, J.

**(b) Frivolous and Vexatious Actions.**

**318. Cause of Action arising in Scotland—Inconvenience causing Injustice—Jurisdiction of Court.**—Where an action of a transitory nature is without good reason brought in England by a person domiciled abroad against a person also resident abroad upon a cause of action arising out of the jurisdiction, if the Court is of opinion that there is such vexation and oppression in bringing the action here that the defendant would be subjected to injustice to which he would not be subjected if the action were brought in another accessible and competent Court, the Court ought to stay the action.

LOGAN v. THE BANK OF SCOTLAND AND  
[OTHERS (2), [1906] 1 K. B. 141, 75 L. J.  
K. B. 218, 54 W. R. 270; 94 L. T. 153; 22  
T. L. R. 187—C. A.

**319. Cause of Action arising out of Jurisdiction — Inconvenience causing Injustice to Defendant.**—In 1902 a deed of separation was executed between a husband and wife, who were then resident in India, the husband being an American. A solicitor practising in India was the trustee under the deed. The husband having made default in paying the allowance due under the deed, the wife brought an action in England against the solicitor, alleging that he had so negligently conducted proceedings against her husband in India that she had been unable to recover the moneys due in respect of the allowance. The wife at the time when the writ was issued was temporarily staying at an hotel in England, and the solicitor was served with the writ when he happened to be in England. The wife knew of her alleged cause of action when she was resident in India. Upon an application by the solicitor to stay or dismiss the action:—

**HELD**—that the proper place for the action to be brought was India, the liability, if any, arising under the law of India; that the action was not brought *bonâ fide* in this country, and that there was such injustice to the solicitor in bringing the action in this country that the Court would order it to be dismissed.

*Logan v Bank of Scotland* ([1906] 1 K. B. 141; 75 L. J. K B 218; 94 L. T. 153; 54 W. R. 270; 22 T. L. R. 187—C. A., *supra*) applied.

EGBERT v. SHORT, [1907] 2 Ch. 205; 76 [L. J. Ch. 520; 97 L. T. 90; 23 T. L. R. 558—Warrington, J.

**320. Conditions — Jurisdiction of Judge — R. S. C., Ord. 19, r. 27.**—On an application to

stay proceedings as frivolous and vexatious and an abuse of the process of the Court, the judge has no jurisdiction to impose conditions on his assent to or refusal of the application.

BRIGHT v. KILLEY, (1900) 16 T. L. R. 559—  
[C. A.]

**321. Dismissal.**—A vexatious action ought to be dismissed and not merely stayed.

HARRINGTON v. RAMAGE, (1907) 51 Sol. Jo. 514  
[Kekewich, J.]

**322. Interlocutory Proceedings—Order to Prevent—Costs.**—A defendant made twenty-four interlocutory applications in a pending action, most of which were dismissed, others proving abortive owing to defective service or his own failure to attend. He had paid none of the costs incurred in such applications.

**HELD**—that the Court had jurisdiction to make an order prohibiting any further applications by him under the summons for directions or on matters of procedure except by leave of a judge in chambers.

*Grepe v. Loam* ((1887) 37 Ch. D 168; 57 L. J. Ch. 435; 58 L. T. 100—C. A.) followed.

KINNAIRD (LORD) v. FIELD, [1905] 2 Ch. 306;  
[74 L. J. Ch. 554; 54 W. R. 3; 93 L. T. 147—  
C. A.]

**323. Interlocutory Order in County Court—Subsequent Action in High Court—Identical Question—Inherent Jurisdiction of Court.**—The judgment creditor under an action in a county court agreed to accept from the judgment debtor a smaller sum than that which was due under the judgment, and accordingly executed a deed releasing the judgment debtor from the judgment debt and costs, and covenanting not to tax his costs or take further proceedings under the judgment.

Subsequently he discovered that the deed had been obtained from him by misrepresentation, and applied to the county court judge for an order to tax his costs.

Upon hearing evidence on both sides, the county court judge held that the deed had been obtained through the fraud of the judgment debtor, and he ordered the bill to be taxed and paid by the judgment debtor, together with the balance due under the judgment.

An action was then commenced by the judgment debtor in the High Court for a declaration that he had been released by the judgment creditor from the judgment debt, and for an injunction to restrain him from further proceedings to enforce payment.

Upon a summons to stay the High Court action:—

**HELD**—that since the county court judge had jurisdiction to decide upon, and had decided upon, the validity of the deed of release, and the question raised in the High Court action was identical with that decided by the county court judge, the action ought to be stayed as frivolous

**Stay of Proceedings—Continued.**

and vexatious and an abuse of the process of the Court.

STEPHENSON *v.* GARNETT, [1898] 1 Q. B. 677; [67 L. J. Q. B. 447, 78 L. T. 371; 46 W. R. 410—C. A.]

**324. Interlocutory Order in County Court—Subsequent Action raising same Point.**—The Court is slow to dismiss an action as frivolous and vexatious.

In 1880 W. let premises to M for 95 years. In 1881 M. demised the term less three days at a peppercorn rent to H to secure advances now amounting to £8,000. In 1882 M bought the fee and in 1885 conveyed it for value to F. subject to the lease of 1880.

In 1902 in M.'s bankruptcy the county court registrar ordered that H.'s representatives should be excluded from all interest in the lease unless they accepted a vesting order with a rent equal to that payable by M. They did not appeal, but now asked for a declaration that a merger took place in 1882, and that the only subsisting term was that created in 1881.

HELD—that there was a question to be tried, and that the action ought not to be stayed as frivolous and vexatious.

Decision of Eady, J., ((1904) 89 L. T. 744) affirmed.

LEA *v.* THURSBY, (1904) 90 L. T. 265—C. A.

**325 Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), s. 1.**—The defendants, members of the Wellington-borough Permanent Allotments Association, in the actions brought by the plaintiff, were all persons in the same rank of life as the plaintiff, men of humble position. The plaintiff had issued five writs, and had filed five statements of claims in respect of the same subject-matter. Every one of these actions had been stayed, and the last was dismissed as frivolous and vexatious. There was also a statement in the affidavit made by the secretary of the association, registered under the Industrial and Provident Societies Act, 1876, that the plaintiff said that he had no means and meant to make the association spend its money.

HELD—that as the effect of the order asked for would not be to stop the plaintiff altogether from taking any proceedings, but to enable the plaintiff to obtain the leave of a judge before instituting fresh proceedings, an order must be made that no legal proceedings should be instituted by the plaintiff unless he obtained the leave of a judge, after having satisfied him that such legal proceedings were not an abuse of the process of the Court, and that there was *prima facie* ground for them.

IN RE JONES, (1902) 18 T. L. R. 476—Div. Ct.

**(c) Miscellaneous.**

**326. Abuse of Process—Ulterior Motive.**—The motive of a party who commences proceedings before a Court, however reprehensible, is not enough to make it an abuse of process or a fraud

upon the Court, unless it be shown that the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others.

KING *v.* HENDERSON, [1898] A. C. 720, 67 [L. J. P. C. 134; 79 L. T. 37; 14 T. L. R. 190, 47 W. R. 157—P. C.]

**327. Amount tendered by Judgment Debtor and refused—Act of Bankruptcy already committed—Jurisdiction to stay Proceedings—Discretion.**—The plaintiff had signed two judgments, for £32 and £41 respectively, against the defendant, and served a bankruptcy notice in respect of the latter. The defendant then tendered the amount due on the smaller judgment, and, upon the plaintiff refusing to accept it, applied to the judge in chambers.

The judge made an order staying all proceedings on the £32 judgment upon payment of that sum; he knew that at the time the defendant had committed an available act of bankruptcy.

HELD—that the order was improperly made.

BROOK *v.* EMERSON, (1907) 95 L. T. 821—C. A.

**XXXV. MISCELLANEOUS**

**328. District Registrar — Jurisdiction — R. S. C., Ord. 35, rr. 1—6.**—Under Ord 35, r. 6, a district registrar has a concurrent jurisdiction to set aside a final judgment which has been obtained in the district registry.

Hood & Sons *v.* Yates ([1894] 1 Q. B. 240) considered.

TOWNEND *v.* KIRKMAN, [1898] 1 Q. B. 51; 67 [L. J. Q. B. 5; 77 L. T. 419; 46 W. R. 65—C. A.]

**329. Middlesex Registry — Rectification of Register—Jurisdiction—Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 61), s. 1—Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 95—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7, sub-s. 2**—The Court now has power to order the Register of Middlesex Deeds to be rectified, and, in exercise of this jurisdiction, ordered the registration of certain forgeries purporting to be assignments of leaseholds in Middlesex, dated in 1887, and also the registration of certain mortgages dated in 1898 of the same property to be vacated.

STEPHENSON *v.* YORKE, [1900] 1 Ch. 505; 69 [L. J. Ch. 253; 48 W. R. 430; 82 L. T. 55—Buckley, J.]

**330. Receiver—Ejectment Action—Defendant in Possession—Disputed Title—Tenants—Discretion—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.**—On applications in ejectment actions for the appointment of a receiver the circumstances of each particular case must be considered, and where it appeared to the Court that the plaintiff would probably succeed, and the defendant was a person of small means, so that the tenants were exposed to the risk of being



**Miscellaneous—Continued.**

called on to pay their rent twice over, the Court appointed a receiver until the trial of the action.

*Fowell v. Van Grutten* ([1897] 1 Ch. 64) considered.

*JOHN v. JOHN*, [1898] 2 Ch. 573; 67 L. J. Ch [616; 79 L. T. 362; 14 T. L. R. 583; 47 W. R. 52—C. A

**331. Short Causes without Pleadings—Copies of Affidavits for Judge.**—In actions coming on as short causes without pleadings or notice of motion copies of the affidavits should be left with the papers for the use of the judge

*IN RE CHURCH STRETTON MINERAL WATER* [Co., LD., (1904) 52 W. R. 375—Byrne, J.

**332. Liability to Apply—Implied where Judgment not final—Correction of Order.**—Although in all orders of the Court, where the order is not final, liberty to apply is implied though not expressed, the Court will in a proper case correct the order under Ord. 28, r. 11, by adding to it the words "liberty to apply."

*WEBSDELL v. JENKINS*, (1902) 46 Sol. J. 484—Byrne, J.

**333. Commission to examine Witnesses—Liberty to Other Party to also examine Witnesses—Party obtaining Order to Pay in the First Instance all Fees and Expenses—R. S. C., Ord. 37, r. 50**—Where one party obtains an order for the examination of witnesses before an examiner, and the order gives liberty to the other side to also examine witnesses, the party obtaining the order may, upon the true construction of Ord. 37, r. 50, be ordered to pay in the first instance to the examiner all his fees and expenses, including those attributable to the examination of the witnesses of the other party.

*LINLEY v. HOULDER*, (1903) 88 L. T. 829—C.A.

**334. Examination of Witnesses out of Jurisdiction—Order to send Property in Dispute for Inspection by Witnesses—Jurisdiction—R. S. C., Ord. 37, r. 5; Ord. 50, r. 3.**—The Court or a judge has power, under Ord. 37, r. 5, and Ord. 50, r. 3, to order that property, the subject of a cause or matter, shall be sent out of the jurisdiction for inspection by witnesses who are to be examined by commission.

*CHAPLIN v. PUTTICK*, [1898] 2 Q. B. 160; 67 [L. J. Q. B. 516; 78 L. T. 410; 14 T. L. R. 365; 46 W. R. 481—C.A.

**335. Witness—Prematurely Serving—Subpoena ad testificandum—Abuse of Process of Court—R. S. C., 1883, Ord. 37, rr. 26—34.**—Although a subpoena ad testificandum may be issued at any time, the Court will set aside the service of a subpoena which is issued at a time when it cannot be effective by any possibility, and can only be oppressive to the witness.

*LONDON AND GLOBE FINANCE CORPORATION v. KAUFMAN*, (1900) 69 L. J. Ch. 196; 48 W. R. 458; 16 T. L. R. 62—North, J.

**PRESCRIPTION.**

See EASEMENTS; HIGHWAYS; MINES AND MINERALS; REAL PROPERTY AND CHATTELS REAL; WATERS AND WATERCOURSES.

**PRESS AND PRINTING.**

See also GAMING AND WAGERING; LIBEL; PRACTICE AND PROCEDURE, 90; TORTS. 7.

**1. Action against Newspaper—Conspiring to keep Advocate's Name out of Newspaper—Reports of Cases.**—An action will not lie by a solicitor against the proprietors of Sunday newspapers for conspiring to keep his name out of reports of cases in which he has been engaged as advocate  
*SHARP v. FEENEY & Co.*, (1898) 14 T. L. R. 185 [—Hawkins, J

**2. Action against Newspaper for Libel—Apology with Payment into Court**—The defendants in an action of libel pleaded an apology which was admitted to be insufficient, with payment into Court of the sum of £50 under 6 & 7 Vict. c. 96. The plaintiff recovered judgment for £35.

**HELD**—that the defence had failed and that the plaintiff was entitled to his costs

*SLEY v. TILLOTSON*, (1898) 62 J. P. 505; 14 [T. L. R. 545—Bruce, J., Manchester Assizes.

**3. Newspaper giving Advice—Negligence—Damages—Remoteness—Intervening Crime.**—The plaintiff bought a copy of a newspaper which was owned and published by the defendants, and in which the City editor gave advice to intending investors and upon application recommended stockbrokers to them. The plaintiff wrote to the newspaper asking for a safe investment paying 5 per cent., and also for the name of a stockbroker, and the City editor handed the plaintiff's letter to an "outside" broker, asking him to answer it and authorising him to introduce himself to the plaintiff. The broker thereupon wrote to the plaintiff and recommended him to purchase certain stocks (as to which no question was raised), and upon the plaintiff sending him the money the broker, who, unknown to the defendants or their City editor, was an undischarged bankrupt, applied it to his own use and did not invest it. In an action to recover from the defendants the amount sent to the broker it was admitted that the defendants had committed a breach of contract or duty towards the plaintiff, but it was contended that the damages claimed were too remote.

**HELD**—that even if the broker committed a criminal offence by converting the money to his own use, the defendants' negligence or breach of contract in recommending the broker to the

**Press and Printing—Continued.**

plaintiff was the primary and substantial cause of the loss, and that therefore the plaintiff was entitled to recover.

Decision of Lord Alverstone, C. J., ([1907] 1 K. B. 483 ; 76 L. J. K. B. 309 ; 96 L. T. 425 ; 23 T. L. R. 264) affirmed.

DE LA BERE v. C. A. PEARSON, LD., (1907), 24 [T. L. R. 120—C. A.

4. *Newspaper — Publication — "Sporting Paper" — Racing Intelligence — Betting Odds — Amateur Athletics.*—A newspaper is published when and where it is offered to the public, and may be published at more than one place at the same time. A newspaper which excludes racing and betting intelligence is not a "sporting paper" within the meaning of an agreement framed to protect the copyright of papers specially connected with horse-racing; though such newspaper is devoted to "sports" such as cricket, football, cycling, running, &c.

McFARLANE v. HULTON, [1899] 1 Ch. 884 ; 68 [L. J. Ch. 408 ; 47 W. R. 507 ; 80 L. T. 486—Cozens-Hardy, J.

**PRESTON COURT OF PLEAS.**

*See* COURTS.

**PRESUMPTION AS TO DOCUMENTS AND FACTS.**

*See* EVIDENCE ; SALE OF LAND.

**PREVENTION OF CRIMES.**

*See* CRIMINAL LAW AND PROCEDURE.

**PREVENTION OF CRUELTY TO CHILDREN.**

*See* CRIMINAL LAW AND PROCEDURE.

**PRINCIPALS AND ACCESSORIES.**

*See* CRIMINAL LAW AND PROCEDURE.

**PRINCIPAL AND AGENT.**

*See* AGENCY.

**PRINCIPAL AND SURETY.**

*See* BANKRUPTCY AND INSOLVENCY ;  
BILLS OF EXCHANGE ; GUARANTEE.

**PRISONS AND REFORMATORIES.**

1. *Industrial Schools — Notice to Parent of Charge against Child — Necessity for Notice before sending Child to such School — Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), s. 15.*—Although when a parent's address is known, especially if he is a reputable person, magistrates would do well to give him notice before they decide to send his child to an industrial school, yet the statute does not actually require them to give such notice.

HUNTER v. WADDELL, (1906) 7 F. 61—Cl. of [Justiciary.

**PRIVATE INTERNATIONAL LAW.**

*See* CONFLICT OF LAWS.

**PRIVATE STREET WORKS.**

*See* HIGHWAYS ; METROPOLIS.

**PRIVATE WAYS.**

*See* EASEMENTS.

**PRIVILEGE.**

*See* DISCOVERY ; EVIDENCE ; EXECUTION ; LIBEL AND SLANDER ;  
RATES.

**PRIVY COUNCIL.**

*See* COURTS ; DEPENDENCIES AND  
COLONIES.

**PRIZE FIGHTING.**

*See* CRIMINAL LAW AND PROCEDURE.

**PROBATE DUTY.**

*See* DEATH DUTIES.

**PROBATE OF WILLS.**

*See* EXECUTORS AND ADMINISTRATORS.

**PROCESS.**

*See* PRACTICE AND PROCEDURE.

**PROFITS À PRENDRE.**

*See* EASEMENTS AND PROFITS À PRENDRE.

**PROMISSORY NOTE.**

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

**PROPERTY TAX.**

*See* INCOME TAX ; REVENUE.

**PROSTITUTION.**

*See* CRIMINAL LAW AND PROCEDURE.

**PROVIDENT SOCIETIES.**

*See* INDUSTRIAL AND PROVIDENT SOCIETIES.

**PROXIES.**

*See* COMPANIES, 136, 226—229.

**PUBLIC AUTHORITIES AND PUBLIC OFFICERS.**

I. THE PUBLIC AUTHORITIES PROTECTION ACT, 1893.	COL.
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*And see* LOCAL GOVERNMENT ; METROPOLIS ; PATENTS, 217 ; PUBLIC HEALTH, 61, 62.

**I THE PUBLIC AUTHORITIES PROTECTION ACT, 1893.****(a) Application of Act.**

1. *Action between Councils to set aside an Agreement—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).*]

*HELD*—that the provisions of the Public Authorities Act, 1893, had no application to an action in which one local authority sought as against another to set aside an “adjustment” agreement between them on the ground that such agreement had been entered into under a misapprehension as to the law.

*HOLSWORTHY URBAN DISTRICT COUNCIL v. [HOLSWORTHY RURAL DISTRICT COUNCIL, [1907] 2 Ch. 62 ; 76 L. J. Ch. 389 ; 71 J. P. 330 ; 23 T. L. R. 452—Warrington, J.*

*And see* No. 26, *infra*.

2. *Action in rem—Action “Against any Person”—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.*—An action *in rem* does not fall within sect. 1 of the Public Authorities Protection Act, 1893, and therefore can be commenced after the expiration of six months next after the act, neglect, or default complained of.

*The Longford (1889) 14 P. D. 34 ; 58 L. J. P. 33 ; 60 L. T. 373 ; 37 W. R. 372 ; 6 Asp. M. C. 371—C. A.) followed.*

*Decision of Deane, J. (23 T. L. R. 258) affirmed*

*THE BURNS, [1907] P. 137 ; 76 L. J. P. 41 ; [71 J. P. 193 ; 96 L. T. 684 ; 23 T. L. R. 323 ; 5 L. G. R. 676—C. A.*

3. *Action of Deceit — Contract — Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.*—The Public Authorities Protection Act, 1893, limiting the time within which an action may be commenced against a public authority, does not apply to an action brought by a contractor where the cause of action alleged is a fraud which induces him to make his contract with the authority.

*Decision of C. A. (Ir.) ([1907] 2 Ir. R. 82) reversed.*

*PEARSON v. DUBLIN CORPORATION, [1907] [A. C. 351 ; [1907] 2 Ir. R. 537—H. L. (Ir.).*

4. *Commercial Company—Act done in Execution of Private Act or Public Duty or Authority —Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a).*—A company incorporated by private Act of Parliament for the purposes of completing and maintaining a pier and harbour, and empowered to raise money by rates and dues to be applied for those purposes, and also for the purpose of paying to the shareholders

**Public Authorities Protection Act—Continued.**

a yearly dividend limited in amount, is a commercial company and not a company acting in the execution of statutory or other public duties within the benefit of the Public Authorities Protection Act, 1893.

Dictum of Jeane, P., in *The Ydun* ([1899] P. 236, 239; 68 L. J. P. 101; 81 L. T. 10; 15 T. L. R. 361; 8 Asp. M. C. 551—C. A., No. 142, *infra*) followed.

**ATTORNEY-GENERAL v. COMPANY OF PROPRIETORS OF MARGATE PIER AND HARBOUR**, [1900] 1 Ch. 749; 69 L. J. Ch. 331; 64 J. P. 405; 48 W. R. 518; 82 L. T. 448—Kekewich, J.

**5. Breach of Contract—Transfer of Officer—Abolition of Office—Dismissal without Notice—Compensation—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)—London Government Act, 1899 (62 & 63 Vict. c. 14), s. 30.**—An officer of a metropolitan borough council, whose office is abolished under sect. 30 of the Local Government Act, 1899, is only entitled to compensation as prescribed by the section, and has no right of action against the council for damages in lieu of notice, although he was appointed by the predecessors of the council under an agreement giving him three months' notice.

The Public Authorities Protection Act does not apply where the cause of action is the breach of a contract, and not the abolition of an office in accordance with statutory provisions.

**CLARKE v. LEWISHAM BOROUGH COUNCIL**, [1903] 67 J. P. 195; 19 T. L. R. 62; 1 L. G. R. 63—Bigham, J.

**6. Commercial Company—Liability for Repairing Road—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—The Public Authorities Protection Act, 1893, does not protect commercial companies; and when the liabilities and powers of such a company are transferred to a public authority, such authority cannot rely upon the statute any more than their predecessors could have done.

Where an authority, having control of roads, are by statute empowered to recover the expense of repairing them from a water company which has broken them open and failed to reinstate them, the provisions of the Act of 1893 do not apply to a claim for the expenses incurred.

**LANARKSHIRE UPPER WARD DISTRICT COMMITTEE v. AIRDRIE, COATBRIDGE AND DISTRICT WATER TRUSTEES**, (1906) 8 F. 777—Ct. of Sess.

**7. Contractors for Public Authority—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—The limitation of time in sect. 1 of the Public Authorities Protection Act, 1893, does not apply to an Act of misfeasance committed by an independent contractor, not being an authority's servant or agent, but executing work

in performance of his private obligations under his contract with the authority.

**KENT COUNTY COUNCIL v. FOLKESTONE CORPORATION**, [1905] 1 K. B. 620; 74 L. J. K. B. 352; 69 J. P. 125; 53 W. R. 371; 92 L. T. 309; 21 T. L. R. 269; 3 L. G. R. 438—C. A.

**8. Contractors for Public Authority—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).**—Contractors carrying out under a contract for their own benefit work, which a local authority are by a statute empowered to do, are not within the protection of the Public Authorities Protection Act, 1893.

*Kent County Council v. Folkestone Corporation* (*supra*), followed.

**TILLING, LD. v. DICK, KERR & CO., LD.**, [1905] 1 K. B. 562; 74 L. J. K. B. 359; 69 J. P. 172; 53 W. R. 380; 92 L. T. 731; 21 T. L. R. 281; 3 L. G. R. 369—Warrington, J.

**9. Debts of Guardians—Period for Payment—Limitation—Time Running from date of Ascertainment of Amount—Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), s. 1—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—A contractor agreed for a lump sum to execute building works for a board of guardians under a contract containing an arbitration clause. Eleven months after the completion of the work the contractor demanded arbitration, alleging that he had suffered damage in consequence of the work being delayed through the default of the guardians and alterations required by them.

**HELD**—(1) that, as the amount due was uncertain until the arbitrator made his award, the claim was not barred by sect. 1 of the Poor Law (Payment of Debts) Act, 1859; and (2), that it was not barred by the Public Authorities Protection Act, 1893, sect. 1 of that Act not applying, as the claim was one in respect of a private duty arising out of a contract, and not of negligence in performing a statutory duty.

**SHARPINGTON v. FULHAM GUARDIANS**, [1904] 2 Ch. 449; 52 W. R. 617; 73 L. J. Ch. 777; 68 J. P. 510; 20 T. L. R. 643; 91 L. T. 739—Farwell, J.

**11. "In case of a continuance of damage or injury"—Meaning of—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—The words "in case of a continuance of damage or injury" in sect. 1 of the Public Authorities Protection Act, 1893, do not mean or refer to damage inflicted once and for all which remains unrepaired, but a new damage recurring day by day in respect of an act either done once and for all at some prior date, or repeated from day to day.

**HARRINGTON (EARL OF) v. DERBY CORPORATION**, [1905] 1 Ch. 205; 69 J. P. 62; 92 L. T. 153; 21 T. L. R. 98; 3 L. G. R. 321—Buckley, J.

**12. Letting Town Hall for Entertainments—Breach of Agreement—Action by Lessee—Public**

**Public Authorities Protection Act—Continued.**

*Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.*—The magistrates of a Scotch burgh let the town hall to A. for the purpose of a public entertainment. On the day fixed they refused to allow him to use the hall. After a lapse of seven months he sued them for breach of contract.

HELD—that they were not within the protection of sect. 1 of the Act of 1893 since they were not acting in pursuance of any public duty.

MOPHIE v. GREENOCK MAGISTRATES, [1905] 7 [F. 246—Ct. of Sess.

**13 Medical Practitioner, Action against—Infectious Disease—Mistaken Diagnosis and Notification—Claim for Damages—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**

*Semble*, a medical practitioner in private practice, who gives the statutory notification in a case of illness, erroneously diagnosed by him, is within the scope of the Public Authorities Protection Act, 1893; and, if he has been guilty of negligence in giving such notification, any action in respect of such negligence must be commenced within six months.

SALISBURY v. GOULD, [1904] 68 J. P. 158—[Grantham, J.

**14. Neglect in Execution of Statute—Six Months' Limitation of Action—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), ss. 1, 3—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—The defendants, as part of their public duty under the Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1898, maintained a hospital, in which the plaintiff's husband was a patient. A nurse, who was a servant of the defendants, and part of whose duty it was to give medicine to the patients, administered to him a sleeping draught, which was so strong as to prove fatal. His widow, more than six months after her husband's death, but within twelve months, brought an action against the defendants, alleging negligence on the part of the nurse. The defendants claimed the protection of the Public Authorities Protection Act, 1893.

HELD—that the Public Authorities Protection Act, 1893, does not interfere with the Fatal Accidents Act, 1846, except that as to certain classes a different time limit is imposed and the action should have been brought within six months, calculated from the death of the deceased, and that judgment must be for the defendants.

MARKEY v. TOLWORTH JOINT ISOLATION [HOSPITAL BOARD, [1900] 2 Q. B. 454; 69 L. J. Q. B. 738; 64 J. P. 547; 83 L. T. 28; 16 T. L. R. 411—Div. Ct.

**15. Officer Commanding Volunteer Corps—Alleged Negligence on Duty—Accident due to—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—An action was brought against the commanding officer of a volunteer corps in respect of a street accident alleged to be due to his negligence in selecting horses and

drivers for an ammunition waggon. Six months had elapsed before proceedings were instituted.

HELD—that, as the cause of action alleged was his neglect of duty in his public capacity of commanding officer training his corps, the action was barred by sect. 1 of the Public Authorities Protection Act, 1893.

WILSON v. MACKAY AND OTHERS, [1905] 7 [F. 168—Ct. of Sess.

**16. Repair of Highway—Contract by Local Authority to Pay if liable to Repair—Limitation of Six Months—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—A landslip occurred upon a highway repairable by the defendant council whereby part of the road fell on to the plaintiffs' land. The plaintiffs wrote offering to execute the necessary repairs if instructed to do so by the council, the question of liability to be dealt with afterwards. The defendant council replied asking the plaintiffs to proceed with the repairs upon those terms. The work was completed, and after the expiration of six months this action was brought to recover the sum of £109 12s. 1d. for work done and materials supplied for, and at the request of, the defendant council. The question arose whether the action was maintainable having regard to the provisions of sect. 1 of the Public Authorities Protection Act, 1893, because it was not brought within six months.

HELD—that the road was not destroyed, but was repairable by the council, that the real action as brought on the contract was not within the Act, which does not apply to actions for the price of goods sold and delivered and for work and labour done; that a contract was made to the effect that if the plaintiffs executed the repairs and the defendant was liable to repair the road, then the council would pay the cost of the work to the plaintiffs; and that the action was maintainable.

MILFORD DOCKS CO. v. MILFORD HAVEN [URBAN DISTRICT COUNCIL, [1901] 65 J. P. 483—C. A.

And see title HIGHWAYS.

**17. Tramways worked by Local Authority—Negligence—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—A local authority, by virtue of certain private and local Acts of Parliament, obtained the power to acquire, and work certain tramways. A passenger on one of the tramways who sustained personal injuries, caused by the alleged negligence of the local authority's servants, commenced an action to recover damages for such injuries more than six months after the injuries were sustained.

HELD—that the local authority were protected by the Public Authorities Protection Act, 1893, s. 1, and that therefore the action was barred by the limitation imposed by that section.

PARKER v. LONDON COUNTY COUNCIL [1904] [2 K. B. 501; 73 L. J. K. B. 561; 68 J. P. 239; 52 W. R. 476; 90 L. T. 415; 20 T. L. R. 271; 2 L. G. R. 662—Channell, J.

**Public Authorities Protection Act—Continued.**

**18. Tramways — Duty to Carry — Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—A local authority, by virtue of an order made by the Light Railway Commissioners under the Light Railways Act, 1896, and confirmed by the Board of Trade, obtained the power to construct and work electric tramways, the local authority being bound to provide such a service of cars as might be reasonably required in the public interest. A passenger in one of the tramcars who sustained personal injuries, caused by the alleged negligence of the local authority's servants, commenced an action to recover damages for such injuries more than six months after the injuries were sustained.

**HELD**—that the plaintiffs' cause of action did not depend upon a contract, but arose out of the defendants' duty under their order to carry him safely; and that, therefore, the defendants were protected by the Public Authorities Protection Act, 1893, s. 1, and the action was barred by the limitation imposed by that section.

*Quære*, whether an ordinary trading company is a "person" within the protection of the Act.

*Palmer v. Grand Junction Ry. Co.* ((1839) 4 M. & W. 749); and *Carpue v. London and Brighton Ry. Co.* ((1844) 5 Q. B. 747) distinguished.

*The Ydan* ([1899] P. 236; 68 L. J. P. 101; 81 L. T. 10; 8 Asp. M. C. 551—C. A., No. 42, *infra*); and *Parker v. London County Council* ([1904] 2 K. B. 501; 73 L. J. K. B. 561; 68 J. P. 239; 52 W. R. 476; 90 L. T. 415; 20 T. L. R. 271—Channell, J., No. 17, *supra*) followed.

**LYLES v. SOUTHEAST-ON-SEA CORPORATION**, [1905] 2 K. B. 1; 74 L. J. K. B. 484; 69 J. P. 193; 92 L. T. 586; 21 T. L. R. 389; 3 L. G. R. 691—C. A.

**19. Tramways—"Continuance of Injury or Damage"—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—Local authorities carrying on under statutory powers such profit-earning undertakings as tramways are within the protection of the Public Authorities Protection Act, 1893.

A mere continuance of the injurious effects or damage caused by an accident is not a "continuance of injury or damage" within the meaning of sect. 1 of that statute.

**SPITTAL v. GLASGOW CORPORATION**, (1905) 6 [F. 828—Ct. of Sess.

**20. Trustees of Loan Society—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).**—The Public Authorities Protection Act, 1893, only applies to Acts done and to neglects and defaults in the execution, or intended execution, of an Act of Parliament, or of a public duty or authority. It has no application in the case of trustees of a loan fund society sued for breach and neglect of their duties as such trustees.

**O'BRIEN v. MITCHELSTOWN LOAN FUND**, [1903] [1 Ir. R. 282—C. A.

**(b) Costs as Between Solicitor and Client.**

**21. Action for a Declaration—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**

—The plaintiffs, being about to erect certain buildings upon land belonging to them within the defendants' district, were served by the defendants with notice that if they did so legal proceedings would be taken against them for infringing the provisions of the Public Health (Buildings in Streets) Act, 1888. The plaintiffs thereupon brought an action against the defendants for a declaration that they were entitled to erect the contemplated buildings without the consent of the defendants. The action was dismissed with costs.

**HELD**—that it was an action within sect. 1 of the Public Authorities Protection Act, 1893, and consequently that the defendants were entitled to their costs as between solicitor and client.

**GRAND JUNCTION WATERWORKS CO. v. HAMP-  
TON URBAN DISTRICT COUNCIL**, (1899) 63 J. P. 503; 15 T. L. R. 412—Stirling, J.

**22. Action for Negligence — Corporation — Statutory Powers—Electric Lighting Provisional Order—"Public Duty or Authority"—Negligence—Action—Judgment for Corporation—Costs as between Solicitor and Client—Appeal—Party and Party Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b).**—The defendants, in lighting or providing for the lighting of the streets of Bradford, acquired some land which adjoined a stream, and upon that they proceeded to erect certain sluices, the object of which was to divert the stream so as to supply motive power for the driving of the electric machinery placed in the works which they erected on the adjoining land. In 1890 a heavy thunderstorm burst over the Bradford Valley, filling the Bradford Beck and causing a flood, which the plaintiffs alleged, by reason of the obstruction of the sluices and the consequent heading back of the water, forced up the covering of the stream on to the plaintiffs' premises, causing damage to large quantities of goods and machinery belonging to the plaintiffs, for which they sued the corporation, and on the trial of which judgment was given in favour of the corporation, with costs as between party and party.

**HELD**—that the defendants in lighting or providing for the lighting of the streets of Bradford under the powers conferred upon them by their provisional order, were acting in execution of a "public duty or authority" within the meaning of sect. 1 (b) of the Public Authorities Protection Act, 1893; that the judgment obtained by the Bradford Corporation carried costs, to be taxed as between solicitor and client; and that the appeal would be allowed, with costs as between party and party.

**JEREMIAH AMBLER & SONS, LD. v. BRADFORD CORPORATION**, [1902] 2 Ch. 585; 71 L. J. Ch. 744; 66 J. P. 708; 87 L. T. 217; 18 T. L. R. 758—C. A.

**23. Appeals—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—Sect. 1 of the Public Authorities Protection Act, 1893, gives

**Public Authorities Protection Act—Continued.**

a right to solicitor and client costs in actions for injunctions, as well as in actions for damages; but it does not apply to interlocutory appeals.

Decision of C. A. ([1899] 1 Ch. 1, 67 L. J. Ch. 611; 47 W. R. 295; 79 L. T. 281; 14 T. L. R. 566, affirmed.

**FILDEN v. MORLEY CORPORATION**, [1900] A. C. 133, 69 L. J. Ch. 314; 64 J. P. 481; 48 W. R. 545; 82 L. T. 29; 16 T. L. R. 219—H. L. (E.)

**25. Abating Nuisance on Highway**—Where a district council abate an encroachment upon a main road vested in the county council, and successfully defend an action brought against them for so doing, they are entitled to costs as between solicitor and client.

**HARVEY v. TRURO RURAL DISTRICT COUNCIL**, [1904] 68 J. P. 51—Joyce, J.

**26. Alteration of Areas—Adjustment of Property and Liabilities—Power to Compromise—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 62—Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61)**—In 1900 a district which had previously formed part of a rural district was constituted a separate urban district. After considerable negotiations between the councils of the rural and urban districts as to the adjustment of the property, income, debts, liabilities and expenses affected by the separation, under sect. 62 of the Local Government Act, 1888, an agreement was come to whereby a considerable sum was to be paid by the urban council to the rural council in settlement of (among other claims) an estimated annual loss in income owing to the transfer of rateable area from the rural district to the urban district.

The urban council now brought an action against the rural council in which they alleged that the agreement was *ultra vires* and not binding upon them, as, according to a recent decision of the House of Lords (*see supra*), the rural council was not entitled to any payment as compensation for loss of area.

**HELD**—that the agreement having been made *bonâ fide* between the councils in settlement of their respective claims, the fact that one of the claims put forward *bonâ fide* by one of the parties was not well founded in law was no ground for setting aside the compromise, and that the action failed.

**HELD**, also, that the defendants were not entitled to costs as between solicitor and client, under the Public Authorities Protection Act, 1893, the action not being brought by the plaintiffs for any act done by the defendants.

**HOLSWORTHY URBAN DISTRICT COUNCIL v. HOLSWORTHY RURAL DISTRICT COUNCIL**, [1907] 2 Ch. 62; 76 L. J. Ch. 389; 91 J. P. 330; 23 T. L. R. 452; 5 L. G. R. 791—Warrington, J.

**27. Consent Order—Dismissing Action with Costs—Judgment—Public Authorities Protection**

*Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b).*—An action for trespass and an injunction was brought against a county council. Before trial a consent order was made that the action be dismissed and that the plaintiff do pay to the defendants their costs of the action to be taxed.

**HELD**—that such consent order was a final “judgment,” and sect. 1 (b) of the Public Authorities Protection Act, 1893, which makes it imperative that the costs should be taxed as between solicitor and client, applied. Sect. 1 (b) does not apply to the costs of an appeal.

**SHAW v. HERTFORDSHIRE COUNTY COUNCIL**, [1899] 2 Q. B. 282; 68 L. J. Q. B. 857, 63 J. P. 659; 81 L. T. 208, 15 T. L. R. 462—C. A.

**28. Construction of Contract—Act done in Pursuance of an Act of Parliament or of Public Duty or Authority—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—By an agreement a public authority had, in pursuance of statutory authority, given to the plaintiffs certain powers, reserving to itself the right, by duly giving notice, to determine those powers. The public authority gave notice to the plaintiffs to determine the powers. In an action by the plaintiffs against the public authority, seeking declarations that the notice to determine had not been duly given, and that, by reason of the subsequent passing of an Act of Parliament, the public authority had become incapacitated from determining the powers, the plaintiffs were unsuccessful.

**HELD**—that the act done by the public authority which gave rise to the action was not done in pursuance of an Act of Parliament or of any public duty or authority, and that the plaintiffs were liable to pay to the public authority costs taxed as between party and party only, and not as between solicitor and client.

**NATIONAL TELEPHONE CO., LD. v. CORPORATION OF KINGSTON-UPON-HULL**, (1903) 68 J. P. 62, 1 L. G. R. 777; 52 W. R. 26—Buckley, J.

**29. Discretion of Judge to deprive Successful Authority of Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b).**—The above section takes away the judge's discretion to deprive a successful authority of their costs, and compels him to give them costs to be taxed as between solicitor and client.

**CREE v. ST. PANCRAS VESTRY**, [1899] 1 Q. B. 693; 68 L. J. Q. B. 389; 80 L. T. 388—Bruce, J.

[This decision was dissented from by C. A. in *Bostock v. Ramsey Urban District Council*, *infra*, and may be regarded as overruled.]

**30. Discretion of Judge to deprive Successful Authority of Costs—“Good Cause”—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b)—Ord. 65, r. 1.**—The power given by Ord. 65, r. 1, to the judge at the trial of an action to deprive a successful party of costs is not taken away or affected by sect. 1 (b) of

**Public Authorities Protection Act—Continued.**

the Public Authorities Protection Act, 1893; and, therefore, if in an action brought against a public authority for any act done in pursuance of any Act of Parliament or of any public duty or authority, judgment is obtained by the defendants after a trial with a jury, the judge has, for good cause, a discretion to deprive the successful defendants of costs; and in determining what is good cause, the judge may take into consideration the antecedent conduct of the party which led to the litigation.

*Cree v. St. Pancras Vestry* ([1899] 1 Q. B. 693; 68 L. J. Q. B. 389, 80 L. T. 388, *supra*—Bruce, J.) not followed.

Judgment of Lord Russell of Killowen, L.C.J. ([1900] 1 Q. B. 357; 69 L. J. Q. B. 108, 64 J. P. 150; 48 W. R. 254; 81 L. T. 756; 16 T. L. R. 96) affirmed.

**BOSTOCK v. RAMSEY URBAN DISTRICT COUNCIL.** [1900] 2 Q. B. 616; 69 L. J. Q. B. 945; 64 J. P. 660; 83 L. T. 358; 16 T. L. R. 520—C. A.

**31. Discretion of Judge—Judicature Act, 1873** (36 & 37 Vict. c. 66), s. 49—*Ord. 65, r. 1—Public Authorities Protection Act, 1893* (56 & 57 Vict. c. 61), s. 1 (b).—An action was brought with respect to four rights of way. A public authority was one of the defendants, and succeeded in establishing the existence of three rights of way, but failed as to the most important. The judge who tried the action held that the plaintiffs had substantially succeeded and that the public authority was not entitled under the Public Authorities Protection Act, 1893, s. 1 (b), to the whole costs of the action, except so far as they had been increased by the claim in respect of which they had succeeded; but that the plaintiffs were entitled to the costs except so far as they were increased by the issues on which they failed.

**HELD**—that under the circumstances the C. A. ought not to interfere with the discretion exercised by the judge.

Decision of Eady, J. (69 J. P. 54; 3 L. G. R. 72) affirmed.

**LECKHAMPTON QUARRIES CO., LD. v. BAL- LINGER AND OTHERS,** (1905) 69 J. P. 377; 93 L. T. 93; 21 T. L. R. 632; 3 L. G. R. 940—C. A.

**32. Discretion of Court—Public Authorities Protection Act, 1893** (56 & 57 Vict. c. 61), s. 1 (b).—

*Seem*, the Public Authorities Protection Act, 1893, does not, in cases where it applies, take away the Court's discretion to refuse costs altogether or to modify them; it merely provides that costs, if given, are to be taxed on a certain scale.

**AIRD v. TARBERT SCHOOL BOARD,** (1907) S. C. [305—Ct. of Sess.]

**33. Dismissal of Action—Form of Judgment—Taxation—Public Authorities Protection Act,**

1893 (56 & 57 Vict. c. 61), s. 1 (b).—The London County Council, having substantially succeeded in an action falling within the Public Authorities Protection Act, 1893, the judgment as drawn merely directed the plaintiff to pay the defendants' costs without saying how they were to be taxed.

**HELD**—that the taxing Master was right in giving the defendant council costs as between solicitor and client, the mere omission of an express direction to that effect in the judgment not depriving them of their right to such costs under the statute.

**NORTH METROPOLITAN TRAMWAYS CO. v. [LONDON COUNTY COUNCIL,** [1898] 2 Ch. 145; 62 J. P. 488; 67 L. J. Ch. 419; 78 L. T. 711; 14 T. L. R. 114; 46 W. R. 551—Romer, J.

**34. Harbour Authority—Shipowner's Action in respect of Fire on Staith—Staith not Constructed in exact Conformity with Statute—Costs of successfully defending Action—Public Authorities Protection Act, 1893** (56 & 57 Vict. c. 61), s. 1.—A shipowner brought an unsuccessful action against the Tyne Improvement Commissioners in respect of damage done by a fire on one of their staiths.

**HELD**—that the defendants were entitled to solicitor and client costs; they erected and worked the staith in "intended execution" of statutory powers; and if in constructing it they had deviated a little from such powers, adjoining owners were the only people entitled to complain, and the plaintiff could not rely on that fact.

**THE JOHANNESBURG,** [1907] P. 65; 76 L. J. P. [67; 96 L. T. 461—Barnes, P.

**35. Infringement of Patent—Solicitor and Client Costs—Public Authorities Protection Act, 1893** (56 & 57 Vict. c. 61), s. 1 (b).—A municipal corporation, acting under a provisional order, hired electricity meters from third persons. The plaintiffs brought an action against the corporation for infringement of their patent for electricity meters. Judgment having been given in favour of the corporation:—

**HELD**—that the corporation were entitled under sect. 1 (b), of the Public Authorities Protection Act, 1893, to costs as between solicitor and client.

**CHAMBERLAIN AND HOOKHAM, LD. v. BRAD-FORD CORPORATION,** (1901) 64 J. P. 806; 83 L. T. 518; 17 T. L. R. 62; 17 R. P. C. 462—Kekewich, J.

**36. Injunction—Action—Dismissal of Action—Costs as between Solicitor and Client—Public Authorities Protection Act, 1893** (56 & 57 Vict. c. 61), s. 1.—An action against a corporation for an injunction restraining the defendants from using certain buildings as a smallpox hospital being dismissed, the defendants were held to be entitled under sect. 1 of the Public Authorities Protection Act, 1893, to costs as between solicitor and client.

The word "action" as used in the Act refers



**Public Authorities Protection Act—Continued.** to every action, and not to an action for damages, or substantially for damages only.

HARROP v. OSETT CORPORATION, [1898] 1 Ch. [525; 62 J. P. 207; 67 L. J. Ch. 347; 78 L. T. 387; 14 T. L. R. 308; 46 W. R. 391—Romer, J.

**37. Injunction—Dismissal of Action—“Act done in pursuance of any Act of Parliament or of any Public Duty”**—Costs as between Solicitor and Client—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 67), s. 1.]—T. brought an action against the C. Urban District Council for an injunction to restrain them from using land as a cemetery except beyond a radius of 100 yards from his dwelling-house, relying on the prohibition to that effect contained in sect. 9 of the Burial Act, 1855 (18 & 19 Vict. c. 128). It was proved at the trial that T. was in fact merely a nominee of one G. for the purposes of this action, who had already sold the fee simple in the land to the defendant council for the purposes of a cemetery

HELD—that, on the principle that a grantor cannot derogate from his own grant, the action failed, and must be dismissed; and that the action being brought against the defendant council for an “act done in pursuance of public duty,” the Public Authorities Protection Act, 1893, applied, and costs must be taxed as between solicitor and client.

TOMS v. CLACTON URBAN DISTRICT COUNCIL, [1898] 62 J. P. 505; 78 L. T. 712; 14 T. L. R. 474; 46 W. R. 629—Romer, J.

**39. Obstruction of Public Right of Way—Action of Trespass—“Act done in Pursuance, or Execution, or Intended Execution, of Public Duty or Authority”**—Solicitor and Client Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (b)—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26.]—A public right of way having been obstructed by the owner of the land through which it ran, the county council passed a resolution, under sect. 26 of the Local Government Act, 1894, that the powers and duties of the district council, who had failed to take proceedings to protect the right of way, should be transferred to them. The county council then, under an arrangement with the owner of the land, directed the defendants, two of their officials, to drive along the way so as to enable the question of the public right to be raised. The landowners brought an action of trespass against the defendants, in which the latter obtained judgment.

HELD—that the defendants in committing the alleged trespass by the direction of the county council were acting in pursuance, or execution, or intended execution, of the public duty or authority, of protecting public rights of way, imposed upon the local authority by sect. 26 of the Local Government Act, 1894, and were therefore entitled to their costs, as between solicitor

and client, under sect. 1 of the Public Authorities Protection Act, 1893.

Decision of Bruce, J. (16 T. L. R. 130) affirmed.

GREENWELL v. HOWELL, [1900] 1 Q. B. 535; [69 L. J. Q. B. 461; 48 W. R. 307; 82 L. T. 183; 16 T. L. R. 235—C. A.

**40. Payment into Court—Discontinuance—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (c).**—The provisions of the Public Authorities Protection Act, 1893, s. 1 (c), as to the payment of solicitor and client costs by the defendant, do not apply when an action has been discontinued.

SMITH v. NORTHLEACH RURAL DISTRICT COUNCIL, (1901) 50 W. R. 104; 85 L. T. 449; 18 T. L. R. 30; [1902] 1 Ch. 197; 71 L. J. Ch. 8; 66 J. P. 88—Farwell, J.

**41. Quo warranto.**—The Public Authorities Protection Act, 1893, does not apply for the purpose of costs to proceedings for a rule for a writ of *quo warranto*.

R. v. CARTER, (1904) 68 J. P. 466—Div. Ct.

#### (c) Limitation of Actions.

See also title LIMITATION OF ACTIONS.

**42. Act done pursuant to Statute—Six Months’ Limitation of Action—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—Sect. 4 of the Ribble Navigation and Preston Dock Act, 1883, incorporates the Harbour, Docks and Piers Clauses Act, 1847; the corporation of Preston, therefore, has authority over the port and harbour of Preston down to the sea, and has power to take tolls. *The Ydun* arrived off the entrance to the Ribble, and was taken in tow by a steam tug of the corporation to be taken up the river to the docks, and whilst so proceeding took the ground in the channel and suffered damage.

HELD—that the corporation was acting in pursuance of its public duties, and that the action for damages by the owners of *The Ydun* not having been brought within six months next after the matter complained of was a good defence, and they were entitled to the protection of sect. 1 of the Public Authorities Protection Act, 1893, which has a retrospective effect.

Decision of Jeune, P. affirmed.

THE YDUN, [1899] P. 236; 68 L. J. P. 101; 81 L. T. 10; 15 T. L. R. 361; 8 Asp. M. C. 551—C. A.

**43. Continuance of Injury or Damage—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—The plaintiff was injured by the misfeasance of the defendants, their servants or agents, committed whilst they were engaged in the execution of work under statutory powers. The plaintiff brought an action against the defendants whilst still suffering from the injuries caused by the defendants’ misfeasance. Her injuries were received on June 17th, 1901, and the act of the defendants complained of was committed some days before that date. The

**Public Authorities Protection Act—Continued.**

writ in the action was issued on October 8th, 1902.

**HELD**—that by reason of sect. 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), the plaintiff's action would not lie. The words in the section, "in case of a continuance of injury or damage" refer only to those cases where there is a continuance of the act which causes damage.

*Markey v. Tolworth, &c. Board* ([1902] 2 Q. B. 454; 69 L. J. Q. B. 738; 64 J. P. 647, 83 L. T. 28—Div. Ct., No. 14, *supra*) considered

Decision of Channell, J. ((1903) 67 J. P. 109) affirmed.

*CAREY v. BOROUGH OF BERMONDSEY*, (1903) 20 [T. L. R. 2; 67 J. P. 447—C. A.]

**44. High Bailiff of County Court—Non-service of Judgment Summons—"Act, Default or Neglect"—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a).**—In an action against the high bailiff of a county court by a plaintiff who has been arrested under a committal order founded on a judgment summons never served upon him, the six months period of limitation runs not from the date of arrest, but from the date when the bailiff wrongly informed the Court that he had duly served the summons.

*TURLEY v. DAW*, (1906) 94 L. T. 216; 22 T. L. R. [231—Bray, J.]

**45. Highway Authority—Pulling down Fence—Claim to Land—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.**—A plaintiff alleged that a highway authority had pulled down a fence erected by him round a roadside waste, and claimed such waste. He asked for a declaration and an injunction against trespassing.

**HELD**—that the action was barred at the expiration of six months from the pulling down of the fence.

*OFFIN v. ROCHFORD RURAL DISTRICT COUNCIL*, [1906] 1 Ch. 342; 70 J. P. 97; 54 W. R. 244—Warrington, J.]

**46. Magistrate, Action against—Wrongful Distress pursuant to Conviction subsequently Quashed—Action brought more than Six Months from Conviction—Less than Six Months from Distress—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (a).**—Where an action is brought against a magistrate for illegal distress, levied pursuant to a conviction which has been quashed by the High Court, "the act" "complained of" in the terms of sect. 1 (a) of the Public Authorities Protection Act is the levy of the distress, and not the conviction or order pursuant to which the distress warrant is issued. Such an action therefore commenced more than six months after the wrongful conviction, but within six months of the levy of the distress, pursuant to the conviction, is not barred by the statute.

*POLLEY v. FORDHAM* (1), [1904] 2 K. B. 345; [73 L. J. K. B. 687; 68 J. P. 321; 53 W. R. 48; 90 L. T. 755; 20 T. L. R. 435; 53 W. R. 188—Div. Ct.]

**47. Negligence—Action by Personal Representative of Man Killed—Fatal Accident Act, 1846 (9 & 10 Vict. c. 93)—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, sub-s. (a).**—The plaintiff's husband met with an accident owing to the negligence of the defendants, who were a public authority, in the execution of a public duty. In consequence of the injury then received he died two years afterwards without having brought an action against the defendants. Within six months after his death the plaintiff, as his personal representative, brought an action against the defendants to recover damages for his death under the Fatal Accidents Act, 1846.

**HELD**—that, as at the time when the action was brought, an action by the plaintiff's husband if he had lived, would have been barred by sect. 1, sub-s. (a), of the Public Authorities Protection Act, 1893, the plaintiff could not maintain the action, she having no greater rights than he would have had.

*WILLIAMS v. MERSEY DOCKS AND HARBOUR BOARD*, [1905] 1 K. B. 804; 74 L. J. K. B. 481; 69 J. P. 196; 53 W. R. 188; 92 L. T. 41; 21 T. L. R. 397; 3 L. G. R. 529—C. A.]

**48. School Board—Limitation of Time for bringing Action of Libel against Board—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).**—An action for libel by a schoolmaster against a school board in whose employment he had been, in respect of statements contained in a resolution of the board stating the reasons for the master's dismissal:—

**HELD**—to come within the Public Authorities Act, 1893, which required the action to be brought within six months, as the Act was clearly intended to protect bodies who had rates to make from stale claims being brought against them.

*REID v. BLISLAND SCHOOL BOARD*, (1901) 17 [T. L. R. 626—Wills, J. Bodmin Assizes.]

**II. ACTS OF STATE.**

**49. Act of State—Annexation of Native State—Property of Infant Ruler—Private Property—State Property—Confiscation and Guardianship by Government—Jurisdiction of Court of Law.**—In 1846 the Crown (then represented by the East India Co.) annexed a native State in India and confiscated the State property, granting a life pension to the infant Maharajah. It also took possession of his private property, and assumed the guardianship of his person during his infancy.

An action was now brought by persons claiming under him for arrears of the pension, and an account of the private property.

**HELD**—that the acts done were done as "acts of State," and that no action would lie in respect of them.

Per Moulton, L.J., dissenting on this point, an action would lie in respect of the private property.

The nature and effect of "acts of State" discussed.

**Acts of State—Continued.**

*Secretary of State v. Kamachee Boye Sahaba* (1859) 7 Moo. Ind App. 476, 13 Moo. P. C. C. 22) followed.

**SALAMAN v. SECRETARY OF STATE FOR INDIA**  
[IN COUNCIL, [1906] 1 K. B. 613; 75 L. J. K. B. 418, 94 L. T. 858—C. A.]

**III PUBLIC OFFICERS.**

*See Nos. 5, 10, supra.*

*See also* BARRISTERS; CORONERS; EDUCATION, FOOD AND DRUGS, INCOME TAX; LOCAL GOVERNMENT; MAGISTRATES; METROPOLIS; POOR LAW RAILWAYS, 66.

**50. Compensation to Officers—Solicitor—Whether "Officer".—***Bristol Corporation Act, 1904* (4 Edw. 7, c. cccxxiii.), ss. 18, 53, 57—*Local Government Act, 1888* (51 & 52 Vict. c. 41), ss. 100, 120.]—A solicitor acted for many years for the guardians of a union and for a district council. He was appointed by resolution to act as solicitor in each matter as it arose, and was paid costs and charges upon the usual scale for the work actually done by him. He was never formally appointed solicitor to the guardians or district council, but he was retained on every occasion when the services of a solicitor were required.

By a local Act, which abolished the union and dissolved the district council, it was provided that any officer who suffered direct pecuniary loss by virtue of the Act should be deemed to be an officer entitled to compensation within the meaning of sect. 120 of the Local Government Act, 1888.

**HELD**—that the solicitor was not an "officer" within the definition contained in sect 100 of the Local Government Act, 1888, and was therefore not entitled to compensation under sect. 120 of that Act.

**IN RE CARPENTER AND BRISTOL CORPORATION,**  
[1907] 2 K. B. 617; 76 L. J. K. B. 1145; 97 L. T. 461; 71 J. P. 417, 23 T. L. R. 654; 5 L. G. R. 977—C. A.]

**51. Ireland—Poor Rate Collector—Transfer to County Council—Increase of Duties—Remuneration—Scheme—Local Government (Ireland) Act, 1898** (61 & 62 Vict. c. 37), s. 115.]—Sect. 115 (18) of the Local Government Act (Ireland) does not apply to poor rate collectors transferred to the county council, at any rate not so far as the fixing of their salary is concerned. Such matters are dealt with by the scheme contemplated by sect. 115 (11), and are therefore excluded from sect 115 (18) by its opening words, "subject to the provisions of this Act."

**LOCAL GOVERNMENT BOARD FOR IRELAND v. THE KING, EX PARTE MCKAY,** [1903] A. C. 402; 72 L. J. P. C. 100; 89 L. T. 277; 19 T. L. R. 675—H. L. (Ir.).

**52. Salary—Contribution to Superannuation Fund—Deductions—Income Tax—Income Tax Act, 1842** (5 & 6 Vict. c. 35), s. 146—*Poor Law Officers' Superannuation Act, 1896* (59 & 60 Vict.

c. 50), s. 12.]—An officer or servant in the employ of poor law guardians is entitled by sect. 146 of the Income Tax Act, 1842, to deduct from the amount of his salary on which income tax is payable the amount deducted from his salary for the purpose of the superannuation fund under the powers conferred by the Poor Law Officers' Superannuation Act, 1896.

**BEAUMONT v. BOWERS,** [1900] 2 Q. B. 204; 69 [L. J. Q. B. 600, 64 J. P. 552, 48 W. R. 557; 83 L. T. 126, 16 T. L. R. 376—Div. Ct.]

**53. Treasury Solicitor—Not on the Roll of Solicitors—Instructed by Crown to appear for Individual—Right to recover Costs—Revenue Solicitors Act, 1828** (9 Geo. 4, c. 25), s. 1—*Solicitors Acts, 1843* (6 & 7 Vict. c. 73), ss. 2, 47; and 1874 (37 & 38 Vict. c. 68), s. 12—*Treasury Solicitor Act, 1876* (39 & 40 Vict. c. 18).]—Where the Crown instructs the Treasury solicitor to appear for an individual, he can recover his costs against an unsuccessful plaintiff. Nor is he under any personal incapacity by reason of not holding a certificate, or not being on the roll, for though representing a private individual, he was none the less fulfilling his duty to the Crown as the Treasury solicitor.

Per Romer, L. J.: "His position is similar to that of an insurance company's solicitor defending an action by a workman against a master who is insured with the company."

**R. v. ARCHBISHOP OF CANTERBURY, EX PARTE COBHAM,** [1903] 1 K. B. 289, 72 L. J. K. B. 188; 51 W. R. 277; 88 L. T. 150; 19 T. L. R. 92—C. A.]

**PUBLIC COMPANY.**

*See COMPANIES.*

**PUBLIC DOCUMENTS.**

*See DISCOVERY; EVIDENCE.*

**PUBLIC HEALTH.**

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 MENT; METROPOLIS, NUISANCE;  
 PUBLIC AUTHORITIES; RATES AND  
 RATING; SEWERS AND DRAINS.

## I. HOUSING.

### (a) Common Lodging House.

1. *Poorer Classes—Keeper—Registration—Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28)—Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41).*—The respondent had opened and kept a lodging-house for men of the poorest class, known as a Salvation Army shelter, which, though not kept for the purpose of gain, was conducted upon business principles. The house was not registered, nor had it been inspected and approved by the local authority in accordance with sect. 3 of the Common Lodging Houses Act, 1853.

The facts as found in the case were substantially the same as those in *Booth v. Ferrett* ((1890) 25 Q. B. D. 87; 59 L. J. M. C. 136; 55 J. P. 7; 38 W. R. 718; 63 L. T. 346—Div. Ct.), and the magistrate held himself bound by that decision, and dismissed the summons against the respondent charging him with the offence of keeping an unregistered common lodging-house.

**HELD**—that *Booth v. Ferrett* was wrongly decided, and that these shelters being of a class of lodging-house in which persons of the poorer sort were received for short periods, and, although strangers to one another, were allowed to inhabit one common room, were common lodging-houses, and therefore the magistrate should have convicted the respondent.

*Booth v. Ferrett* overruled.

LOGSDON v. BOOTH, [1900] 1 Q. B. 401; 69 L. J. [Q. B. 131; 64 J. P. 165; 48 W. R. 266; 81 L. T. 602; 16 T. L. R. 129—Div. Ct.]

2. *Poorer Classes—Keeper—Registration—Common Lodging Houses Act, 1851 (14 & 15 Vict. c. 28)—Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41).*—The respondent kept a house (containing, *inter alia*, 128 single-bedded cubicles) for the reception of male lodgers of the poorer class, each inmate being accommodated with the use of a single-bedded cubicle to sleep in, and the use of certain common rooms, at a charge of 6d. to 8d. a night. Drunken or disorderly persons, or persons suspected to be of the criminal class, or verminous, were excluded; but, with these exceptions, the house was open to any male who paid the above charge. The house was not carried on by the respondent for profit, and efforts were made by him to find situations for any inmates, and to befriend them in sickness. The majority of the usual inmates

were of the class that frequented common lodging-houses, but some were of a better class.

**HELD**—that the house was a common lodging-house within the meaning of the Common Lodging Houses Acts, 1851 and 1853, and that the respondent had been guilty of the offence of keeping a common lodging-house without having his name registered as the keeper thereof.

*Logsdon v. Booth* ([1900] 1 Q. B. 401; 69 L. J. Q. B. 131; 64 J. P. 165; 48 W. R. 266; 81 L. T. 602; 16 T. L. R. 129—Div. Ct., No. 1, *supra*) followed.

LOGSDON v. TROTTER, [1900] 1 Q. B. 617, 69 L. J. [Q. B. 312; 64 J. P. 421; 48 W. R. 365; 82 L. T. 151; 16 T. L. R. 175—Div. Ct.]

3. *House for reception of Destitute Persons—Admission without Payment—Common Lodging Houses Act (Ireland), 1860 (23 & 24 Vict. c. 26), s. 3—Common Lodging Houses Acts, 1851 (14 & 15 Vict. c. 28); and 1853 (16 & 17 Vict. c. 41).*—The definition of “common lodging-house” in sect. 3 of the Common Lodging Houses Act (Ireland), 1860, as “a house in which persons are harboured or lodged for hire for a single night, or for less than a week at any time, or any part of which is let for a term less than a week,” applies to the Common Lodging Houses Acts, 1851 and 1853, and therefore a common lodging-house within the meaning of those Acts must be a house in which persons are harboured or lodged for hire.

A lodging-house in which persons of the very poorest class are received without payment of any kind, direct or indirect, the inmates being treated and dealt with in a manner similar to that in which the habitual frequenters of common lodging-houses are treated, is not a common lodging-house within the above Acts.

*Gilbert v. Jones* ([1905] 2 K. B. 691; 74 L. J. K. B. 929; 69 J. P. 392; 54 W. R. 94; 93 L. T. 520; 21 T. L. R. 709; 3 L. G. R. 987—Div. Ct.) overruled; *Logsdon v. Booth* ([1900] 1 Q. B. 401; 69 L. J. Q. B. 131; 64 J. P. 165; 81 L. T. 602; 48 W. R. 266—Div. Ct., *supra*); and *Logsdon v. Trotter* ([1900] 1 Q. B. 617; 69 L. J. Q. B. 312; 64 J. P. 421; 82 L. T. 151; 48 W. R. 365; 19 Cox, C. C. 460—Div. Ct., *supra*) discussed.

PARKER v. TALBOT, [1905] 2 Ch. 643; 93 L. T. [522; 54 W. R. 132; 22 T. L. R. 10; 75 L. J. Ch. 8; 70 J. P. 43; 4 L. G. R. 27.—C. A.]

*See also* No. 25.

### (b) Housing of Working Classes.

*And see* COMPULSORY PURCHASE;  
 METROPOLIS

4. *Local Authority—Unsanitary Area acquired under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70)—Improvement Scheme—Provisional Order—Confirmatory Act—Valuation for Compensation—Property in Premises acquired—Reversioner—Right to Sue—Costs—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 4-8, 12, 20, 21.*—When property in an unhealthy district is compulsorily acquired by a local authority under the Housing

**Housing—Continued.**

of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), persons interested therein retain all their legal rights in respect of the same until the provisional order made in respect thereof under sect. 8 of the Act has been confirmed by Act of Parliament, under sub-sect. 6 of sect. 8.

When property is taken under this Act, the estimate of the value payable by way of compensation, under sect. 21, is not limited to the value of the property as given in the estimate made under the improvement scheme provided for by sects. 4 and 6.

The fact that a party to an action has refused an offer made on the other side, without prejudice, before the happening of certain events, which might have made the offer, if subsequently made, a reasonable one for him to accept, will not disentitle him to costs.

DYE v. PATMAN, (1898) 62 J. P. 135; 46 W. R. [200—Byrne, J.]

5. "*Dwelling-house*" unfit for Human Habitation—"Inhabited"—Closing Order—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 29, 32.]—Proceedings were taken under sect. 32 of the Housing of the Working Classes Act, 1890, for a closing order in respect of three dwelling-houses of which the respondent was the owner, on the ground that they were used as dwelling-houses, and were in a state so injurious to health as to be unfit for human habitation. It was contended by the owner that, because for five and a half years the premises had not in fact been occupied, they were therefore not "inhabited" within the meaning of sect. 29 of the Act. The magistrate refused to make the order. On appeal:—

HELD—that the meaning of sect. 32 is that power is given to make a closing order if the owner, upon notice given to him, does not put the premises into a proper condition; that sect. 29 is not intended to negative the provisions of sects. 32 and 33; that the mere fact of non-occupancy is not in itself an objection in point of law to the making of the closing order; and that the appeal must be allowed.

ROBERTSON v. KING, [1901] 2 K. B. 265; 70 [L. J. Q. B. 630; 65 J. P. 453; 49 W. R. 542; 84 L. T. 842—Div. Ct.]

6 *Plans deposited to obtain Provisional Order—Compulsory Purchase Completed—Power to subsequently modify Plans—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70).]*—Plans deposited in order to obtain a provisional order under the Housing of the Working Classes Act, 1890, are only so deposited for the purpose of identifying the lands to be compulsorily acquired.

HELD, therefore, that the local authority were not bound to adhere to the representation of intention shown on their plans as to the number of cottages to be erected, the size of a playground, and the width of an approach, so long as

they did not go outside the purposes mentioned in the statute.

BRADSHAW AND ANOTHER v. BRAY URBAN [DISTRICT COUNCIL, [1906] 1 Ir. R. 560—Barton, J.]

7. *Closing Orders—Declaration by Local Authority under Bye-law that Premises were unfit for Human Habitation and should be closed—Subsequent Application to Justices for Closing Order—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 32, 91, Sched. III—Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 8.*—The appellants were the owners of certain premises, and on April 21st, 1904, the respondents, by a declaration made under a bye-law then in force, declared the same unfit for human habitation, and directed that the same should be closed. The premises were accordingly closed and kept uninhabited. On December 19th, 1905, the respondents applied to the justices for a closing order under the Housing of the Working Classes Acts, 1890–1903.

HELD—that the declaration made by the respondents was no bar to the proceedings.

SLEIGHT v. PORTSMOUTH CORPORATION, (1906) [70 J. P. 359, 95 L. T. 356, 4 L. G. R. 635—Div. Ct.]

**II. MILK, MEAT, AND WATER SUPPLY.**

And see under FOOD AND DRUGS; WATERWORKS.

8 *Milk—Building in Flats—Scarlet Fever—Milk Business on Ground Floor—Regulations as to Milkshops—Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57).]*—By the regulations made in pursuance of the Diseases of Animals Act, 1894, by the London Council, it is ordered (*inter alia*) 28: "That every purveyor of milk or person selling milk by retail shall immediately on any outbreak of contagious or infectious disease within the building or upon the premises in which he keeps milk . . . give notice of such outbreak to the board;" and (29) "shall immediately on any outbreak coming to his knowledge remove all milk for sale, and utensils for containing milk for sale, from such building, and shall cease to keep milk for sale or sell milk in such building until the same has been disinfected and declared by the medical officer . . . to be free from infection."

The respondent was summoned for not, immediately upon the knowledge of an outbreak of scarlet fever in the building in which he kept milk, removing all milk for sale from such building.

The shop and rooms on the ground floor were used by him for carrying on his business as a purveyor of milk, the floors above were tenements or flats. The first floor was occupied by one Yapp, and the respondent occupied the second.

In November, 1897, one of the respondent's children was taken ill with scarlet fever, and during that time he had in his shop milk for sale, and did not remove the utensils containing the milk.

The magistrate was of opinion that each floor was a separate building, and that no offence had been committed.

**Milk, Meat and Water Supply—Continued.**

Held (reversing the decision of the magistrate)—that the room where the child was ill was part of the building within the regulations

LONDON COUNTY COUNCIL *v* EDWARDS, [1898]  
[2 Q. B. 75; 62 J. P. 377; 67 L. J. Q. B. 648,  
78 L. T. 558; 19 Cox, C. C. 65—Div. Ct.]

9. *Meat—Unsound Meat not for Sale*—To obtain a conviction under sects. 116 and 117 of the Public Health Act, 1875, it is essential that the carcass, meat, &c. should have been exposed for sale, or deposited for the purpose of sale, or of preparation for sale.

RENDELL *v* HEMINGWAY, (1898) 14 T. L. R.  
[456—Div. Ct.]

10. *Water—Furnishing Supply to House—Cost of Works—Limit as to Expenses—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62—Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3.*—A rural sanitary authority brought a supply of water into a certain district and within a reasonable distance of a dwelling-house, and then required the owner of the house to make a communication of the supply to his house. The owner not complying, the local authority made the communication of the supply to the house at a cost exceeding the scale of charges which had been fixed by the Local Government Board under sect. 8 of the Public Health (Water) Act, 1878, for the compulsory supply of water within the district. The owner of the house having refused to pay to the authority in respect of the communication of the supply to his house more than the limit fixed by the Local Government Board.—

HELD—that the owner was bound to pay the whole of the cost, as the provisions of sect. 3 of the Public Health (Water) Act, 1878, applied to the bringing of the supply to a reasonable distance from the house, but did not apply to the communication of the supply to the house, and that as to the latter there was no limit of cost.

WEST LANCASHIRE RURAL DISTRICT COUNCIL  
[*r.* OGILVY, [1899] 1 Q. B. 377; 68 L. J.  
Q. B. 215; 63 J. P. 166; 47 W. R. 363, 80  
L. T. 162—Div. Ct.]

11. *Water, Public Well "Used for the Gratuitous Supply of Water to the Inhabitants of the District"—Voluntary Contributions for Repairs—Restriction on User—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 64*—A well had been used by the inhabitants of a village from time immemorial, mainly for the watering of cattle and horses, and except occasionally it was not used for drinking water. There was no actual dedication to the public. No charge was made for the supply of water. Contributions for repairs were strictly voluntary. There was a moral obligation to contribute on those who used the well much, but there was in no sense a legal obligation. The well was from time to time locked. The windlass was locked, and in very recent times the cover was locked. Persons had to ask for the key.

HELD—that the supply of the water was gratuitous within the meaning of sect. 64 of the Public Health Act, 1875, and also within the meaning of the language of Lord O'Hagan in *Smith v Archibald*, (1880) 5 App. Cas. 189 at p. 508—H. L. (Sc.)

HELD, also, that the restriction on the user was inconsistent with any user as of right inconsistent with the dedication of the well to the public.

ATTORNEY-GENERAL *v.* TONKIN, (1902) 18  
[T. L. R. 29—Kekewich, J.]

12. *Water—House Without—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 62*—It is a question of fact whether particular premises such as a "look-up shop" are a "house" within sect. 62 of the Public Health Act, 1875, so that water rate may be recovered under that section as if the owner or occupier had demanded a supply.

WOOTTON *v* BISHOP, (1907) 71 J. P. 331; 96  
[L. T. 705; 5 L. G. R. 760—Div. Ct.]

**III VACCINATION.**

13. *Conscientious Objection—Certificate of Exemption—Certificate of Birth of Child—Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 2.*—Justices have power to make a rule that they will not entertain an application for a certificate of conscientious objection under sect. 2 of the Vaccination Act, 1898, unless and until, where it is possible, a certificate of the birth of the child in respect of whom the application is made is produced to them.

REG *v.* LOWNDES, [1899] 1 Q. B. 577, 68 L. J.  
[Q. B. 318, 63 J. P. 344; 47 W. R. 315; 80  
L. T. 532; 15 T. L. R. 200—Div. Ct.]

14. *Non-compliance with Order—Onus of Proof—Presumption from Non-registration—Vaccination Act, 1867 (30 & 31 Vict. c. 81), s. 31*—The appellant was summoned for disobedience to an order of justice made pursuant to sect. 31 of the Vaccination Act, 1867, requiring him to cause a child of his to be vaccinated. The respondent, a vaccination officer appointed by the guardians of the F. union, deposed he had not received any certificate of successful vaccination of the child in question, nor any certificate that the child was unfit to be vaccinated, nor to be insusceptible to vaccination, and produced the register of vaccination kept by him. No evidence was submitted by the appellant, nor any further evidence by the respondent.

HELD—that the burden of proof of non-compliance was upon the prosecution, and that the evidence adduced was sufficient to justify the justices, if they thought fit, to convict the appellant, as the fact that no notification of vaccination had been received by the proper officer is *prima facie* evidence sufficient to satisfy the burden of proving the negative proposition that the child had not been vaccinated.

OVER *v.* HARWOOD, [1900] 1 Q. B. 803; 69 L. J.  
[Q. B. 272; 64 J. P. 326; 48 W. R. 608; 16  
T. L. R. 163—Div. Ct.]

**Vaccination—Continued.**

**15. Neglect to Procure—Default before January 1st, 1899—Notice—Condition Precedent to Proceedings—Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31—Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1, sub-s. 3.]**—Where a child was born in 1897, and notice was given under sect. 31 of the Vaccination Act, 1867, to the parent requiring him to procure the child to be vaccinated, and the notice was disregarded before the coming into operation of the Vaccination Act, 1898.—

**HELD**—that as the default had been committed before the coming into operation of the Act of 1898, the requirements of sect. 1, sub-sect. 3, of that Act were not a condition precedent to proceedings being taken to recover a penalty under sect. 31 of the Act of 1867

**PYM v. WILSHER**, [1901] 2 K. B. 806; 70 L. J. [K. B. 1031; 65 J. P. 755; 49 W. R. 654; 85 L. T. 49, 17 T. L. R. 558—Div. Ct.]

**16. Neglect to Procure—Completion of Offence—Limitation of Time for Laying Information—Vaccination Acts, 1867, 1871, 1898 (30 & 31 Vict. c. 84, s. 29; 34 & 35 Vict. c. 98, s. 11; 61 & 62 Vict. c. 49, s. 1).]**—The vaccination orders do not create any fresh offence, and the Local Government Board has no power to create new offences.

A child was born on December 30th, 1898, and the six months allowed by sect. 1, sub-sect. 1, of the Vaccination Act, 1898, expired on June 30th, 1899. A notice in compliance with the Vaccination Order of 1898 was served on the appellant on July 7th, 1899, requiring him to have the child vaccinated within fourteen days from the date thereof. Information was laid on July 12th, 1900.

**HELD**—that the offence was complete after June 30th, 1899—the expiration of six months from the birth of the child—and as the proceedings were not taken until several days after June 30th, 1900, they were out of time, the information having been laid more than twelve months after the offence was committed.

**LANGRIDGE v. HOBBS**, [1901] 1 K. B. 497; 70 [L. J. K. B. 362; 84 L. T. 319; 17 T. L. R. 237; 19 Cox C. C. 671—Div. Ct.]

**17. Neglect to Procure—Unsuccessful Proceedings—Notice to Parent—Fresh Proceedings—Child between Six and Eighteen Months old—Vaccination Act, 1867 (30 & 31 Vict. c. 84), ss. 29, 31—Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1 (3).]**—In December, 1900, notice to procure the vaccination of a child was given to the appellant, and in February, 1901, a summons was taken out against him under sect. 29 of the Vaccination Act, 1867, for neglecting to cause the child to be vaccinated. This summons was dismissed. No further notice was served on the appellant. A summons was then issued under sect. 31 of the Act, and an order was made directing the child to be vaccinated. The child was then between the age of six and eighteen months. The public vaccinator had previously visited the appellant's house for the purpose of vaccinating the child, in accordance with sect. 1 (3) of the

Vaccination Act, 1898, but had failed to serve notice of his intention so to do.

**HELD**—that the order directing the vaccination of the child was properly made.

**BOWDEN v. TOLL**, (1901) 85 L. T. 486; 18 T. L. R. [22; 66 J. P. 53; 50 W. R. 208—Div. Ct.]

**18. Conscientious Objection—Certificate of Exemption—Satisfying Justices that Applicant believed that Vaccination would be Prejudicial to the Health of the Child—Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 2.]**—Where a person applies for a certificate of exemption under sect. 2 of the Vaccination Act, 1898, it is necessary that he should satisfy the justices, a stipendiary, or metropolitan police magistrate (as the case may be) that he conscientiously believes that vaccination would be prejudicial to the health of the child. Even if the justices, stipendiary, or metropolitan police magistrate are or is wrong, the High Court cannot make them or him satisfied.

**REG. v. WELBY, EX PARTE BIRD**, (1902) 66 [J. P. 86—Div. Ct.]

(*N.B.*—This case was decided January 27th, 1899—*Ed.*)

**19. Institution of Proceedings against Parent for Neglect—Conditions Precedent—Formal Proof of Notice—Domestic Visit—Directions of Guardians—Reasonable Excuse—Vaccination Acts, 1867 to 1898 (30 & 31 Vict. c. 84; 34 & 35 Vict. c. 98; 37 & 38 Vict. c. 75; 61 & 62 Vict. c. 49); General Order of Local Government Board, October 18th, 1898, arts. 26, 27.]**—A vaccination officer, by virtue of his appointment as such, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, can institute proceedings under the Vaccination Acts, 1867 to 1898, as vaccination officer, against a parent for neglecting to cause his child to be vaccinated within six months of its birth. The vaccination officer is bound to obey the orders of the Local Government Board.

It is not in every case a condition precedent to a prosecution by the vaccination officer under sect. 29 of the Vaccination Act, 1867, that formal proof should be given of the service on the parent of the child by the public vaccinator of the notice mentioned in the Vaccination Acts, 1867 to 1898, and of his having visited the house of the child as therein directed; though upon the question of reasonable excuse for the parent's neglect it may be material to consider whether there has or has not been a visit by the public vaccinator.

**MOORE v. KEYTE**, [1902] 1 K. B. 768, 71 [L. J. K. B. 454; 66 J. P. 499; 50 W. R. 457; 86 L. T. 532; 18 T. L. R. 396—Div. Ct.]

**20. Medical Certificate given after Date of Summons—Certificate only Referring to Present Time—Held no Defence—Vaccination Acts, 1867 (31 & 32 Vict. c. 84), ss. 29, 31, and 1898 (61 & 62 Vict. c. 49), s. 1.]**—Under the Vaccination Acts a parent commits an offence by not having

**Vaccination—Continued.**

a child vaccinated before it attains the age of six months. Therefore, if he is summoned when the child is eleven months old, a medical certificate not professing to cover the past five months, but merely stating that the child is from some temporary cause *at present* unfit to be vaccinated, is no answer to the charge.

HINDS *v.* ELSAM, (1903) 67 J. P. 328; 88 L. T. [867, 20 Cox C. C. 490—Div. Ct.

**21. Order for Vaccination—Order Signed but not Sealed—Subsequent Order as from later Date—Validity—Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31.]**—On May 7th, 1902, an order was made by justices under sect. 31 of the Vaccination Act, 1867, requiring D. N. to cause his child to be vaccinated within four weeks. The order was drawn up and signed by one of the justices, but not sealed.

Upon the hearing of an information preferred against D. N. for unlawfully omitting to carry into effect the above order, objection was taken that the order was a nullity, not being under the "hand and seal" of a justice as required by sect. 31. Another order was then drawn up under the hand and seal of two justices sitting on May 7th, 1902, this order being dated June 25th, 1902, and directing D. N. to cause his child to be vaccinated within four weeks of the latter date.

HELD—that this second order was invalid.

NUTTER *v.* MOORHOUSE, (1904) 68 J. P. 134; [2 L. G. R. 1204—Div. Ct.

**22. Neglect to cause Child to be Vaccinated within Six Months from Birth—Refusal of Certificate of Exemption on Seven Occasions—Offence 'of trifling nature'—Dismissal of Information.]**—A parent, within four months of the birth of his child, on seven different occasions applied to the justices under sect. 2 of the Vaccination Act, 1898, for a certificate that he had satisfied the justices that he conscientiously believed that vaccination would be prejudicial to the health of his child, but on each occasion was refused a certificate.

On an information being subsequently preferred by the vaccination officer against the parent for that he had not within six months after the birth of his child caused it to be vaccinated, the justices who heard the information dismissed the same under sect. 16 of the Summary Jurisdiction Act, 1879, on the ground that the offence was "of a trifling nature."

HELD—that the justices ought to have convicted.

NISBET *v.* LLOYD, (1904) 68 J. P. 396; 2 L. [G. R. 1277—Div. Ct.

**23. Legal Assistance—Costs of Prosecution—'Necessary Legal Assistance'—Vaccination Acts, 1867 to 1898—Vaccination Order, 1898, Art. 29 (1).]**—Under Art. 29 (1) of the Vaccination Order, 1898, it is for the vaccination officer to employ legal assistance in the conduct of prosecutions for breaches of the Vaccination Acts, and the Board of Guardians have no power

to overrule his decision. The Court may review that decision, but will not interfere if it finds that the vaccination officer's discretion was exercised *bonâ fide*. If so, the Court will compel the guardians to pay the taxed bill of costs incurred in connection with the prosecution.

HITCHCOCK *v.* WANDSWORTH AND CLAPHAM [GUARDIANS: CHESHIRE *v.* WANDSWORTH AND CLAPHAM GUARDIANS, (1904) 68 J. P. 348; 20 T. L. R. 458; 2 L. G. R. 1260—Div. Ct.

**24. Legal Assistance—Costs of—Proceedings by Vaccination Officer—Employment of Solicitor—Refusal of Guardians to Pay—Mandamus—Vaccination Order, 1898, Art. 29 (1).]**—A vaccination officer employed a solicitor in connection with proceedings taken by him under the Vaccination Acts; but the guardians refused to pay the solicitor's bill of costs on the grounds that the charges were unreasonable costs and expenses and the employment of a solicitor unnecessary. A rule *nisi* was obtained calling upon the guardians to show cause why a writ of *mandamus* should not issue commanding them to pay such costs.

Ordered, that a writ of *mandamus* should issue directed to the guardians commanding them to pay to the vaccination officer "the reasonable costs of obtaining necessary legal assistance in connection with the institution and conduct of proceedings taken by him under the Vaccination Acts," the questions as to how far, if at all, legal assistance was necessary and the costs were reasonable expenses being left over until the return to the writ.

R. *v.* WELLINGBOROUGH UNION, (1904) 68 J. P. [179—Div. Ct.

**IV. HOSPITALS AND INFECTIOUS DISEASES.**

**25. Common Lodging-houses Act, 1851, s. 11—Failure to give Notice—Management of House left to Deputy.]**—It is no defence to a charge against the keeper of a common lodging-house for failing to give notice of an infectious disease under sect. 11 of the Common Lodging-houses Act, 1851, that he had left the management of the house to a deputy and had no personal knowledge of any infectious disease having occurred there.

LOGSDON *v.* HOLLAND, (1898) 14 T. L. R. 449 [—Div. Ct.

**26. Order for Removal to Hospital—"Proper Lodging and Accommodation"—Protection of Others—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 124.]**—On an application for an order for the removal of an infected person under sect. 124 of the Public Health Act, 1875, the justice must take into consideration not only whether the infected person is without proper lodging or accommodation, but also whether under the circumstances the infected person is a source of danger and infection to others.

WARWICK *v.* GRAHAM, [1899] 2 Q. B. 191; 68 [L. J. Q. B. 1001; 63 J. P. 599; 80 L. T. 773; 15 T. L. R. 410; 19 Cox, C. C. 363—Div. Ct.



**Hospitals and Infectious Diseases—Continued.**

**27. Order for Removal to Hospital—Finality of Order—Jurisdiction to state a Special Case—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 124—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 5.]**—The justices upon the hearing of a summons under sect. 124 of the Public Health Act, 1875, for obstructing the execution of an order, made *ex parte* by a single justice, for the removal to a hospital of a person suffering from an infectious disorder, have no jurisdiction to go behind the order or inquire into the grounds or the truth of the facts on which it was made. The proper means of questioning the validity of such an order is by writ of *habeas corpus* or *certiorari*. The High Court has jurisdiction under the Summary Jurisdiction Act, 1857, s. 5, to determine whether it is proper to order the justices to state a special case, and therefore in a case where the justices have acquitted but ought to have convicted with a nominal penalty the High Court is not compelled to order the justices to state a special case.

REG. v. DAVEY, EX PARTE BISHOP, [1899] 2 Q. B. 301; 68 L. J. Q. B. 675; 63 J. P. 515; 80 L. T. 798; 15 T. L. R. 344; 19 Cox, C. C. 365—Div. Ct.

**28. Local Authority carrying out Disinfection—No Certificate by Medical Officer, nor Notice in Writing—Articles Destroyed—Articles Damaged by Disinfection—Liability of Local Authority to Compensate Owner—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 120, 121, 308.]** Where, in a case of infectious disease, a local authority themselves carry out the work of disinfection, and in so doing necessarily damage some articles and intentionally destroy others, they are liable to pay compensation therefor to the owner, provided he is not "in default." The absence of the medical officer's certificate, and of the written notice, provided for by sect. 120 of the Public Health Act, is immaterial, if the owner assents to the authority's proceedings.

FOSTER v. EAST WESTMORELAND RURAL [DISTRICT COUNCIL, (1904) 68 J. P. 103—County Ct.

**29. Children with Infectious Disorder—Maintenance of in Hospital—Charitable Guardians—"Patients"—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 131, 132.]**—The respondents had provided a hospital under sect. 131 of the Public Health Act, 1875. The appellant was, and was sued as, the treasurer of the Victoria Hospital for Children, which maintains a convalescent home within the respondents' district. The matron of the respondents' hospital received a telephonic message from the doctor in attendance at the home, requesting the admission of certain children who had developed scarlet fever in the home. In an action by the respondents against the appellant for the maintenance of the children the county court judge gave judgment for the respondents on the ground that the appellant was liable under sect. 132 of the Public Health Act, 1875. It was also contended that the appellant was liable on a contract, expressed or

implied, but the point was not dealt with by the county court judge.

HELD, on appeal—that the Victoria Hospital was not liable under sect. 132. Charitable guardians of children treated in the hospital could not be included in the term "patients." The action must, at the option of the respondents, be set down in the county court on the question as to whether the appellant was liable in contract.

FARQUHAR v. ISLE OF THANET HOSPITAL [BOARD, (1904) 68 J. P. 319; 2 L. G. R. 1310—Div. Ct.

**30. Destruction of infected Clothing—Power of Local Authority to order—Order given by Medical Officer—Scope of Authority—Ratification—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 121.]**—A medical officer of health has no power *virtute officii* to order the destruction of infected clothing, at any rate not except in cases of great urgency.

The plaintiff having contracted small-pox, the medical officer of health, who was also his ordinary medical attendant, ordered his infected clothing to be destroyed. The plaintiff claimed compensation from the sanitary authority. The medical officer had not acted as if the matter was urgent, nor had he (apparently) reported his action to the authority.

HELD—that the plaintiff could not recover, as the medical officer in giving the order was not acting within the scope of his authority, and there had been no ratification by the authority of his act.

GARLICK v. KNOTTINGLEY URBAN DISTRICT [COUNCIL, (1905) 68 J. P. 494; 2 L. G. R. 1345—Div. Ct.

**31. Negligence—City Hospital—Position of Visiting Physician—Obligation of Local Authority.]**—An infant who was treated for scarlet fever in a hospital carried on by a city corporation was discharged while still in an infectious state, and communicated the disease to his brothers. In accordance with the rules of the hospital, the boy was discharged by the matron, under the instructions of the visiting physician, who was a competent medical man. In an action for damages by the father, the jury found that there was a want of due skill and care in the discharge of the boy, and that there was an undertaking by the corporation to the father that their visiting physician should act with reasonable skill and care in treating the boy.

HELD—that there was no evidence upon which the jury could find that such an undertaking existed.

The obligation undertaken by a local authority carrying on the business of a hospital is only that they will carry it on with all reasonable skill and care, and that patients while in their hospital shall receive competent medical advice and assistance.

EVANS v. LIVERPOOL CORPORATION, (1905) 74 [L. J. K. B. 742; 69 J. P. 263; 21 T. L. R. 558; 3 L. G. R. 868—Walton, J.

**Hospitals and Infectious Diseases—Continued.**

**32 Reception of Pauper Children from Local School—Children Chargeable to Union outside Hospital District—Recovery of Expenses—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 131, 132—Poor Law (Certified Schools) Act, 1862 (25 & 26 Vict. c. 43)—Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58), s. 13.]**—Certain pauper children chargeable to the guardians of the C. Union were, under the provisions of the Poor Law (Certified Schools) Act, 1862, sent to a school situated in the urban district of T. An outbreak of fever having occurred at the school, some of the children were taken to a hospital provided by the B. and D. Joint Hospital Board, constituted by provisional order under sect. 279 of the Public Health Act, 1875. The children were so taken at the instance of the medical adviser to the school, who was also the medical officer of health for the T. district, the authority of the guardians of the C. Union was not obtained for the removal of the children to the hospital. The urban district of T. was one of the constituent districts of the B. and D. Joint Hospital Board; the C. Union was outside such constituent districts.

Upon an action by the B. and D. Joint Hospital Board against the guardians of the C. Union to recover the expenses of maintenance of the pauper children in the hospital:—

**HELD**—(1) that the plaintiffs could not recover under any statutory provisions; (2) that there was, in fact, no promise by the superintendent of the school to repay the expenses of maintenance of the children in the hospital, and, moreover, that the superintendent had no authority to pledge the credit of the defendants to any expense outside the school; and (3) that there was no such urgency as to create an implied request by the defendants to the plaintiffs to maintain the children in the hospital.

*Semble*, even if the case had been one of urgency the plaintiffs would not have been entitled to recover.

**BURY AND DISTRICT JOINT HOSPITAL BOARD**  
[*v. CHORLTON UNION*, (1906) 70 J. P. 31; 4 L. G. R. 489—Bray, J

**33. Negligence—City Hospital—Position of Visiting Physician—Obligation of Local Authority]**—An infant who was treated for scarlet fever in a hospital carried on by a city corporation was discharged while still in an infectious state, and communicated the disease to his brothers. In accordance with the rules of the hospital, the boy was discharged by the matron, under the instructions of the visiting physician, who was a competent medical man. In an action for damages by the father, the jury found that there was a want of due skill and care in the discharge of the boy, and that there was an undertaking by the corporation to the father that their visiting physician should act with reasonable skill and care in treating the boy

**HELD**—that there was no evidence upon which

the jury could find that such an undertaking existed.

The obligation undertaken by a local authority carrying on the business of a hospital is only that they will carry it on with all reasonable skill and care, and that patients while in their hospital shall receive competent medical advice and assistance.

**EVANS v. LIVERPOOL CORPORATION**, [1906] 1 [K. B. 160; 74 L. J. K. B. 742; 69 J. P. 263; 21 L. R. 558; 3 L. G. R. 868—Walton, J.

**V. NUISANCE ABATEMENT AND EXPENSES.**

**34. Smoke Nuisance—Notice to Abate—No Specification of Works to be Done—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91, 94.]**—By sect. 94 of the Public Health Act, 1875, the notice required under sect. 91 to abate a nuisance shall be a notice requiring the person causing the nuisance "to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

The respondent Wastall was summoned before the justices, under sect. 91 and subsequent sections, for permitting black smoke to be discharged from a chimney not being a chimney belonging to a private dwelling-house in such quantity as to be a nuisance.

A preliminary objection was taken that the notice under the Act was bad on the ground that it did not set out the works required to be done in order to remedy the nuisance.

The justices upheld the objection and dismissed the summons.

**HELD** (reversing the decision of the magistrates)—that the notice was quite sufficient, as no works were required to be done, but only the black smoke stopped.

**MILLARD v. WASTALL**, [1898] 1 Q. B. 342; 18 [Cox, C. C. 695; 62 J. P. 135; 67 L. J. Q. B. 277; 77 L. T. 693; 14 T. L. R. 172; 46 W. R. 258—Div. Ct.

**35. Notice to Abate served upon Owner—Compliance with Notice by Owner, though not Legally Liable—Sanitary Authorities themselves Liable—Recovery of Expenses by Owner from Sanitary Authority—Compulsion.]**—The plaintiffs, in compliance with a notice to abate a nuisance served upon them by the sanitary inspector of the district for which the defendants were the sanitary authority, and in the belief that they were bound to comply with the notice, did certain repairs to a drain pipe which drained their premises. It subsequently turned out that the pipe in question was a sewer repairable by the defendants themselves, and the plaintiffs thereon sought to recover the expenses of the repairs done by them from the defendants, on the ground that they had been compelled to do work which the defendants were legally compellable to do, and that, therefore, they were entitled to those expenses as money paid at the defendants' request. The defendants denied liability, on the ground that there was no compulsion, or not sufficient

**Nuisance : Abatement and Expenses—Continued.**

compulsion, to bring the case within the doctrine relied upon by the plaintiffs.

**HELD**—that where, as in the case of a nuisance, it is necessary for someone to act, and to act promptly, and the person who has so acted has done work which it was another's duty to do, that person is not bound to show he was directly or irresistibly compelled to do the work in order to avail himself of the doctrine above enunciated; that it is sufficient to show he did the work under pressure, which practically amounted to compulsion; and that, therefore, even though the notice upon which the plaintiffs acted was not a statutory notice with which they would have been bound to comply, there was sufficient compulsion to entitle them to maintain their action.

**NORTH v. WALTHAMSTOW URBAN DISTRICT COUNCIL**, (1898) 67 L. J. Q. B. 972; 62 J. P. 836—Channell, J.

**36. Abatement—Costs—“Full Compensation”**—*Public Health Act*, 1875 (38 & 39 Vict. c. 55), s. 308.]—In litigation between the appellant and the respondent corporation respecting the abatement of a nuisance, the latter were ordered to pay the former his costs of two appeals to be taxed.

By sect. 308 of the *Public Health Act*, 1875, “where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, *full compensation* shall be made to such person by the local authority exercising such powers.” In prosecuting his appeals the appellant reasonably incurred greater expenses than his taxed costs, and he claimed the difference.

**HELD**—that the law does not, in general, recognize the difference between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay, and which is commonly known as costs between solicitor and client; that sect 308 of the *Public Health Act*, 1875, makes no difference so as to cause the case to be an exception to the general rule of law, and that the meaning of “full compensation” in sect. 308 is the compensation which the law gives to the person claiming, and that is costs taxed and recoverable as between party and party.

Decision of Div. Ct. ([1900] 2 Q. B. 104; 69 L. J. Q. B. 556; 64 J. P. 439; 16 T. L. R. 316) affirmed.

**BARNETT v. ECCLES CORPORATION**, [1900] 2 [Q. B. 423; 69 L. J. Q. B. 837; 64 J. P. 692; 83 L. T. 66; 16 T. L. R. 463—C. A.

*And see* No. 38, *infra*.

**37. Private Prosecution—Abatement—Specifying requisite Works—Prohibition of Recurrence**—*Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 94, 95, 105.]—On a complaint against the appellant by a private person that a nuisance existed on the appellant's premises by an accu-

mulation of slaughter-house offal and filth, the justices, under sect. 105 of the *Public Health Act*, 1875, made an order that within one calendar month from the service of the order the appellant should take such steps as might be necessary to abate the said nuisance, and further prohibited the appellant from doing such acts as might lead to a recurrence of the said nuisance.

**HELD**—that though the complaint was made by a private person, the order must specify the works necessary to be done in order to abate the said nuisance.

**HELD**, further, that that part of the order prohibiting the appellant from doing such acts as might lead to a recurrence of the said nuisance was good, and must be upheld.

**REG v. HORROCKS** (1900), 69 L. J. Q. B. 688; [64 J. P. 661; 82 L. T. 767; 16 T. L. R. 435—Div. Ct.

**38. Failure of Proceedings instituted by Corporation—Arbitration to assess Compensation—Fresh Proceeding—Awarding Costs to unsuccessful Party—Public Health Act**, 1875 (38 & 39 Vict. c. 55), s. 180.]—A corporation commenced proceedings against B. under sect. 95 of the *Public Health Act*, 1875, in respect of a nuisance, with the result that the High Court of Justice decided that B was not liable, and awarded him the costs of the proceedings. B. then claimed full compensation under sect. 308 of the Act, and the matter went to arbitration. B. recovered nothing, but the arbitrator ordered the corporation to pay the costs of the arbitration.

**HELD**—that the arbitrator had no jurisdiction under sect. 308 to award costs to a wholly unsuccessful party.

**HELD**, also, that the arbitration was not part of the litigation commenced by the corporation, but a fresh proceeding instituted by B.

**In re BARNETT AND ECCLES CORPORATION**, [(1901), 65 J. P. 757—Div. Ct.

*And see* No. 36, *supra*.

**39. Abatement—Structural Defects—“Owner”**—*Collector of Rents—Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 4, 94, 95, 96, 98, 104.]—A complaint was preferred against the respondent, a collector of rents and agent for the owner, under sect. 94 of the *Public Health Act*, 1875, requiring him to abate a nuisance on the premises arising from structural defects. The justices held that the respondent was not the “owner.”

**HELD**—that the rent collector was the “owner” within the definition of sects. 4, 94, of the *Public Health Act*, 1875, and might be served with a notice under sect. 94.

**St. Helen's Corporation v. Kirkham** (1885) 16 Q. B. D. 403; 50 J. P. 647; 34 W. R. 440—Lopes, J.) followed.

**BROADBENT v. SHEPHERD**, 65 J. P. 70; 49 W. [R. 205; 83 L. T. 504; 17 T. L. R. 52—Div. Ct.

In the above case, at some time after the first

**Nuisance: Abatement and Expenses—Continued.** hearing the respondent ceased to be agent, and on the second hearing the justices dismissed the summons.

**HELD**—that the justices ought to have made the order upon the respondent, notwithstanding that he had ceased to be the agent for the property when the case was actually determined.

**BROADBENT v. SHEPHERD**, [1901] 2 K. B. 274; [70 L. J. K. B. 628; 65 J. P. 499; 49 W. R. 521; 84 L. T. 844, 17 T. L. R. 460—Div. Ct.

**40. Abatement—Drainage of Houses—Drain for Surface Water—Slops and Soapsuds—Discharge of Faecal Matter into Drain—Notice to Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 21.]**—There was in a village an adequate system of sewage by privies and cesspools so far as faecal matter was concerned. There was also running along the highway a drain, and persons occupying houses along the highway had connected their houses with it for the purpose of sending down slops and that class of water. The appellant, without any notice to the local authority, in 1900 made a water-closet on his land, and connected it with a communication which he already had with the highway drain, and which had been used for passing soapsuds and that class of liquid down the drain. The matter which he sent from his water-closet passed directly through the channel into the bottom of a disused quarry, which was part of the plaintiff's premises, and immediately adjoined her garden. The effect of that was to create an intolerable nuisance to the plaintiff.

**HELD** (by Byrne, J.)—that the drain was not the class of sewer to which the provisions of the Public Health Act, 1875, enabling any person to pass the faecal matter of his household into it, applied.

**Kinson Pottery Co. v. Poole Corporation** ([1899] 2 Q. B. 41; 68 L. J. Q. B. 819, 63 J. P. 580; 47 W. R. 607; 81 L. T. 24, 15 T. L. R. 379—Div. Ct., *see* SEWERS AND DRAINS, No. 48) followed.

**HELD** (by the C. A.)—that the above point did not arise, and that even if it was a sewer into which the appellant had a right under the conditions of the statute to pass faecal matter he had not performed those conditions.

Judgment of Byrne, J. ((1901) 17 T. L. R. 470) affirmed.

**GRAHAM v. WROUGHTON**, [1901] 2 Ch. 451; 70 [L. J. Ch. 673; 65 J. P. 710; 49 W. R. 643, 84 L. T. 744; 17 T. L. R. 573—C. A.

**41. Overcrowding—Order to Inspect—"House"—Day School without Boarders—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 91, 92, 102.]** Under sect. 102 of the Public Health Act, 1875, if a local authority desire to obtain admission to a "house" for the purpose of seeing as to whether or not there is a nuisance there, they may apply to a magistrate or justices on complaint on oath by an officer of the local authority,

after reasonable notice in writing of intention to make the same to the person having custody of the premises, who may by order require the person having the custody to admit the local authority by their officer to the premises. Sect. 4 says that "house" is to include "school."

**HELD**—that neither the magistrates nor quarter sessions have to decide whether there is a nuisance or not, but they have to consider whether there is reasonable ground for suspecting there is a nuisance; that the order ought to be made in reference to the particular subject-matter, not to give an officer the right to inspect everything; and that "house" in sect. 91 (5) of the Public Health Act included a day school where there were no boarders and where none of the members of the staff resided and the only persons dwelling upon the premises were two maidservants.

**WIMBLEDON URBAN DISTRICT COUNCIL v. [HASTINGS]**, (1902) 87 L. T. 118; 67 J. P. 45—Div. Ct.

**42. Obstructing Local Authority in Execution of Duty—Notice to Abate Nuisance—Refusal to Admit Members of District Council to Premises—Entering Premises without Permission—Trespass—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 102, 306.]**—A notice having been served by an urban council upon the owner of premises requiring him to abate a nuisance thereon, certain members of the council went to the premises, and, without the permission of the owner, some of them entered the premises to make an inspection, the rest remaining outside. The owner thereupon locked the door of the premises, thus preventing the members who were outside from entering, and those who were inside from getting out. Upon an information charging the owner with having wilfully obstructed the members in the execution of the Public Health Act, 1875:—

**HELD**—that the members had no power under sect. 102 of the Act to enter premises except by permission of the owner, or by an order of a magistrate, and that therefore they were not lawfully there, and the owner was not guilty of obstructing them in the performance of their duty.

**CONSETT URBAN DISTRICT COUNCIL v. CRAWFORD**, [1903] 2 K. B. 183, 72 L. J. K. B. 571; 67 J. P. 309; 51 W. R. 669; 88 L. T. 836; 19 T. L. R. 508; 1 L. G. R. 558—Div. Ct.

**43. Order—Signature by one Justice insufficient—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 96, 251, and Sched. IV., Form C.—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 12, 14—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 29, 31—Summary Jurisdiction Rules, 1886, r. 31, Consolidated Form, No. 19.]**—An order of justices for the abatement of a nuisance under sect. 96 of the Public Health Act, 1875, must be drawn up in writing, and must be signed by two justices, at least, who were present and took part in the hearing and

**Nuisance: Abatement and Expenses—Continued.**

determination of the case, and *semble* it should be served upon the defendant

Decision of Qr. Sess (67 J. P. 380) reversed.

WING v. EPSOM URBAN DISTRICT COUNCIL, [1904] 1 K. B. 798; 73 L. J. K. B. 389; 68 J. P. 259, 52 W. R. 461; 90 L. T. 543, 20 T. L. R. 310, 2 L. G. R. 714—Div. Ct

**44. Sewage—Disposal of—Local Authority—Liability—Statutory Powers—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 17, 27, 299—Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1900 (63 & 64 Vict. c. clxxviii.), *Dorchester Order*, 1900, art. 21.]—Sect. 27 of the Public Health Act, 1875, empowers any local authority to construct works for the disposal of the sewage of their district "provided that no nuisance be created." By a provisional order, confirmed by Act of Parliament, a local authority were required to carry out within a fixed time works for the disposal of the sewage of their district approved by the Local Government Board, and in case of default these requirements were made enforceable in manner provided by sect. 299 of the Public Health Act, 1875, which authorises the Local Government Board to enforce performance of duty by defaulting local authorities by writ of mandamus. The local authority accordingly constructed sewage works approved by the Local Government Board, and the works, though constructed without negligence, created both a public and a private nuisance.**

**HELD**—that the order was only a direction to the local authority to exercise the powers of sect. 27, within a given time, and did not exempt the local authority from their obligation under that section not to create a nuisance, and an injunction was granted.

An effluent of improperly treated sewage was sent by the local authority from their works into a small non-navigable stream in contravention of sect. 17 of the Public Health Act, 1875.

**HELD**—that an action was maintainable by the Attorney-General for the breach of the statutory obligation, although no damage was proved, but, the breach having been abated, no injunction was granted.

*Attorney-General v. Cockermouth Local Board* ((1874) L. R. 18 Eq. 172; 44 L. J. Ch. 118, 22 W. R. 619, 30 L. T. 590) followed.

Decision of Kekewich, J. (69 J. P. 363, 93 L. T. 290; 21 T. L. R. 695) affirmed.

ATTORNEY-GENERAL v. DORCHESTER CORPORATION, (1906) 70 J. P. 281; 94 L. T. 682; 22 T. L. R. 480; 4 L. G. R. 675—C. A.

*See also Cases in Section VI.*

**VI. EARTH AND WATER-CLOSETS.**

**45. Powers of Local Authority—No general Resolution—Notice to provide sufficient Water-closet—Specification—Validity of Notice—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 36.]—The Public Health Act, 1875, provides by sect. 36**

that if a house appears to the local authority to be without a sufficient water-closet, earth-closet, or privy, the authority shall, by written notice require the owner or occupier "to provide a sufficient water-closet, earth-closet, or privy," and that "if such notice is not complied with," the authority may do the work and recover the expenses from the owner.

The plaintiff R. was the owner of a house, and on November 24th, 1897, the defendants served on him a notice that, as the house was without a sufficient water-closet he was "to provide a sufficient water-closet to the said house according to the specification given by this notice," and then followed the usual notice that if the work was not done the authority would enter and do the work, and a specification of the kind of water-closet to be put in.

In an action for an injunction to restrain the authority from entering:—

**HELD**, by Ridley, J. (62 J. P. 216; 78 L. T. 184), that the notice was bad on the ground that it did not allow the owner to comply with it by providing any other "sufficient" water-closet than that specified, although it was not given in pursuance of a general resolution without regard to the particular requirement.

*Semble*, that it might be bad also for leaving out the words "earth-closet or privy," which according to the section the premises should be without before the notice can be given.

In such a case the remedy of the plaintiff is not by appeal to the Local Government Board under sect. 268 of the Public Health Act, 1875, but appeals to that body lie only in cases where the question arises as to the sufficiency.

On appeal, the C. A. varied the order of Ridley, J., and stayed proceedings pending the decision in No. 47, *infra*, holding that the statement of claim disclosed a cause of action.

ROBINSON v. SUNDERLAND CORPORATION, [1899] 63 J. P. 19—C. A.

**46. Powers of Local Authority—General Resolution—Notice to Provide sufficient Privy—Validity of Notice—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 36.]—The Public Health Act, 1875, provides by sect. 36 that if a house appears to the local authority to be without a sufficient water-closet, earth-closet, or privy, the authority shall by written notice require the owner or occupier "to provide a sufficient water-closet, earth-closet, or privy," and that "if such notice is not complied with," the authority may do the work and recover the expenses from the owner.**

A local authority passed a general resolution that in all cases of nuisances requiring the reconstruction of privies it should as far as practicable be ordered that the privies should be converted into privies on a particular system. In pursuance of that resolution, a notice was served upon the owner of some houses, under sect. 36, that each house was without a sufficient privy, and requiring him "to provide . . . a sufficient privy on the waste water-closet system in accordance with plans" specified.

**HELD**—that the notice was invalid because it

**Earth and Water-Closets—Continued.**

was given in pursuance of a general resolution, and also because it did not permit the owner to comply with the notice by providing any other "sufficient" privy than that specified.

Decision of Div. Ct. ([1897] 2 Q. B. 357; 61 J. P. 646; 66 L. J. Q. B. 797; 77 L. T. 306; 13 T. L. R. 537; 46 W. R. 30) affirmed.

WOOD v. WIDNES CORPORATION, [1898] 1 Q. B. [463; 62 J. P. 117; 67 L. J. Q. B. 254; 77 L. T. 779; 14 T. L. R. 192; 46 W. R. 293—C A

**47. Entering Premises—Inquiry as to Sufficiency of present Sanitary Arrangements—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 36, 268, 305.]**—Justices have no jurisdiction to inquire into the sufficiency of present sanitary arrangements upon the hearing of an application for an order to enter, examine, and lay open premises under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 305, for the purpose of making plans, &c., for works to be executed under sect. 36 of the Act. An appeal from the decision of the local authority lies to the Local Government Board under sect. 268.

ROBINSON v. SUNDERLAND CORPORATION, [1899] 1 Q. B. 751; 68 L. J. Q. B. 330; 63 J. P. 841, 80 L. T. 262; 15 T. L. R. 195; 19 Cox, C C 245—Div. Ct.

**48. Privies—Power of Local Authority to Order a Water-closet in place of a Privy—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 35, 36, 268.]**—Sect. 36 of the Public Health Act, 1875—which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and an ashpit, or either of them, and, in case of non-compliance, empowers the local authority to do the necessary works and recover the expenses—does authorise the local authority to order a sufficient water-closet to be provided in place of a privy where the existing accommodation is insufficient.

*St. Luke's Vestry v. Lewis* (1862) 1 B. & S. 865; 31 L. J. M. C. 73, 10 W. R. 249; 5 L. T. (N.S.) 608; 8 Jur. (N.S.) 432 approved.

NICHOLL v. EPPING URBAN DISTRICT COUNCIL, [1899] 1 Ch. 844; 68 L. J. Ch 393; 63 J. P. 600; 47 W. R. 457; 80 L. T. 515; 15 T. L. R. 338—Stirling, J.

**49. Nuisance — "Cleansing" by Local Authority — Responsibility — Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 42, 94.]**—Where a local authority have themselves undertaken the cleansing of privies under sect. 42 of the Public Health Act, 1875, and, owing to cases of typhoid fever in the houses to which the privies are attached, the privies have become in such a state as to be a nuisance and injurious to health; the local authority are responsible for the abatement of the nuisance, and not the owner of the houses, especially where such owner has recently purchased such houses in that condition without knowledge of the existence of the

nuisance. "Cleansing" in sect. 42 has a wide meaning, and includes removal of all matter which causes the nuisance, *e.g.* bacteria

BARNETT v. LASKEY, (1899) 68 L. J. Q. B. 55; [63 J. P. 5; 79 L. T. 408—Div. Ct.

**50. Existing Closet Accommodation a Nuisance — Conversion into Water-closet—(Complying with Requirements of Corporation—Expenses)]**—By the Bootle Provisional Order, 1897, when a sewer and water supply sufficient for the purpose are reasonably available, the corporation may by written notice to the owner of any building require any existing closet accommodation provided at or in connection with such building to be altered so as to be converted into a water-closet which shall comply with the bye-laws in force, and shall communicate with a sewer. Power is also given to the corporation that if the owner fail to comply with the notice the corporation may do the work and recover the expenses. An appeal to justices is given to any person who deems himself aggrieved by any of the requirements of the corporation, or as to the reasonableness of any expenses wholly or partially recoverable from him, and justices on such appeal 'may make such order in the matter as to them may seem equitable'

O, an owner of certain houses, was served with a notice by the inspector of nuisances requiring the existing closet accommodation to be converted into water-closets, and it was stated in such notice that the existing closet accommodation had been certified by the medical officer to be in such a state as to create a nuisance and to be injurious to health. O. appealed to justices, who found that the existing closet accommodation was in such a state as to create a nuisance and to be injurious to health, and that the requirements of the corporation were reasonable, and ordered that the expenses in carrying out these requirements should be borne in equal shares by O. and the corporation.

HELD—that it was competent for the justices to deal with the matter in the way in which they had done, and they had power to make any order as to expenses which appeared to them to be reasonable, having regard to all the circumstances of the case.

BOOTLE CORPORATION v. OWENS, (1902) 66 [J. P. 357; 87 L. T. 74—Div. Ct.

(N.B.—This case was decided May 19th, 1898—ED)

**51. "Proper and Convenient Place" — Nuisance to adjoining Owner—Mandatory Injunction—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 39.]**—The power which local authorities have under sect. 39 of the Public Health Act, 1875, of erecting urinals in "proper and convenient situations" does not authorise them to do anything which constitutes a private nuisance to individuals.

The test is, does it materially interfere with the ordinary comfort and convenience of the adjoining owners in the enjoyment of their property? And, if it does, it cannot be justified

**Earth and Water-Closets—Continued.**

on the ground that it was erected in order to obviate pre-existing nuisances.

The Court granted a mandatory injunction ordering the defendant council to remove within six weeks a urinal, erected within twelve feet of the entrance gates to the plaintiff's property, on the ground that it was a nuisance to him and other inhabitants of his house. *Semble*, also, such a situation is not "proper and convenient."

*Sellors v Matlock Bath Local Board* ((1885) 14 Q. B. D. 928; 52 L. T. 762—Denman, J.) followed.

*LEYMAN v. HESSLE URBAN DISTRICT COUNCIL*, [(1903) 67 J. P. 56; 19 T. L. R. 73; 1 L. G. R. 76—Joyce, J.]

**52. Proper and Convenient Situation—Nuisance—Detriment to Property—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 39, 40.]**—In an action to restrain a local authority from erecting a public lavatory close to the plaintiff's property at a seaside resort, it appeared that the roof of the lavatory and its approaches, but not the entrance to it, would be visible from the plaintiff's house.

**HELD**, upon the particular facts, that the lavatory was required, that it was to be in a proper and convenient situation; that it was not a nuisance either public or private; and that although it might prove detrimental to the property of the plaintiffs, yet the local authority having acted reasonably and *bonâ fide* in the exercise of their powers under sect. 39 of the Public Health Act, 1875, the action must be dismissed.

*MAYO v. SEATON URBAN DISTRICT COUNCIL* [(1904) 68 J. P. 7; 2 L. G. R. 127—Kekewich, J.]

**53. Cleansing of "Earth-closets, Privies, Ashpits and Cesspools"—Duty of Sanitary Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 42, 44.]**—The appellants were the owners and occupiers of premises on which there was a cesspool receiving the drainage from the premises, which consisted of a shop, slaughter-house, and stables. The appellants used to empty and cleanse the cesspool, but afterwards ceased to do so, and contended that the obligation to do so was on the respondents. It appeared that in 1890 the respondents' predecessors had passed a bye-law which provided that every occupier of any premises shall once at least in every three months cleanse every cesspool belonging to such premises. Subsequently in 1894 the respondents passed a resolution pursuant to sect. 42 of the Public Health Act, 1875, that "the scavenging of privies, closets, and ashpits be undertaken by the board at once." By a subsequent resolution tenders were obtained, and the work carried out under contracts.

**HELD**—that the words of sect. 42 must be read distributively, and that a local authority may undertake or contract for the cleansing of earth-closets, privies, ashpits, and cesspools or such one or more of them only as they may

decide to deal with, and that, therefore, the obligation to comply and cleanse the cesspool was still on the appellants

*STAINLAND, & CO. INDUSTRIAL SOCIETY v. [STAINLAND, & CO. URBAN DISTRICT COUNCIL]*, [1906] 1 K. B. 283; 75 L. J. K. B. 190; 70 J. P. 150; 94 L. T. 214, 4 L. G. R. 295—Div. Ct.

**54. Power to Order in Place of Existing Privies—Notice specifying particular Things required—Standard Specification—Bradford Improvement Act, 1873 (36 & 37 Vict. c. clxvii.), s. 21.]**—The appellants were summoned for neglecting to provide water-closets and ashpits for certain houses in pursuance of a notice issued under sect. 21 of the Bradford Improvement Act, 1873. The appellants contended that the notice was bad in law because it required the substitution of water-closets for privies, and specified the particular things the appellants were required to do, giving them no opportunity of submitting their own plans to the corporation for approval. They also contended that in requiring work to be done according to a standard specification the corporation had not exercised such discretion as they ought to do.

**HELD**—that the powers given by sect. 21 of the Bradford Improvement Act, 1873, were in addition to, and not in substitution for, those conferred by sects. 35 and 36 of the Public Health Act, 1875; that the corporation might require the substitution of water-closets for privies, and might require the work to be done in accordance with a standard specification.

*Agnew v Manchester Corporation* ((1902) 77 J. P. 174; 1 L. G. R. 9—Div. Ct., see LOCAL GOVERNMENT, Nos. 32 and 85) followed.

*SMITH v. GREENWOOD*, [1907] 2 K. B. 385; 76 L. J. K. B. 1129; 71 J. P. 353; 96 L. T. 730, 5 L. G. R. 660—Div. Ct.

**VII. HOURS OF EMPLOYMENT.**

*And see EDUCATION; FACTORIES; INFANTS.*

**55. Employment of Young Person—"Shop"—"Licensed Public-houses and Refreshment Houses of any Kind"—Hotel—Page Boy—"Wholly employed as Domestic Servant"—Shop Hours Act, 1862 (55 & 56 Vict. c. 62), ss. 1, 5, 9, 10.]**—The appellants, a large London hotel company, employed a young person as a page boy in their hotel. His duties were to dust the reception rooms in the morning, but he was principally employed as a messenger, taking up messages and sending off telegrams and messages for persons staying at and using the hotel and restaurant. There was no bar or counter for the sale of intoxicating liquors at the hotel, which was duly licensed under the Ale-house Act, 1828 (9 Geo. 4, c. 61), and the Acts amending the same, and held an excise licence under the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 43 (4). The magistrate held that the page boy was not "wholly employed as a domestic servant" within the meaning of the

**Hours of Employment—Continued.**

Shop Hours Act, 1862 (55 & 56 Vict. c. 62), and that the hotel came within the words "licensed public-house or refreshment rooms of any kind" mentioned in sect. 9 of the same statute.

HELD—that there was evidence on which the magistrate could find as a matter of fact that the page boy was not wholly employed as a domestic servant, and that the hotel came within the definition of "licensed public-house and refreshment room of any kind" mentioned in the statute, and that the conviction must be upheld.

SAVOY HOTEL COMPANY v. LONDON COUNTY [COUNCIL, [1900] 1 Q. B. 665; 69 L. J. Q. B. 274; 64 J. P. 262; 49 W. R. 351; 82 L. T. 56, 16 T. L. R. 148—Div. Ct.

56 "Shop"—*Newspaper Stall at Railway Station — Temporary Structure — Newspaper Boy — Shop Hours Act, 1892 (55 & 56 Vict. c. 62), ss. 3, 4, 9.*—A boy under eighteen years of age was employed by a firm of newspaper agents at Redhill railway station, where there was a newspaper stall, and on which was a notice referring to the provisions of the Shop Hours Act. Part of the boy's duties was to go to Merstham Station, about two miles off, for about four hours every morning to deliver newspapers in the district, and to sell newspapers at the station from a temporary stall composed of a board laid across two trestles. No notice of the Shop Hours Acts was affixed there.

HELD—(1) that the temporary stall at Merstham Station was not a "shop" within the meaning of sects. 4 and 9 of the Shop Hours Act, 1892, so as to require a notice to be exhibited there; and (2) that the boy was "employed" at the stall at Redhill station.

W. H. SMITH & SON v. KYLE, (1901) 85 L. T. 428, 18 T. L. R. 32; [1902] 1 K. B. 286; 71 L. J. K. B. 16; 66 J. P. 101—Div. Ct.

**VIII. SLAUGHTER-HOUSES.**

57. *Licence—Old Slaughter-house—Continuous User—Personal Licence—Licence for Premises—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 125, 126.*—A slaughter-house licence under sect. 125 of the Towns Improvement Clauses Act, 1847, is a personal licence for a particular place.

The appellant was convicted of having used premises as a slaughter-house without having obtained a licence from the urban sanitary authority in the following circumstances.—A licence had been granted in 1874 to one Henry Smith to slaughter animals on the premises in question. Smith died in 1881, but the premises continued to be used by his widow as a slaughter-house till 1898, and were occasionally so used by her between 1898 and 1906, when they were let to the appellant. It was contended by the appellant that by virtue of the licence which had been granted to Smith under sect. 125 of the Towns Improvement Clauses Act, 1847, the premises were a new slaughter-house within the

meaning of sects. 125 and 126, and that, therefore, the premises remained a licensed slaughter-house, whether continuously used as such or not, and that the licence was not a personal licence to Smith only, but endured for the benefit of successive occupiers.

HELD—that Smith's licence died with him, and that on his death the premises ceased to be licensed, and that therefore the appellant had been rightly convicted.

GOODWIN v. SALE, [1907] 2 K. B. 278; 76 L. J. [K. B. 654; 71 J. P. 303; 96 L. T. 694; 23 T. L. R. 453; 5 L. G. R. 611—Div. Ct.]

58. *Licence — Period of less than Twelve Months—Effect of Attempt to Limit Duration of Licence to Period of less than Twelve Months—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 29*—The limitation of a grant of a slaughter-house licence to a period of less than twelve months is void under sect. 29 of the Public Health Acts Amendment Act, 1890, and a licence containing such an attempted limitation must be read as extending for the full period of twelve months.

TAYLOR v. WINSFORD URBAN DISTRICT [COUNCIL, [1907] 2 K. B. 396; 76 L. J. K. B. 897; 71 J. P. 375; 97 L. T. 401; 5 L. G. R. 786—Div. Ct.]

**IX. FIRE BRIGADE.**

59. *Implied Authority of Superintendent — Applying for Aid from Adjoining District — Remuneration—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 32—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171.*—The superintendent of a fire brigade applied to a volunteer fire brigade in an adjoining district for help to extinguish a fire in his district. The volunteer fire brigade was accordingly sent, and helped to extinguish the fire. In an action against the council of the district where the fire occurred for the services rendered:

HELD—that the superintendent had authority to contract on behalf of the district council for the services of the fire brigade from the adjoining district, that the word "provide" in sect. 32 of the Town Police Clauses Act, 1847, enabled him to hire the engine and other apparatus, and that therefore the district council were liable.

JAMES AND ANOTHER v. STAINES URBAN [DISTRICT COUNCIL, (1900) 83 L. T. 426; 17 T. L. R. 2—Div. Ct.]

60. *Attendance at Fire Outside Limits of District—Determination of Justices of Amount of Expenses and Reasonable Charge for Use of Brigade—Order for Payment or Otherwise—Whether Complaint in Time—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 33—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 8, 11*—A determination of two justices under sect. 33 of the Town Police Clauses Act, 1847, of the amount of the expenses incurred by a local authority in sending a fire brigade to a fire outside the limits of their district, and of a reasonable charge for the use of the engines with



**Fire Brigade—Continued.**

their appurtenances, and for the attendance of firemen, is not "an order for payment or otherwise" within the meaning of sect. 8 of the Summary Jurisdiction Act, 1848. Therefore a complaint or information asking for such a determination under sect. 33 need not be made within six months of the fire, as sect. 11 of the Summary Jurisdiction Act, 1848, does not apply to such a complaint or information.

R. v. PART AND ANOTHER, (1906) 70 J. P. 398; [4 L. G. R. 1122—Div. Ct.]

**X. BYE-LAWS.**

61. *Building Bye-laws—Public Health Act, 1875* (38 & 39 Vict. c. 55).]—The Crown is not expressly or impliedly bound by the provisions of the Public Health Act, 1875.

Therefore building bye-laws made under that Act do not apply to buildings erected for State purposes upon State property, *e.g.* warders' dwellings erected in connection with a prison on land vested in the Prison Commissioners or the Home Secretary.

GORTON LOCAL BOARD OF HEALTH v. PRISON COMMISSIONERS, (1887) reported [1904] 2 K. B. 165 (n.); 73 L. J. K. B. 114 (n.); 68 J. P. 27; 89 L. T. 478 (n.); 1 L. G. R. 838 (n.)—Div. Ct.

62. *Scotland—Closing Ice Cream Shops at 10 p.m.—Burgh Police (Scotland) Acts, 1892* (55 & 56 Vict. c. 55), ss. 316, 318, 380, and 1903 (3 Edw. 7, c. 33, s. 82 (2)).]—By sect. 380 of the Burgh Police (Scotland) Act, 1892, refreshment and provision shops must not be opened between midnight and 5 a.m. Under the Act of 1903 town councils may make bye-laws as to the hours of opening and closing ice cream shops, but must allow them to be open at least fifteen hours daily.

HELD—that a bye-law closing ice cream shops between 10 p.m. and 7 a.m. was neither *ultra vires*, nor unreasonable.

Decision of Ct. of Sess. ((1906) 8 F. 564) affirmed.

DA PRATO AND OTHERS v. PARTICK MAGISTRATES, [1907] A. C. 153; 96 L. T. 398—H. L. (Sc.).

**XI. PRACTICE.**

And see ARBITRATION; MAGISTRATES.

63. *Appeal—Notice of Appeal to Quarter Sessions—Authority of Clerk to District Council—Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 259—*Subsequent Ratification by Council*]—A notice of appeal to quarter sessions given by the clerk of a rural district council against a summary order authorising the occupation of a house, notwithstanding the refusal of a certificate by the rural district council under sect. 6 of the Public Health (Water) Act, 1878, is sufficient if subsequently ratified by resolution of the council under their seal approving and confirming the giving of the notice of appeal, and authorising

the clerk to enter into the necessary recognizance and prosecute the appeal.

ST. MELLON'S RURAL DISTRICT COUNCIL v. [EDWARDS, (1903) 67 J. P. 396—Monmouthshire Qr. Sess.]

64. *Statutory Declaration by Umpire—Omission to Make and Annex to Award—Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 180 (10), (11).]—An umpire, duly appointed under the Public Health Act, 1875, failed to make the statutory declaration and to annex it to his award as required by sect. 180 (10), (11), of the Public Health Act, 1875. One of the parties, on becoming aware of the omission, at once took steps to have the award set aside.

HELD—that the award must be set aside.

LUDLOW CORPORATION v. PROSSER, (1906) 70 J. P. 400; 22 T. L. R. 597; 4 L. G. R. 940—Div. Ct.

**XII. MISCELLANEOUS.**

65. *Jurisdiction—Proceedings before Justices—Jurisdiction of High Court to Interfere by way of Injunction or Declaration—Public Health (Building in Streets) Act, 1888* (51 & 52 Vict. c. 52), s. 3—*R. S. C.*, 1883, *Ord.* 25, r. 5.]—The High Court will not, in the absence of very special circumstances, exercise its jurisdiction (if any exists) to interfere, by way of injunction or declaration of right, where the Legislature has prescribed a mode of procedure before justices.

*Lord Auckland v. Westminster Local Board of Works* (L. R. 7 Ch. 597), *Kerr v. Corporation of Preston* (6 Ch. D. 463), and *Stannard v. Vestry of St. Giles, Camberwell* (20 Ch. D. 190), considered.

GRAND JUNCTION WATERWORKS CO. v. HAMP-TON URBAN DISTRICT COUNCIL, [1898] 2 Ch. 331; 62 J. P. 566; 46 W. R. 644; 78 L. T. 673—Stirling, J.

66. *Street Improvements—Resolution by Sanitary Authority to do Works—Objections—"Insufficient or Unreasonable"—Private Street Works Act, 1892* (55 & 56 Vict. c. 57), ss. 6, 7, 8.]—By the Private Street Works Act, 1892, s. 4: "During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds, that is to say . . . (d) that the proposed works are insufficient or unreasonable, and that the estimated expenses are excessive"; and by sect. 8 the sanitary authority have power to have any objections heard by a Court of summary jurisdiction.

HELD—that the Court of summary jurisdiction has only power to quash the resolution by the sanitary authority on the grounds of insufficiency and unreasonableness, if the proposed scheme is found to be insufficient to carry out the purpose supposed to be effected by the works, or if it, taken as a whole, is unreasonable to be done.

**Miscellaneous—Continued.**

The section does not mean insufficient or unreasonable having regard to some matter which might make a better scheme for the neighbourhood in general.

**MANSFIELD CORPORATION v. BUTTERWORTH**, [1898] 2 Q. B. 274; 62 J. P. 500; 67 L. J. Q. B. 709; 78 L. T. 527; 14 T. L. R. 431; 46 W. R. 650—Div. Ct.

**67. Police—Prosecutions—Town Police Clauses Act, 1847** (10 & 11 Vict. c. 89), s. 28—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 171, 253.]—Within a district of an urban district council, where the provisions of sect. 28 of the Town Police Clauses Act, 1847, are in force owing to their incorporation with sect. 171 of the Public Health Act, 1875, the police can institute proceedings for offences within that section, and the institution of such proceedings is not restricted to the person aggrieved or the local authority under sect. 253 of the Public Health Act, 1875.

**JOBSON v. HENDERSON**, (1900) 64 J. P. 425; 82 [L. T. 260—Div. Ct.

**68. Midwives—Employment of Uncertified Substitute—Removal from Roll—Inquiry before Central Midwives Board—Evidence—Midwives Act, 1902** (2 Edw. 7, c. 17), s. 1 (4).]—At an inquiry held by the respondents, the Central Midwives Board, into charges against the appellant of employing an uncertified person as her substitute contrary to sect. 1 (4) of the Midwives Act, 1902, evidence was given by an inspector of certain admissions made to him by the appellant as to her husband having attended patients in her stead, and of statements made to him (the inspector) by the appellant's patients. The appellant gave evidence denying the charges, but the Board after deliberation decided that the appellant's name be removed from the roll of midwives.

**HELD**—on appeal, that "employ" in sect. 1 (4) of the Midwives Act, 1902, did not necessarily mean "employ for payment"; that the Board was a body acting judicially, and that as they had before them legal evidence on which they were entitled to act, the Court would not interfere.

Whether on such an inquiry the Board are bound by the legal rules of evidence, *quære*.

**IN RE FELDMANN**, (1907) 71 J. P. 269; 97 L. T. [548, 23 T. L. R. 432; 5 L. G. R. 653—Div. Ct.

**69. Dismissal of Servants—Matron of Isolation Hospital—Terms of Employment—No Special Contract—Right to Dismiss at Pleasure—Public Health Act, 1875** (38 & 39 Vict. c. 55), ss. 174 (1), 189.]—The plaintiff was employed by the defendants as matron of an isolation hospital, at a salary of £60 per annum. There was no contract between the parties as to dismissal or notice to terminate the employment.

**HELD**—that the plaintiff was removable by the defendants at their pleasure, under sect. 189

of the Public Health Act, 1875, and that, therefore, the defendants were entitled to dismiss her at any time without assigning any reason and without notice.

*Ex parte Richards* ((1876) 3 Q. B. D. 368; 47 L. J. Q. B. 498; 38 L. T. 684; 26 W. R. 695) followed.

**WOOD v. EAST HAM URBAN DISTRICT COUNCIL**, [(1907) 71 J. P. 129, 5 L. G. R. 403—C. A.

**70. Pistols—Sale by Retail—Pistols Act, 1903** (3 Edw. 7, c. 18), ss. 2, 3.]—The term "pistol" in sect. 2 of the Pistols Act, 1903, does not apply to a pistol which is a mere toy, but only to a pistol which is a weapon from which a shot, bullet, or other missile can be discharged.

**BRYSON v. GAMAGE, LD.**, [1907] 2 K. B. 630; [76 L. J. K. B. 936; 71 J. P. 439; 97 L. T. 399—Div. Ct.

**PUBLIC LIBRARIES.**

*See* LOCAL GOVERNMENT; RATES.

**PUBLIC MEETINGS.**

*See* CRIMINAL LAW.

**PUBLIC SAFETY AND ORDER.**

*See* EXPLOSIVES; HIGHWAYS; LOCAL GOVERNMENT; METROPOLIS; PUBLIC HEALTH; STREET TRAFFIC; THEATRES, ETC.

**PUBLIC ELEMENTARY SCHOOLS.**

*See* EDUCATION.

**PUBLIC WORSHIP.**

*See* ECCLESIASTICAL LAW.

**PUNISHMENT.**

*See* CRIMINAL LAW.

**QUANTUM MERUIT.**

*See* AGENCY, 36.

**QUARRIES.**

See MINES, MINERALS, AND QUARRIES.

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See MAGISTRATES, CRIMINAL LAW.

**QUEENSLAND.**

See DEPENDENCIES AND COLONIES.

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**RAILWAYS AND CANALS.****I. RAILWAYS.**

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**I. RAILWAYS.****(a) Construction.**

See also COMPULSORY PURCHASE; ARBITRATION, 28, HIGHWAYS, 10-12, 122-128, 132, 133, 141, 142.

**(i.) Accommodation Works.**

**1. Damage caused by Improper Construction.]**  
—A bridge formed part of the design of a railway. The Act of Parliament giving powers to make the line said the defendants would make a bridge at a particular point according to a design approved by the plaintiffs' predecessor in title.

**HELD**—that the bridge was not an accommodation work; and that the plaintiffs' right of action for damage by floods caused by the

improper construction of the bridge was not taken away.

**FERRAND AND OTHERS v. MIDLAND RY. CO.**  
[(1901) 17 T. L. R. 427—Kennedy, J.]

**2. Grant of Easement—Level Crossings—Substantially increasing Burden of Easement—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 16, 68-76.]**—By a deed of covenant of March 13, 1868, it appeared that the works specified in the schedule thereto were executed in pursuance of an agreement between the plaintiff company and a landowner, whose lands were about to be intersected by the company's railway, and those works were to be "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway." Prior to and on March 13, 1868, the schedule included three level crossings which ran side by side.

**HELD**—that the defendant, the successor of the landowner, was not entitled to use the level crossings for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at or previous to March 13, 1868, or as since enjoyed by the defendant or her predecessors in title, if, owing to acquiescence or otherwise, such subsequent enjoyment was then binding on the plaintiffs; and that the defendant was entitled to bring goods across the level crossings substantially as the same were brought at or previous to March 13, 1868, but so that the burden of the easement was not increased as aforesaid.

**Great Northern Ry. Co. v. M'Alister** ([1897] 1 Ir. R. 587, 602) approved and adopted.

**GREAT WESTERN RY. CO. v. TALBOT**, [1902] 2 Ch. 759; 71 L. J. Ch. 835; 87 L. T. 405; 18 T. L. R. 775; 5 W. R. 312—C. A.

**(ii.) Parliamentary Deposit.**

**3 Abandonment of Undertaking—Repayment of Deposit—"Creditors"—Engineers and Solicitors—Right to Claim against Deposit.]**—A special Act provided that, in the event of the proposed railway being abandoned, the parliamentary deposit should be "applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof," and subject to such application should be repaid to the depositors. It also provided that "all costs, charges, and expenses of, and incident to, the preparing, obtaining and passing of this Act shall be paid by the company." Upon the abandonment of the undertaking:

**HELD**—that the Court could allow against the deposit the claims of the engineers and solicitors who had given their services in carrying through the company's Bill, although they had given such services solely in the expectation of being remunerated by the company when formed; and, also, that the Court could give direct effect to the claims of persons employed by the professional promoters of the company.

**MUIR v. FORMAN'S TRUSTEES AND OTHERS**, [(1903) 5 F. 546—Ct. of Sess.]

**Railways—Continued.**

4. *Abandonment—Distribution—Inquiry as to Persons entitled—Costs of Inquiry.*—By a railway company's Act, and a subsequent Act authorising its abandonment, the Parliamentary deposit was to be applied first in payment of compensation to landowners, secondly in payment of creditors, and the balance to be repaid to the depositors.

Upon a summons by the depositors an inquiry was ordered, and it was certified that no compensation was due, that one creditor's claim must be disallowed, but that the other creditors' claims exceeded the amount of the deposit.

**HELD**—that the cost of the inquiry could not be paid out of the deposit in priority to the creditors' claims.

*In re Wretham, Mold and Connah's Quay Ry. Co.* ([1900] 1 Ch. 261; 69 L. J. Ch. 291, 48 W. R. 311, 82 L. T. 33—C. A., No. 86, *infra*) distinguished on the ground that in the present case the depositors had instituted the proceedings for their own benefit

**IN RE LANCAIRE, DERBYSHIRE AND EAST COAST RAILWAY ACTS, 1891—1896, AND LINCOLN AND EAST COAST (1904) RAILWAY ACTS, 1897—1902, [1903] 2 Ch. 711; 72 L. J. Ch. 789; 52 W. R. 26—Farwell, J.**

5. *Abandonment of Undertaking—Payment out of Court of Deposit—Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20), s. 3—Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), s. 1*—Where a railway undertaking is definitely abandoned, the Court can deal with the deposit made under the Parliamentary Deposits Act, 1846, without requiring the promoters to obtain a special abandonment Act.

**IN RE TORRINGTON AND OKEHAMPTON RAILWAY [BILL, [1907] 1 Ch. 186, 76 L. J. Ch. 175—Neville, J.**

6. *Agreement to Repay—Ultra vires*—Where persons provide the required deposit to enable a railway company to obtain its special Act, it is *ultra vires* for the company to agree to repay such deposit out of their assets before it is decided whether or not there are any creditors.

*Quære*, whether it is *ultra vires* to agree to repay the deposit when the prescribed period has elapsed without the railway having been made and the claims of creditors have been satisfied.

**HOARE AND ANOTHER v. PLYMOUTH AND [NORTH DEVON DIRECT RY. CO., (1905) 21 T. L. R. 165—Channell, J.**

**(iii.) In General.**

7. *Agreement by Two Companies to Construct a Railway—Interpretation—Completion of a Branch Line by One of the Companies—Inequality of User—Rights of the Companies.*—The West Wallsend Coal Company and the Monk Wearmouth Colliery Company were in possession of certain adjacent coal mines and land containing coal. These two companies desired to construct a railway to facilitate the communication between their respective collieries and the

Government railway, and they accordingly entered into an agreement for the purpose of carrying out their object, whereby the cost of construction and purchase of land for the line to run over and all necessary expenses of laying the line were to be borne by the respective companies in equal shares, and half the cost of value of land belonging to the West Wallsend Coal Company over which the railway passed was to be paid by the Monk Wearmouth Colliery Company. The cost of renewals and maintenance to the line was to be paid by each company or their transferees in proportion to the traffic done by each company or their transferees. The appellants became transferees of the West Wallsend Company, and the respondents became transferees of the Monk Wearmouth Colliery Company, and since then the two companies jointly used and managed the railway. The appellants purchased the Killingworth Colliery and completed a branch line for the purpose of conveying coal on to the railway belonging to the two companies.

**HELD**—that what the appellants had done was lawful although they might thereby obtain a greater advantage from the joint line than that enjoyed by the other company, as the parties to the agreement seemed to contemplate that this inequality of user might exist.

**CALEDONIAN COAL CO. v. SEAHAM COLLIERY CO., [1901] A. C. 554; 70 L. J. P. C. 105, 81 L. T. 785—P. C.**

8. *Contract to Make Station—Private Act—Clause for Protection of Landowner—Agreement with Third Person—Ultra vires*—By a private Act authorising the construction of a railway certain provisions "for the protection of" a landowner were to have effect "unless otherwise agreed between the company and the owner." One of those provisions was that the company were to construct and maintain a station for passengers and goods with proper access to and from the estate of the owner at a certain place.

The defendants, in whom the railway with all its obligations had become vested, but who were ignorant of the provision referred to, agreed with the plaintiff, who was the owner of a building estate adjoining another part of the line, in consideration of certain payments, to discontinue the first-mentioned station, and in lieu thereof to erect a new station adjoining the plaintiff's estate.

**HELD** (Romer, L. J. dissenting)—that the agreement was *ultra vires*, it not being competent for the company to take the land and then do what the Act prohibited, and that it made no difference that the provision was one for the benefit of an individual and not of the public.

**HELD**, therefore, that the plaintiff could not maintain an action for damages or specific performance.

Decision of Farwell, J. ([1905] 2 Ch. 280; 74 L. J. Ch. 659; 53 W. R. 629; 93 L. T. 41; 21 T. L. R. 499) reversed.

**CORBETT v. SOUTH EASTERN AND CHATHAM [RY. CO.'S MANAGING COMMITTEE, [1906] 2 Ch. 12; 75 L. J. Ch. 489; 94 L. T. 748; 22 T. L. R. 550—C. A.**

**Railways—Continued.**

9. *Land Acquired under Special Act—Subsequent Repeal of Special Act*—"Not to Annul or in any wise Prejudice or Affect any Purchase, Sale, Conveyance, or Contract heretofore made"—*Rights of Mineral Owners—By which Statute governed—Railway Clauses Act, 1845* (8 & 9 Vict. c. 20), ss. 77, 82—*London and North Western Railway Company's Act, 1846* (9 & 10 Vict. c. cccv.), s. 1—A deed of conveyance made under the authority of an Act of Parliament, must be read as if the sections of the Act were incorporated in it.

The special Acts under which a railway was originally constructed were repealed, and a consolidating Act incorporating the Railway Clauses Act, 1845, was passed, but it was specially provided that the repeal was not to "affect . . . any conveyance . . . heretofore made"

HELD—that the rights of owners of minerals were still governed by the provisions of the special Acts, under which their land was acquired, and not by those of the Railway Clauses Act.

*Elliott v. North Eastern Ry. Co.* ((1863) 10 H. L. C. 333; 11 Eng. Rep. 1055—H. L.) followed.

*R. v. London and North Western Ry. Co.* ([1899] 1 Q. B. 921, 68 L. J. Q. B. 685, No. 11, *infra*) overruled

Decision of C. A. (unreported) reversed.

LONDON AND NORTH WESTERN RY. CO. v. [WALKER, [1903] A. C. 289; 72 L. J. K. B. 578; 88 L. T. 705, 19 T. L. R. 519—H. L. (E).

10. *Limits of Deviation—Deposited Plan—Junction with Existing Line—Railway Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 20), s. 15.]—Sect. 15 of the Railway Clauses Consolidation Act, 1845, permits a railway company to deviate to a limited extent from the line shown on the deposited parliamentary plans.

HELD—that this section and the decision under it as to the limits of deviation permissible do not apply to the junction of a proposed new line with an existing one, but only to the construction of a new line

*Finch v. London and South Western Ry. Co.* ((1890) 44 Ch. D. 330; 59 L. J. Ch. 458; 38 W. R. 513, 62 L. T. 881—C. A.) applied

CARDIFF RY. v. TAFF VALE RY., [1905] 2 Ch. [289; 74 L. J. Ch. 490; 53 W. R. 633, 93 L. T. 239—Farwell, J.

11. *Purchase of Land—Minerals—Lands purchased under repealed Special Act—Repealing Act incorporating Railway Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 20), ss. 77, 78, and *Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 35 ]—A special Act was passed in 1846 for the purpose of amalgamating several lines of railways constructed under divers Acts, and of making those lines one common undertaking governed by one Act. By sect. 11 of the special Act the Lands Clauses Consolidation Act, 1845, was incorporated. By sect. 2 of the special Act, it was enacted that "the Railway Clauses

Consolidation Act, 1845, so far as the same is applicable, and is not modified by this Act [of 1846], or inconsistent with the provisions thereof, be held to apply to the company hereby incorporated [the defendants] . . . and shall be read and construed as forming part of this Act, to all intents and purposes as if the said railways and works made under the powers and provisions of the said Acts hereby respectively repealed had been made under the powers and provisions of the said Railway Clauses Consolidation Act, 1845, instead of the repealed Acts" The repeal was not to annul or prejudice or affect anything done under the repealed Acts, or, except so far as the same might be repugnant to the provisions of the Act of 1846, nothing therein contained was to defeat rights given under the repealed Acts for the benefit of persons whose estates, properties or interests had been, or might be, affected by the making of the railways authorised by the repealed Acts.

HELD—that as regards minerals the old Acts were blotted out, and the clauses relating to minerals of the Railway Clauses Consolidation Act, 1845, should be the governing clauses in the case; and that an award made under sect. 35 of the Lands Clauses Consolidation Act, 1845, to which the defendants were parties under protest, must be taken up by the defendants.

*North Eastern Ry. v. Croxland* ((1863) 4 De G. F. & J. 550; 1 N. R. 72, 32 L. J. Ch. 353; 11 W. R. 83, 7 L. T. (N.S.) 765—L. J.) distinguished.

REG. v. LONDON AND NORTH WESTERN RY., [1899] 1 Q. B. 921; 68 L. J. Q. B. 685; 80 L. T. 782; 15 T. L. R. 329—C. A.

Overruled in *London and North Western Ry. Co. v. Walker*, No. 9, *supra*.

13. *Purchase of Land—Expiration of Special Act—Agreement Made by Solicitor—Adoption of—Ultra vires.*—A railway company, even after completion of their railway, can under their general powers purchase land within the prescribed "limits of deviation," if it is necessary for their undertaking

A railway company built a line on land bought from A., who retained the underlying minerals. Their solicitors subsequently agreed to buy the minerals in order to avoid danger from subsidence. The directors subsequently assigned the benefits of the agreement to B., who was setting up a claim to the same minerals.

HELD—that they had ratified the agreement, and that it was not *ultra vires*.

THOMPSON v. HICKMAN, [1907] 1 Ch. 550, 76 [L. J. Ch. 254—Neville, J.

See also COMPULSORY PURCHASE.

14. *"Superfluous Land"—Land Taken for Purpose of Future Doubling of Line.*—Land taken compulsorily by a railway company for the future doubling of a line of railway cannot be regarded as "superfluous land" within the meaning of the Lands Clauses Consolidation Act, 1845

BROWN v. NORTH BRITISH RY. CO., (1906) [8 F. 534—Ct. of Sess.

**Railways—Continued.**

**15 Tunnel—Surface of Land and Strata over Tunnel—Strata under Tunnel—Telegraph Wires over Surface—Title by Possession by a Stranger—Superfluous Land—Statutes of Limitations.**—A title may be acquired by possession by a stranger to land of a railway company, even though not superfluous land, and therefore land which the railway company could not sell or dispose of.

The plaintiffs brought an action to restrain the defendant from removing over a certain piece of land, being the surface of a certain tunnel, any telegraph lines or wires belonging to the plaintiffs. The possession of the defendant and his predecessors had been such an exclusive possession of the surface of the land as, in an ordinary case between two individuals, would have given them an absolute title to the land and all above and beneath, apart from all question as to the existence of the tunnel below. The land was not superfluous land of the plaintiffs.

**HELD**—that the defendant and his predecessors in title had acquired by possession title to the surface of the land, with so much of what was beneath as was necessary for the enjoyment of it, subject to the right of the plaintiffs to the tunnel and to so much of the underlying and superincumbent strata as was necessary for its due and proper enjoyment as and for a tunnel.

*In re Metropolitan District Ry. Co. and Cosh* ((1880) 13 Ch. D. 607; 49 L. J. Ch. 277; 44 J. P. 393; 28 W. R. 685; 42 L. T. 73—C. A.), *Norton v. London and North Western Ry. Co.* (1879) 13 Ch. D. 268, 44 J. P. 22; 28 W. R. 173, 41 L. T. 429—C. A.), and *Bobbett v. South Eastern Ry. Co.* ((1882) 9 Q. B. D. 424; 51 L. J. Q. B. 161; 46 J. P. 823; 46 L. T. 31) followed.

**MIDLAND RY. CO. v. WRIGHT**, [1901] 1 Ch. 738; 70 L. J. Ch. 411; 49 W. R. 474; 84 L. T. 225, 17 T. L. R. 261—Byrne, J.

**16. Ultra vires—Statutory Powers to Purchase Land for Special Purposes—Purchase by Agreement—Covenant not to Use for Certain of such Purposes—Invalidity of Covenant.**—Under their special Act a railway company were authorised to acquire certain land for the purpose of enlarging stations "and for other purposes of and connected with their undertaking." They in fact acquired the land by agreement, and covenanted in the conveyance that they and their assigns would use the land for a passenger station and for no other purpose.

**HELD**—that the covenant was *ultra vires* and invalid, and that the company could sell superfluous pieces of the land free from any such restriction.

*Ayr Harbour Trustees v. Oswald* ((1883) 8 App. Cas. 623) applied.

**IN RE SOUTH EASTERN RY. CO. AND WIFFEN'S** [CONTRACT, [1907] 2 Ch. 366; 76 L. J. Ch. 481; 97 L. T. 576—Neville, J.

**(b) Working and Management.****(1) In General.**

**17. Agreement for Pooling Traffic—Confirmation of Agreement by Act of Parliament—Stipulation not to seek any New Line—Vital Breach—Determination of Agreement.**—An agreement—afterwards confirmed by Act of Parliament—was come to by the plaintiffs and the defendants to pool their traffic, and that neither company should either directly or indirectly seek any new line from one side of the valley to the other to take away the traffic of either company. Since the making of the agreement the mineral working and traffic of the district had enormously developed, and a powerful railway and dock company had sprung into existence and had become a formidable rival to the two railway companies. The railway and dock company promoted a bill, which both the plaintiffs and defendants vigorously opposed till the defendants came to an agreement with the railway and dock company and withdrew opposition. The Act was obtained, and the result was calculated to take away a considerable part of the plaintiffs' traffic. The plaintiffs claimed a declaration of their right to determine the agreement and that it had been determined.

**HELD**—that the effect of the confirmation by Act of Parliament was merely to remove difficulties which might otherwise have stood in the way, and not to make all the provisions of the agreement absolute and irrevocably binding on both companies for all time, that by joining the railway and dock company in formulating the new line they sought a new line whether they succeeded or not; that the damage to the plaintiffs was clear and imminent and arose from the promotion and passing of the Act; that the defendants' breach of the agreement was so vital as to give the plaintiffs the right to treat it as at an end, and that the plaintiffs were entitled to the declaration asked for.

Judgment of North, J. (83 L. T. 111; 16 T. L. R. 119) reversed.

**RHYMNEY RY. CO. v. BRECON AND MERTHYR** [TYDFIL JUNCTION RY. CO., (1900) 69 L. J. Ch. 813; 49 W. R. 116—C. A.

**18. Collateral Branches of Railway—Siding—Public Safety—Injury to Railway—Inconvenience to Traffic—Openings from Line to Siding—Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 12—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76.**—The applicants had an agreement with the railway company, made in 1894, whereby they acquired the right to have their goods received at and sent from a siding by the defendants' line. That agreement was determined, and the connection between the siding and line was taken up, the applicants not having been willing to continue the agreement on the terms which were afforded. Thereupon the question arose whether under sect. 76 of the Railways Clauses Consolidation Act, 1845, the railway company could be forced to make an opening from their line to the applicants' siding. It was admitted as a fact that to allow the applicants to have access for

**Railways—Continued.**

the purpose of working their own carriages and waggons on the line would be to allow that which could not be done with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon, though the purpose contemplated by sect 76 was the use of the railway by the trader with his own rolling stock.

**HELD**—that the applicants had no right to demand that the railway should submit to the making of an opening on their line, which would simply give the applicants a *locus standi*, so that, having effected a passage into the line, they could come afterwards, and ask for reasonable facilities at that point for the receipt and delivery of their traffic.

Decision of the Railway Commissioners ([1902] 1 K. B. 381, 71 L. J. K. B. 141, 86 L. T. 26; 18 T. L. R. 153) reversed.

LANCASHIRE BRICK AND TERRA COTTA CO v [LANCASHIRE AND YORKSHIRE RY., [1902] 1 K. B. 651, 71 L. J. K. B. 431; 86 L. T. 176, 18 T. L. R. 330—C. A.

**19. Defective Truck—Liability while used by another Company.**—The G railway company had a contract to supply coal to some gasworks at D. Trucks belonging to the appellant company were loaded with coal, and brought over their line to D, and then handed over to the G. company in the ordinary course of business, and were hauled by them over a tramway, without being unloaded, to the gasworks, in pursuance of their contract. While the trucks were so being hauled to the gasworks by the G. company, the husband of the respondent, who was in the employment of the G. company, was killed, in consequence, as was alleged, of a defect in the brake of one of the trucks.

**HELD** (reversing the judgment of the Court below), that the company were not liable.

*Heaven v. Pender* (11 Q. B. D. 503) distinguished.

CALEDONIAN RY. CO. v. MULHOLLAND, [1898] A. C. 216; 67 L. J. P. C. 1; 77 L. T. 570; 14 T. L. R. 41; 46 W. R. 237—H. L. (Sc.).

**20. Detention of Truck—Damages—Jurisdiction of Arbitrator—Action in County Court—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cccxii.), s. 6.**—By sect. 6 of the Great Western Railway (Rates and Charges) Order Confirmation Act, 1891, "where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period. . . . Any difference arising under this section shall be determined by an arbitrator. . . ."

A trader brought an action in the county court "for 8s. 8d., damages occasioned by undue detention of his waggon and cost of hire of another waggon in place thereof." The delay took place in sending an empty waggon from one station to

another for the purpose of being loaded to fulfil an order. The county court judge held that he had no jurisdiction under sect. 6 to entertain the claim.

**HELD** (Moulton, L.J., dissenting)—that the claim was not one for damages "by way of demurrage" within the meaning of sect. 6, and that that section did not apply to a right to damages at common law for detention of a truck, and that therefore the jurisdiction of the county court was not excluded.

Decision of Div. Ct. ([1906] 2 K. B. 426; 75 L. J. K. B. 901; 95 L. T. 192, 22 T. L. R. 530) affirmed.

THE KING v. THE JUDGE OF THE MARYLEBONE COUNTY COURT AND THE GREAT WESTERN RY. CO., EX PARTE PHILLIPS, [1907] 2 K. B. 664; 76 L. J. K. B. 1003, 96 L. T. 802, 23 T. L. R. 541—C. A.

Reversed by H. L. *sub. nom. Great Western Ry. Co. v. Phillips & Co.*, February 4th, 1908 (24 T. L. R. 293).

**21. Docks owned by Railway Company—Supply of Water by Railway Company to Docks—Ultra vires—North-Eastern Railway (Hull Docks) Act, 1893 (56 & 57 Vict. c. cxcviii.), ss. 4, 7 (1) (iv).**—There is nothing in the North-Eastern Railway (Hull Docks) Act, 1893—under which the undertaking of the dock company at Hull was amalgamated with the undertaking of, and transferred to, the North-Eastern Railway Company—to prohibit the railway company from supplying water to the docks from wells or springs on land which belonged to the railway company before the acquisition by them of the docks.

Decision of Joyce, J. ([1906] 1 Ch. 310; 75 L. J. Ch. 166; 70 J. P. 33; 54 W. R. 212, 94 L. T. 13; 22 T. L. R. 119) affirmed.

ATTORNEY-GENERAL v. NORTH-EASTERN RY. [Co., [1906] 2 Ch. 675; 70 J. P. 473; 95 L. T. 512, 22 T. L. R. 695—C. A.

**22. Facilities between Systems—Connecting Trains—Amalgamation Act—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8.**—The Commission considered the statutory agreement between two railway companies as to "facilities," "convenient timing of trains," "ordinary waiting" for connecting trains, &c.; and gave directions as to the length of time a train was to be kept waiting where the other company's connecting train was late.

NORTH BRITISH RY. CO. v. CALEDONIAN RY. [Co., (1906) 12 Ry. Cas. 27—Rly. and Canal Com.

**23. Facilities—Coal Traffic—Barry Dock and Railway Act, 1888, s. 23—Rates.**—By sect. 23 of the Barry Dock and Railway Act, 1888, it is provided that "the Taff Vale Railway Company shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company from or to Tre-forest, or any place northward thereof, at rates

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per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff, Penarth, or Barry."

In a dispute which had arisen between the plaintiffs and the defendants as to whether the defendants had failed to comply with the requirements of the above section, Romer, J. had found in favour of the plaintiffs (*see* 13 T. L. R. 370). The defendants appealed.

**HELD**—that no evidence had been adduced before them to show that the finding of fact by Romer, J. was not right, and that the appeal must be dismissed.

Decision of Romer, J., (1897) 13 T. L. R. 370, affirmed

BARRY RY. CO. v. TAFF VALE RY. CO., (1898)  
[14 T. L. R. 48—C A

**24. Leaving Van in Place where it may become a Cause of Danger—Omission to take Reasonable Precaution to Prevent the Consequences of Interference—Risk of Interference known to Defendants—Interference by Trespassers—Injury to Third Person—Liability of Railway Company.**—A brake-van belonging to the defendants was attached to some trucks by the screw coupling, which was not screwed up tight, but sufficiently tight, if not interfered with, to hold the van in connection with the trucks, and the trucks and van were left on a siding where there was a steepish gradient descending to the point where the line crossed a highway. The wheels of the trucks being safely scotched. With regard to the persons using the highway, where the plaintiff was, the van was in a safe position, unless interfered with afterwards, and the accident to the plaintiff would not have happened if the van had not been interfered with. Some boys, however, appeared to have loosed the van from the trucks, in consequence of which the van ran down the incline and seriously injured the plaintiff, who was passing along the highway. The danger of such interference causing injury to persons using the highway was known to the defendants at the time the van was left and kept where it was, and could have been guarded against by the exercise of reasonable care on the part of the defendants. The company were negligent in not placing the van to the east of a catch-point which would have arrested and diverted the van and have prevented the disaster. The plaintiff sued the defendants for damages, and upon the above facts (so found by the jury) Kennedy, J. gave judgment for the plaintiff.

**HELD**—on the facts, that there was no evidence on which the jury could properly find that the defendants had been guilty of any want of care, or ought to have anticipated any interference with the van.

The rule in such cases is as laid down by Lord Esher in *Engelhardt v. Farrant & Co* ([1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 45 W. R. 179, 75 L. T. 617—C. A.) :—

"If a stranger interferes, it does not follow that the defendant is liable: but equally it does

not follow that because a stranger interferes the defendant is not liable, if the negligence of a servant of his is an effective cause of the accident."

Decision of Kennedy, J. ([1902] 1 K. B. 618, 71 L. J. K. B. 330; 86 L. T. 558; 18 T. L. R. 340) reversed.

MCDOWALL v. GREAT WESTERN RY. CO., (1903)  
[72 L. J. K. B. 652; 88 L. T. 825; 19 T. L. R. 552—C. A.

**25. Level Crossing—Safe Condition of Rails.**—The pursuer's servant was leading his master's horse on a public road across the defendants' line, when the toe of the shoe on the horse's near forefoot was caught and became fixed between one of the rails of the up line and a chair on which the rail rested, so that the horse was thrown to the ground, and was unable to extricate its foot until forcibly relieved, when it was found to be seriously and permanently damaged. It was alleged that this accident was caused by a wedge or key used for the purpose of keeping the rail in position where the accident happened not having been driven sufficiently in between the chair and the rail in which the horse's foot was caught

**HELD**—that, as there was nothing in the evidence to show that the duty of keeping the wedges firm by reasonable inspection according to reasonable and universal practice had been neglected, there was a failure on the part of the pursuer to prove that there was negligence on the part of the defenders.

BELL v. CALEDONIAN RY. CO., (1902) 4 F. 431  
[—2nd Div.

**26. Level Crossing—Speed of Trains Exceeding Four Miles an Hour—Benefit or Injury to Public—Injunction—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 48.**—The defendant company had power conferred upon them to carry their railway over a turnpike road, but a fetter was imposed upon that power by sect. 48 of the Railways Clauses Consolidation Act, 1845, which was incorporated by the special Act. That section provided that trains should not be run over a level crossing adjoining a railway station at a greater rate of speed than four miles an hour. The defendant company had been for a long time past running their trains across a highway adjoining a railway station regardless of the provisions of sect. 48. The Attorney-General took proceedings to enforce compliance by the company with the terms of that section.

**HELD**—that it was not the duty of the Court to inquire whether it was for the benefit of the public that the defendant company should run trains at a greater speed than that directed by the Act, that it was not necessary for the Attorney-General to show any injury at all, and that the defendant company had no defence to the claim for an injunction.

*Attorney-General v. Great Western Ry. Co* (1872) L. R. 7 Ch. 767, *Attorney-General v. Cockermouth Local Board* (1874) L. R. 18 Eq. 172, 44 L. J. Ch. 118, and *Attorney-*



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*General v. Shrewsbury (Kingsland) Bridge Co.* (1882) 21 Ch. D. 752, 51 L. J. Ch 746, 30 W. R. 916; 46 L. T. 687—Fry, J.) followed.

Judgment of Bruce, J. ([1899] 1 Q. B. 72, 68 L. J. Q. B. 4, 79 L. T. 412; 15 T. L. R. 39) affirmed

ATTORNEY-GENERAL *v.* LONDON AND NORTH [WESTERN RY. CO., [1900] 1 Q. B. 71; 69 L. J. Q. B. 26; 63 J. P. 772, 81 L. T. 649; 16 T. L. R. 30—C. A.

**27. Provisional Order—Reasonable Charges—Arbitrator**—"Any difference."—Where a provisional order, confirmed by Act of Parliament, authorises a railway company to make reasonable charges in respect of certain specified services, and provides that any difference arising under it shall be determined by an arbitrator to be appointed by the Board of Trade, at the instance of either party: "any difference," which must be one arising under the order, is to be referred to the arbitrator, and should be by him finally determined. In coming to his determination it is open to him to investigate and to determine any question incidental to that referred to him, in order to determine finally the point in difference. He is to adjudicate upon the whole matter once and for all.

*London and North Western Ry. Co. v. Donellan* ([1898] 2 Q. B. 7; 67 L. J. Q. B. 681; 78 L. T. 575—C. A.) approved.

Decision of the C. A. (14 T. L. R. 361) affirmed.

MIDLAND RY. *v.* LOSEBY & CARNLEY, [1899] [A. C. 133; 68 L. J. Q. B. 326; 47 W. R. 656; 80 L. T. 93, 15 T. L. R. 207—H. L. (E.).

**28. Running Powers.**—By an agreement entered into between the North Eastern and North British Ry. Cos., scheduled to and incorporated with an Act of Parliament, it was provided that "for the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow and other places in Scotland, the North British Co. shall at all times hereafter permit the company (i.e., the North Eastern) with their engines, carriages, waggons and trucks, to run over and use the North British Co.'s railway . . . between Berwick and Edinburgh . . . subject to the payment by the company to the North British Co. for such user of such tolls, rates . . . as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided." Under their statutory powers the Railway Commissioners became the judges both of the extent to which the running powers so conferred were to be exercised and of the payments to be made for the use of the North British Co.'s line. In an application to the Commissioners, the North Eastern asked for an order authorising them to run the whole existing service of passenger trains upon the East Coast route.

**HELD**—that the fact that the North British Co. were owners of the line gave them no legal right to run any of the East Coast passenger trains, and formed no legal obstacle to the Commissioners (in the exercise of their discretion) granting the North Eastern Co.'s application.

NORTH EASTERN RY. CO. *v.* NORTH BRITISH [RY. CO., (1897) 35 Sc. L. R. 282—Rly. Com.

**29. Siding—Agreement to "maintain siding in full efficiency"**—*Effect of.*—An agreement by a railway company to "maintain and uphold" a siding "in full efficiency" is fulfilled by maintaining the structural efficiency of the siding and its necessary appurtenances: the obligation does not extend to the provision of a staff of servants or things in the nature of mere conveniences or facilities

KENNEDY *v.* GLASGOW AND SOUTH WESTERN [RY. CO., (1906) 8 F. 13—Ct. of Sess.

**30. Superannuation Fund—Railway Company—Dismissal of Servant for "Dishonesty"**—*Dishonesty outside Company's Service*—*London, Brighton, and South Coast Railway Act, 1874* (37 & 38 Vict. c. liv.), s. 18, *Sched., r. 5*—The defendant company's servants were obliged to contribute a certain percentage of their wages to the company's superannuation fund, and the company contributed to the fund a sum equal to the amount subscribed by the contributors. By rule 5 of the rules of the superannuation fund, "any contributing member dismissed the service for dishonesty or retiring to avoid such dismissal, shall forfeit all his contributions."

**HELD**—that "dishonesty" included dishonesty outside the service of the company as well as dishonesty towards the company.

THAYRE *v.* LONDON, BRIGHTON AND SOUTH [COAST RY. CO., (1906) 22 T. L. R. 240—Jelf, J.

**31. Ultra vires—Omnibus Service—Incidental Powers—Injunction**—A railway company in connection with their train service provided an omnibus service for the purpose of collecting and distributing passengers starting from and arriving at their central station. They did not, however, confine their omnibus service exclusively to passengers by the railway, but picked up passengers on the line of route and conveyed them between intermediate stopping places, and in some cases charged separate fares for such intermediate journeys. The railway company had no express power under their special Act to run omnibuses. In an action against the company by the Attorney-General, at the relation of a local authority who owned a system of tramways in the district:—

**HELD**—that the omnibus service was not fairly incidental to the railway undertaking and was *ultra vires*, and that an injunction should be granted to restrain the company from carrying on such service.

Decision of C. A. ([1907] 1 Ch. 81; 76 L. J.

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Ch 121; 71 J. P. 105; 96 L. T. 100; 23 T. L. R. 129, 178) reversed.

ATTORNEY-GENERAL *v.* MERSEY RY. CO., [1907] A. C. 415; 76 L. J. Ch. 568; 71 J. P. 448; 97 L. T. 524; 23 T. L. R. 684—H. L. (E.).

**32 Working Agreement—Agreement in Perpetuity—Fair Development of Traffic—Undue Preference of Own Route—Sunday Trains—Group Rates—Through Rates**—The E. company owned a railway consisting of eight miles of single line forming an alternative route to the G. company's main line between E. and N. The E. company and G. company entered into an agreement whereby the latter should work the line in perpetuity, and employ all requisite staff, stock, &c., so as "to fairly develop the traffic to be accommodated thereby."

The commission considered the rights of the two companies as to the following matters, viz., whether the G. company were bound to run Sunday trains on the line, and were bound to work goods traffic on the line in preference to their own route, even though the latter might be cheaper, whether the additional cost of working traffic into the E. company's station justified a difference in rates between goods consigned to it, and those consigned to the G. company's station at the same place, and the proper mode of dividing tolls and receipts from a third line and interchanged traffic.

EXETER RY. CO. *v.* GREAT WESTERN RY. CO., [1906] 12 Ry. Cas. 182—Ry. and Canal Com.

**(II.) Rates.**

**33. Account showing how Rate is Made Up—Carriage from One Private Siding to Another—Terminal charges**—*Railway and Canal Traffic Act, 1888* (51 & 52 Vict. c. 25), s. 33.—Sect. 33 (3) of the Railway and Canal Traffic Act, 1888, applies to a charge for the carriage of goods from one private siding to another, as well as to a charge for the carriage of goods from station to station.

Meaning of the term "terminal charges" discussed with reference to the provisions of the company's special Act.

CALEDONIAN RY. CO. *v.* HAMILTON AND [CALDER, (1906) 8 F. 918—Ct. of Sess.

**34. Application for Rebate—Charge for Station Accommodation—Evidence—Onus of Proof—Railway and Canal Traffic Act, 1894** (57 & 58 Vict. c. 54), s. 4.—By sect. 4 of the Railway and Canal Traffic Act, 1894, whenever merchandise is received or delivered by a railway company at a siding not belonging to the company and a dispute arises between the company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee "in respect that the railway company does not provide station accommodation or perform terminal services," the Railway and Canal Commissioners shall have jurisdiction to hear

and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate.

In an application under this section by the consignor of merchandise who owned the sidings from which it had been despatched, for a rebate on the ground that the rates charged by the railway company included a charge for station accommodation.

HELD, by Smith and Rigby, L.JJ. (Williams, L.J. dissenting)—that it was not enough for the purpose of giving the Commissioners jurisdiction to hear and determine the dispute, that the consignor had proved that he had paid the rates charged, such rates being less than the maximum amount, and had not received any station accommodation or terminal services from the company, but he must further give some *prima facie* evidence to show that the rates paid included a charge for station accommodation or terminal services which the company had not provided or performed.

SALT UNION, LD. *v.* NORTH STAFFORDSHIRE [RY. CO., [1898] 2 Q. B. 485; 67 L. J. Q. B. 889; 79 L. T. 16; 14 T. L. R. 523; 47 W. R. 4—C. A.

**35. Carriage of Goods—Detention—"Reasonable Period"**—*London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891* (54 & 55 Vict. c. ccxxi.), *Sched.*, s. 6.—By sect. 6 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, "where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to receive from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period."

HELD—that the section applies to detention during the transit as well as to detention before or after the transit.

HELD, also, that upon proof that the time occupied in a particular journey considerably exceeded the average time usually occupied during that year in that journey, the burden of justifying the delay was shifted on to the railway company.

CHARRINGTON, SELLS, DALE & CO. *v.* LONDON [AND NORTH WESTERN RY. CO., [1905] 2 K. B. 437; 74 L. J. K. B. 835; 93 L. T. 215; 21 T. L. R. 457, 12 Ry. Cas. 171—Ry. and Canal Com.

**36. Classification of Goods—"Extracts and Essences for Human Food"**—"Virol"—*Article not Clearly Within the Description*—"Virol" is a mixture of component parts rather than an extract or essence; it does not clearly come within the expression "Extracts and essences for human food," and if there be no other appropriate class in their schedule of charges, a railway company must carry it as an unclassified article.

BOVRIL, LD., AND VIROL, LD. *v.* GREAT [WESTERN RY. CO.—12 Ry. Cas. 151—Ry. and Canal Com.

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**37. Increase — Coal Traffic — Complaints — Failure to Prove Increase to be Reasonable — Increase since 1892 — Damages — Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1 — Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 12.]**—Seven applications were made by coal masters complaining of increases in the coal rates of the Caledonian, North British, and Glasgow and South Western Railway Companies, which came into force on January 1st, 1900. The respondents had no accurate knowledge of their coal train mileage, but based their calculations upon the waggon-load.

**HELD**—that the respondents had failed to discharge the onus resting upon them under the Railway and Canal Traffic Act, 1894, in the only way by which they had sought to discharge it—that is to say, by showing that there had been such an increase in the cost of carrying their coal traffic since 1892 as to make the increase of the rates complained of a reasonable increase; that changes affecting only temporarily cost of working were not sufficient, and that the applicants were entitled under sect. 12 of Railway and Canal Traffic Act, 1888, to an inquiry into the damages sustained by them in consequence of their having been compelled to pay these increased rates since January 1st, 1900, such inquiry to be taken before the Registrar in the ordinary way.

**WILLIAM BLACK & SONS v. CALEDONIAN [RY. CO. AND OTHERS, (1902) 18 T. L. R. 11; 11 Ry. Cas. 176—Ry. and Canal Com.**

**38. Increased Rates—Paid under Protest—Rates held unreasonable—Action to recover Excess.]**—Where a railway company has increased its rates, and such increase is held by the Railway and Canal Commission to be unreasonable, an action will not (apart from express agreement to refund) lie for the recovery of the excess paid under protest by consignees of goods, for (1) the demand, though held to be unreasonable, was not illegal; and (2) the commissioners have exclusive jurisdiction to deal with the subject-matter.

**LANARKSHIRE STEEL CO. v. CALEDONIAN RY., [(1904) 6 F. 47—Ct. of Sess**

**39. Increase of—Justification—Order of Court against Undue Preference—Increase Designed to Give Effect Thereto—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1]**—Where the commission have made an order condemning some undue preference, and the company can show that a levelling down of the other rates would involve serious loss, the company is justified in levelling up the particular rate complained of to the standard of the others.

**RISHWORTH, INGLEBY & LOFTHOUSE, LD. v. [NORTH EASTERN RY. CO., (1906) 12 Ry. Cas. 34—Ry. and Canal Com**

**40. Increase since 1892—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1, sub-s. 1.]—Sect. 1, sub-sect. 1, of the Railway and Canal Traffic Act, 1894, which provides that**

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where a railway company have, since December 31st, 1892, increased or hereafter increase any rate or charge, it shall lie on the company to prove that the increase is reasonable, applies to all increases of rates, and not only to an increase which brings the rates above those which were in existence on December 31st, 1892.

**NORTH STAFFORDSHIRE COLLIERY OWNERS' [ASSOCIATION v. NORTH STAFFORDSHIRE RY. CO. AND OTHERS, [1907] 2 K. B. 191; 76 L. J. K. B. 602; 96 L. T. 893; 23 T. L. R. 418—C. A.**

**41. No obligation to Carry—Right to insist on Own Terms—Inclusive charge for carriage, collection and delivery—Consignor wishing to deliver at Station—Rebate—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90.]**—A railway company under their special Act were under no obligation to carry non-perishable goods by passenger train; but they offered to carry "tailors' clothing" from B. to S. by passenger train at a special rate including both collection and delivery. The plaintiffs claimed to deliver their parcels at B. station by their own vans, and to be allowed a rebate; and, upon the company refusing to allow any rebate, they sued in the County Court and recovered the sum of 1s, which they had paid in order to have their goods carried.

**HELD**—that the company were not liable. Not being obliged to carry such goods by passenger train, they might offer to the public any terms they thought fit, so long as they did not prefer one person to another in breach of the provisions of their Act, or of sect. 90 of the Railways Clauses Act, 1845.

**Decision of Div Ct. [(1903) 1 K. B. 741; 72 L. J. K. B. 377; 88 L. T. 92] affirmed.**

**STONE v. MIDLAND RY. CO., [1904] 1 K. B. 669; [73 L. J. K. B. 392, 52 W. R. 491; 90 L. T. 194, 20 T. L. R. 225—C. A.**

**42. Pitwood—Measurement weight or actual weight—Maximum Charge varying with Distance—Journey over lines of two Companies—Calculation of Maximum—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cccxii.).]**—Upon the true construction of the Great Western Railway Company's Act of 1891 the company are not bound to carry pitwood by measurement weight at the rates specified for goods in Class C. The consignor must elect between the Class C. rates at actual machine weight, or the Class I. rates at measurement weight.

Under the same Act, where goods are carried under a through contract, the portion of the journey over another company's line is to be regarded as a separate journey for the purpose of calculating the maximum rate.

**GREAT WESTERN RY. CO. v. CASWELL AND [BOWDEN, LD., [1904] 2 K. B. 508; 73 L. J. K. B. 834—Walton, J.**

**43. Rate Book—Order to specify Details of Expenses—What Details—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14.]**—The Railway Commissioners made an order upon a

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railway company under sect. 14 of the Regulation of Railways Act, 1873.

**HELD**—that the company must specify the particular amounts charged in a rate for the carriage of goods in respect of each of the services performed by them other than conveyance on their line.

*Colman v. Great Eastern Ry. Co.* ((1882) 4 Ry. & Can. Cas. 105) and *Birchgrove Steel Co. v. Midland Ry. Co.* ((1887) 5 Ry. & Can. Cas. 229) approved.

**PICKFORD'S, LD. v. LONDON AND NORTH [WESTERN RY. CO., [1905] 1 K. B. 752; 74 L. J. K. B. 634; 53 W. R. 468; 92 L. T. 607; 21 T. L. R. 381; 12 Ry. Cas. 154—C. A.**

**44. Rebate for not Providing Station Accommodation or Performing Terminal Services—Agreement as to Payment of Rates and Allowances—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4.]**—The applicants were merchants and manufacturers of cotton fabrics, carrying on business near the line of the defendant company, and before the agreement of 1891 the applicants had been receiving and delivering their goods at Shaw Station. In 1891 an agreement was arrived at whereby it was provided that a siding should be constructed by the defendant company, principally upon land belonging to the defendant company, the applicants to pay for the use of the siding and to pay rates for the goods sent from or delivered there. By article 10 of the agreement it was provided that "the railway company will make to the limited company an allowance of not less than threepence per ton for loading and unloading waggons and sheeting the same in respect of cotton and yarns and other goods usually handled by the company received at or forwarded from the proposed sidings. And the company will not charge any terminal in respect of coal traffic to or from the same." The applicants applied under sect. 4 of the Railway and Canal Traffic Act, 1894, for a determination of what was the reasonable and just allowance or rebate to be made from the rates charged, the traffic having been dealt with at their own siding and neither station accommodation nor terminal services having been provided or performed by the railway company. The Railway Rates and Charges, No. 10 (Lancashire and Yorkshire Railway, &c.), Order Confirmation Act, 1892, was passed since the date of the agreement.

**HELD**—that the agreement covered all the deductions which the parties thought fair in the circumstances; and the legislation of 1892 did not affect the matter, because by the agreement the parties had, for good consideration, agreed to take something different from that given by the legislation; and that there was nothing in the legislation to prevent the parties coming to such an agreement.

Decision of the Railway and Canal Commission ((1901) 17 T. L. R. 26) reversed.

**COMPTON & CO., LD. v. LANCASHIRE AND YORKSHIRE RY. CO., [1902] 18 T. L. R. 322, 11 Ry. Cas. 285—C. A.**

**45. Rebate—Siding—"Not belonging to the Company"—Long Lease of Site of Siding—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1.]**—The applicants, who said that a siding did not belong to a railway company, had in 1866 granted to the railway company a sub-lease for 996 years at a nominal rent of the land upon which the railway company afterwards constructed the siding. The applicants were to have a very large user of the siding.

**HELD**—that the siding belonged to the railway company subject only to an easement in favour of the applicants of using it as and when they required to do so for the purposes of their trade; and that the siding was not a "siding not belonging to the company" within the meaning of sect. 4 of the Railway and Canal Traffic Act, 1894.

**HUNTINGTON AND OTHERS v. LANCASHIRE [AND YORKSHIRE RY. CO., (1901) 17 T. L. R. 458—C. A.]**

**46. Rebate—Cartage performed by Trader—Basis of Calculation.]**—In assessing a rebate off a rate for the carriage of goods in respect of the trader performing his own cartage:

**HELD**—that the correct basis was to take the cost of the service rendered, and the saving to the company when the trader carted his own goods.

Decision of Railway and Canal Commission ((1907) 23 T. L. R. 535) affirmed.

**PICKFORDS, LD. v. LONDON AND NORTH [WESTERN RY. CO., (1907) 24 T. L. R. 149—C. A.]**

**47. Short Distance Traffic—Conveyance over Two Railways—"Conveyed by the Company"—London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cxxxi.), Sched., cl. 11.]**—By clause 11 of the schedule, to the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, where merchandise is conveyed for an entire distance not exceeding a certain distance, the company may charge for conveyance as for that distance: "provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway."

**HELD**, by Vaughan Williams and Fletcher Moulton, L.J.J. (Buckley, L.J., dissenting)—that the words "conveyed by the company" mean actually conveyed or carried by the company's own engines, and do not refer merely to the contract of carriage, and that therefore where A. company hauled traffic for three miles on its own line and B. company then hauled it for two miles on its line, the section did not apply.

Decision of the Railway and Canal Commis-

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sion ([1906] 1 K. B. 577, 75 L. J. K. B. 454; 95 L. T. 62) affirmed.

LANCASHIRE AND CHESHIRE COAL ASSOCIATION AND RICHARD EVANS & CO. v. LONDON AND NORTH WESTERN RY. CO. AND LANCASHIRE AND YORKSHIRE RY. CO., [1907] 2 K. B. 902, 76 L. J. K. B. 1020, 97 L. T. 569, 23 T. L. R. 645—C. A.

**48 Siding Accommodation—Charge for Coal Waggon remaining on Sidings—London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cxxvi.), Sched., Part 4.]**—The defendants, who were coal merchants, consigned coal from certain collieries by the plaintiffs' railway to the plaintiffs' sidings at Willesden Junction, there to await further orders as to the ultimate destination of the coal to the purchasers, and when the coal was sent on to the ultimate destination the plaintiffs charged a through rate from the colliery station to the station of the purchaser. The plaintiffs had previously given the defendants notice that they would charge siding rent of 6d. per waggon per day or part of a day on the "wait order" waggons after the first two clear days. In an action to recover the siding rent, the judge found as a fact that two clear days afforded sufficient time to enable the defendants to furnish instructions as to the ultimate destination of the coal.

**HELD**—that the plaintiffs were entitled to recover the siding rent, either (1) upon a common law contract to pay, keeping the coal at Willesden after two days not being an incident of the contract to carry, or (2) under the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, Sched., Part 4, as accommodation provided at the desire of the defendants for which no provision was made elsewhere in the schedule.

LONDON AND NORTH WESTERN RY. CO. v. [CROOKE & CO., (1904) 20 T. L. R. 506—Bigham, J.

**49. Siding not constructed under statutory Powers—Reasonable Charges—Undue Preference—Rebate on Sidings Rate—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4.]**—The F. Railway Company's main line terminates at B.; thence a branch line fifty-four chains long, the property of the company, but not constructed under their statutory powers, leads to a spot where the private sidings of the V. M. works begin. The railway company made a charge of 6d. per ton for coal traffic to the works in return for the following services: shunting and marshalling at B. and haulage to the end of the private sidings. Upon due consideration of the aggregate of traffic, and the work entailed by it:—

**HELD**—that 6d. was a reasonable sum to add to the charge for actual conveyance to B.

A rival company have works one and a quarter miles from B., but on the main line, and were

not charged this 6d.: it appeared, however, that their traffic, being on a very large scale, consisted mainly of entire train loads and needed no marshalling.

**HELD**—no undue preference.

With regard to traffic other than coal, for the V. M. works:—

**HELD**—that where such traffic is not loaded or unloaded at B., any terminals included in the C. and D. rates ought to be excluded: but that for delivery *via* the branch line of any C. and D. traffic 6d. per ton might be charged, as for coal.

FURNESS RY. CO. v. VICKERS, SONS AND [MAXIM (1904), 20 T. L. R. 326; 12 Ry. Cas. 81—Ry. and Canal Com.

**50. Siding—Tolls—Agreement by Landlord to give Land for Siding and to construct Works—Right of Landlord to charge Tonnage Rates—Duration of Agreement—Conduct of Parties.]**—In 1870 an agreement was made between the late Lord Portsmouth and the defendant company the short effect of which was that the Earl was to grant the company for a siding certain land free of cost and to carry out certain works, and the company agreed that Lord Portsmouth should be entitled to charge for any traffic using the siding a tonnage rate of not more than 6d. and not less than 3d., as should be agreed by the parties. The railway company went into possession of the land under the agreement, and were still in possession of it. From 1870 down to the commencement of this action there had been no change or suggestion of change in the rate of the tolls paid by the company. There was no express agreement either in writing or by word of mouth as to whether the agreement of 1870 was to be permanent or not.

**HELD**—that the proper inference from the conduct of the parties was that they intended that the agreement should last as long as the company continued in possession of the land under it, and so long as the company remained in possession they ought to pay the amount which it must be inferred had been determined by agreement between the parties.

Decision of Darling, J. ((1901) 17 T. L. R. 546) reversed.

EARL OF PORTSMOUTH v. LONDON AND SOUTH WESTERN RY. CO. (1902), 18 T. L. R. 793—C. A.

**51 Rates—Through Rates—Dock Company—Lines by which the Business of the Docks is Carried on—"Continuous Line of Railway" Communication—"Railway Company"—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 3.]**—The applicants were a dock company, which came into existence, and existed, under statutory provisions for the purpose of making and working docks; and as incident to that purpose, they were invested with statutory powers of laying down and using rails and tramways among other appliances ancillary to the working of their docks. The applicants applied in the capacity of a "railway

**Railways—Continued.**

company ' under sect. 25 of the Railway and Canal Traffic Act, 1888, for through rates in respect of traffic passing from the quays and warehouses in the Royal Victoria and Albert Docks over the railways of the Great Eastern Railway Company to certain places on the system of the Midland Railway Company. The Railways Clauses Consolidation Acts did not appear to be incorporated in the dock company's Acts, except for purposes which had no relation to the lines involved in the case.

**HELD**—that the applicants were not a "railway company," and that the lines involved in the case could not reasonably be said to form part of a continuous route from any place to any other place within the meaning of the Railway and Canal Traffic Act, 1888, as they were merely the lines by which the business of the docks was carried on; and that the application was not well founded in this respect.

Decision of a majority of the Railway and Canal Commissioners ((1901) 71 L. J. K. B. 153; 86 L. T. 29, 18 T. L. R. 171) reversed.

LONDON AND INDIA DOCKS CO. *v.* GREAT [EASTERN RY. CO., [1902] 1 K. B. 568, 71 L. J. K. B. 369; 50 W. R. 461; 86 L. T. 339; 18 T. L. R. 324—C. A.

**52 Through Rates—Running Powers—Order for Facilities—Power of the Railway and Canal Commissioners—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2.]**—The London and India Docks Company are the owners of a railway about half a mile long, with a station called the South Dock Station: this line connects with the Great Eastern Railway, over whose line the Midland Railway have running powers, and at present the traffic is exchanged at the exchange sidings situated upon the dock company's line, the Great Eastern Railway running over a portion of that line in order to get to the sidings for the purpose of effecting the exchange. The Great Eastern Railway were prepared to continue the practice upon the existing terms; but the dock company asked that the other two companies should be compelled to quote "through rates," and so abolish the present charge for cartage, which in fact is not performed.

The Court considered the application reasonable, but it was objected that there was no power under the circumstances to make the order as to exchange of traffic, which would be required in addition to an order for "through rates."

**HELD**—that there was no power, for—

(1) the various agreements gave the Great Eastern Railway no right to run to the exchange sidings, and therefore they could not be ordered to do so;

(2) the dock company had no running powers to the nearest Great Eastern Railway or Midland sidings, and therefore the same objection held good;

(3) an interchange at the actual point of junction was not feasible.

Decision of Railway and Canal Commission (19 T. L. R. 494) affirmed.

LONDON AND INDIA DOCKS CO. *v.* GREAT [EASTERN RY. CO. AND MIDLAND RY. CO., (1901) 20 T. L. R. 371—C. A.

**53. Undue Preference—Coal—Shipment Rate—Land Sale Rate—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.]**—The existence of a rate for coals carried to a port for shipment considerably lower than the rate charged for carrying to the same port coals for sale on land is not in itself an infringement of the law against undue preference.

The Court declined to interfere where there was no substantial competition between the shippers and the land traders, and the latter were, as between themselves, treated upon identical terms. The land rate was not unduly high, and, owing to circumstances, the shipping rate could not well be raised.

SPILLERS, BAKER & CO. *v.* TAFF VALE RY. CO., [(1904) 90 L. T. 713; 20 T. L. R. 101; 12 Ry. Cas. 70—Ry. and Canal Com.

**54. Undue Preference—Coal—Shipment Coal—Non-competitive Traffic.]**—A railway company carried shipment coal (or slack) to certain sidings on a ship canal at a lower rate than they charged for similar coal carried to a trader at the same sidings. The trader manufactured the coal so carried to him into patent fuel for shipment.

**HELD**—that the trader could not complain of any undue preference, even though his patent fuel might ultimately be in competition with the coal carried by the company for shipment.

LANCASHIRE PATENT FUEL CO., LD. *v.* LONDON [AND NORTH WESTERN RY. CO. AND OTHERS, (1906) 12 Ry. Cas. 77—Ry. and Canal Com.

**55. Undue Preference—Coal Traffic—Guarantee of Quantity—Shipment Coal.]**

**HELD**—that, with nearly equal mileage, a difference varying from 2*d.* to 4*d.* per ton on rates for shipment coal did not under the circumstances constitute an undue preference.

The favoured firm guaranteed a minimum quantity of 200,000 tons per annum, and, in fact, averaged 500,000; the complainants only sent some 60,000 tons. In such cases, the size and constancy of supply enable the company to make their shipping arrangements advantageously and thereby justify the concession of more favourable terms.

HICKLETON MAIN COLLIERY CO., LD. *v.* HULL [AND BARNSELEY RY. CO., (1906) 12 Ry. Cas. 63—Ry. and Canal Com.

**56. Undue Preference—Competing Line—Railway and Canal Traffic Acts, 1854 (17 & 18 Vict. c. 31), s. 2, and 1888 (51 & 52 Vict. c. 25), ss. 27, 29.]**—The applicants complained that the respondents charged them 2*s.* 1*d.* for carrying a ton of coal from A. to W., a distance of twenty-nine miles, but only charged the H. Co.

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1s. 9d. from H. to W., a distance of thirty-three miles; A. and H. are on the same branch line.

The respondents replied that a competing line had a route of twenty miles from H. to W., and one of twenty-seven miles from A. to W., for which they charged 1s. 9d. and 2s. 1d., and that if they themselves raised their H. to W. rate, all traffic would be diverted to the competing line.

The two companies both agreed to reduce their A. to W. rate to 2s.

**HELD**—that the competition justified a difference between the two rates of 1s. 9d. and 2s.

ABRAM COAL CO. v. GREAT CENTRAL RY. CO., [(1905) 21 T. L. R. 264, 12 Ry. Cas. 125—Ry. and Canal Com.]

**57 Undue Preference—Competition with Seaborne Traffic—Rebate—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.**—In dealing with complaints of undue preference it must be borne in mind that the earlier cases cannot be fully relied upon as precedents for the guidance of the Court. The law was changed by the Traffic Act of 1884, and that again has been modified by that of 1888, especially by sect. 27, which authorises the Court to take various matters into consideration, and particularly whether the lower charge or difference in treatment complained of is necessary for the purpose of securing the traffic in the interests of the public. Since the decision of *Phipps v. London and North Western Ry. Co.* [(1892) 2 Q. B. 229, 61 L. J. Q. B. 379; 66 L. T. 721; 8 T. L. R. 419—C. A.] the Court would feel bound to consider all circumstances which would go to show whether the rebate was fairly reasonable.

CHARRINGTON, SELLS, DALE & CO. v. MIDLAND [Ry. Co., (1901) 17 T. L. R. 761—Ry. and Canal Com.]

**58 Undue Preference—Competing Wharf-owners—Railway and Canal Traffic Act, 1884 (17 & 18 Vict. c. 31), s. 2.**—Any person who is directly prejudiced by the breach of the statutory duty imposed upon a railway company to give similar treatment to similar traffic may apply to the Railway and Canal Commission to remedy his grievance.

Hence a wharfowner, who has no interest in the goods carried, may complain if undue preference is given to the owners of goods consigned to wharfs competing with his own.

FORWOOD BROS & CO. v. GREAT NORTHERN RY. CO., [(1904) 20 T. L. R. 320, 12 Ry. Cas. 89—Ry. and Canal Com.]

**59. Undue Preference—Group Rates—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 29, and 1894 (57 & 58 Vict. c. 54), s. 1.**—The fact that the Railway and Canal Commission have decided upon complaint made to them that the "grouping of certain works is not unreasonable," does not prevent the company concerned from grouping *de novo*, or dissolving the group, or varying it by the omission of one or more of the works formerly included in it.

*Quære*—whether a railway company can under sect. 1 of the Railway and Canal Traffic Act, 1894, be called upon to justify the increase of rates which have been lowered since 1892, but again raised to a point not exceeding their then level.

MILLOM AND ASKHAM IRON CO., LD. v. FURNESS RY. CO. AND OTHERS, (1906) 12 Ry. Cas. 1—Ry. and Canal Com.]

**60. Undue Preference—Rates to be "Charged equally to all Persons"—Rate in Book—Duty to prove that Rate is Charged—Recovery of Money Back—Money Had and Received—Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 90.**—Where a person alleges that a railway company has charged him a rate for goods which is higher than that charged to another person in respect of goods of the same description, contrary to sect. 90 of the Railways Clauses Act, 1845, he must show that the goods of that other person have actually been carried by the company at the lower rate, and it is not sufficient to show that the company has advertised such a rate in their books.

TAYLOR v. METROPOLITAN RY. CO., [1906] 2 [K. B. 55, 75 L. J. K. B. 735, 95 L. T. 149; 22 T. L. R. 479—Div. Ct.]

**61. Undue Preference—Rebate given to Trader—Services Performed by him for Railway Company—Complaint of Trader's Competitors.**—A railway company agreed with a miller, who was also a shipowner, that he should act as their agent for a certain district, and should use every effort to develop goods traffic to and from that district, and should receive on all traffic carried partly by his steamers and partly by the railway a commission of 6s. per ton.

The result was that his competitors had to pay 9s. per ton for all grain carried from D. to L, while his grain was carried between the same towns at 3s. per ton, if his steamer was used for a particular portion of the transit.

**HELD**—an undue preference, the company being ordered, *inter alia*, not to make to the particular miller any payment depending on the amount of grain consigned by him from D. to L.

JOHN BANNATYNE & SONS, LD. v. GREAT SOUTHERN AND WESTERN RY. CO. OF IRELAND, (1906) 12 Ry. Cas. 105—Ry. and Canal Com.]

**62. Undue Preference—Rival Traders—Access to Competing Line—Inequality of Rates—Interest of Public—Onus of Proof—Railway and Canal Traffic Act, 1884 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 27, 29.**—The applicants complained of the undue preference of a competing colliery. The applicants' and the competing collieries were situated on the defendants' line of railway, and the distance, in each case, about the same. The explanation afforded by the defendants was that the colliery with the preferential rates was situated on the London and North Western Railway, and by that route the distance was twenty miles only, while the

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applicants' distances were greater in proportion to the rates charged.

The Railway and Canal Commissioners held that the inequality of rate was not justified, for the microscopic interest of the public in such competition was not sufficient to discharge the onus of proof cast on the defendants.

HELD, on appeal, that the question was one of fact, and that, therefore, the Court could not review the decision.

Decision of Railway and Canal Commissioners (18 T. L. R. 788) affirmed

ABRAM COAL CO., LD. v. GREAT CENTRAL RY. CO., (1903) 19 T. L. R. 664—C. A.

**63. Undue Preference of Carriers—Special Agents—Consignees (Giving General Orders for Delivery—Special Services)**—A railway company employed W. & Co. to deliver all goods carried by the company and not invoiced to be delivered by named carriers, and the company refused to act on general orders from ninety-five tradesmen requiring goods consigned to them to be handed to Y. & Co. for delivery

HELD—that under the circumstances the refusal of the company was not an undue preference of W. & Co.

HELD, however, that in paying to W. & Co., 4d per ton, more than they paid to Y. & Co. in respect of carted and delivered traffic they were unduly preferring W. & Co.; 4d per ton must be regarded as an excessive allowance in respect of the services said to be rendered to the company by W. & Co. in the capacity of agents.

JOHN WALLIS & SONS v. G. N. RY. CO. (IRELAND), (1906) 12 Ry. Cas. 38—Ry. and Canal Com.

**64. Undue Preference—Shareholder's Right to go to High Court—Ultra Vires—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20, s. 90—Railway and Canal Traffic Act, 1861 (17 & 18 Vict. c. 31), s. 2.]**—If there is any breach of the provisions of the Railways Clauses Acts known as undue preference, then the scheme of the Acts is that persons who are affected by them are entitled to go, not to the High Court of Chancery, because that court has no jurisdiction in the matter, but to the Railway and Canal Commissioners, to lay the facts before them, and to insist that the provisions of the Acts of Parliament shall be complied with which provide for equal treatment of all customers. There is nothing *ultra vires* in a breach of those provisions which enables a shareholder to come and ask the Court for relief against his company and the customers of his company based upon that breach

ANDERSON v. MIDLAND RY. CO., [1902] 1 Ch. [369, 71 L. J. Ch. 89; 50 W. R. 40; 85 L. T. 408; 18 T. L. R. 5—Buckley, J.

(iii.) *Passenger Fares.*

**65. Conditions on Ticket—Ticket for Sleeping-Car on Railway—Car not available for Whole**

*Journey—Claim for Return of Fare—Condition not Brought to Passengers' Notice*—Where conditions are printed on a ticket, there is no essential distinction between the front and the back of the ticket, wherever they are printed, it is a question of fact whether the passenger had notice of them

S. took a sleeping-car ticket in addition to his ordinary ticket, but the car was unable to run the whole journey, and an ordinary carriage was substituted. he thereupon sued for a return of the supplementary fare for the whole journey, the railway company offering to refund only the proportion corresponding to the portion of the journey on which he did not use the car. They relied on a condition printed amongst advertisements on the face of the ticket.

The County Court judge found that the company had not done what was reasonably sufficient to give S. notice of the condition, and gave judgment for him.

HELD—that the evidence justified the finding of fact.

*Quære* (if the point had been taken), whether there had been such a failure of consideration as to entitle the plaintiff to recover the full fare.

STEPHEN v. INTERNATIONAL SLEEPING CAR CO., (1903) 19 T. L. R. 621—Div. Ct.

**66. Inspector of Weights and Measures—Police Constable acting as Inspector—Right of Policeman to Cheap Ticket while Travelling as Inspector—Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6.]**—A police constable who is an inspector of weights and measures, is not entitled to a passenger ticket from a railway company at a reduced rate under sect. 6 of the Cheap Trains Act, 1883, when he is travelling on his duties as inspector of weights and measures, as the Act does not extend to such inspectors.

SPENCER v. LANCASHIRE AND YORKSHIRE [RY. CO., [1898] 1 Q. B. 643; 62 J. P. 296; 67 L. J. Q. B. 465; 78 L. T. 323; 14 T. L. R. 292; 46 W. R. 443—Div. Ct.

**67. Subscription Tickets—Reasonable Conditions—Carrying Merchandise as Personal Luggage.]**—A railway company issued monthly subscription tickets on (*inter alia*) the following conditions—no subscriber to carry free of charge any merchandise or articles of any kind for hire or profit, or for the use of any person or persons other than the subscriber; the company to be entitled to refuse renewal of ticket to any subscriber not abiding by the conditions.

HELD—that such conditions were fair and reasonable.

MORRISON v. BELFAST AND COUNTY DOWN [RY., (1906) 12 Ry. Cas. 99—Ry. and Canal Com.

**68. Passenger—Travelling Beyond Station to which Ticket is Taken—Payment of Fare—"Through" Fare.]**—The defendant, intending to travel from Huddersfield to Manchester on the plaintiffs' railway, took a ticket to Stalybridge, an intermediate station. The fare from



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Huddersfield to Manchester was 2s. 3d., and to Stalybridge 1s. 6d.; and the fare from Stalybridge to Manchester was 7d. At Stalybridge the defendant gave up his ticket to a collector, and tendered him 7d., the fare from Stalybridge to Manchester. The collector refused it and demanded 9d., being the difference between the fare which the defendant had paid, and the fare from Huddersfield to Manchester. The defendant refused to pay this sum, and travelled on to Manchester in the same train. By the regulations printed in the plaintiffs' time-tables, a passenger using a ticket for any other station than that for which it was available would have to pay the difference between the sum actually paid, and the fare between the stations from and to which the passenger travelled; the passengers could not re-book at an intermediate station by the same train. In an action to recover 9d. :—

HELD—that the plaintiffs were entitled to recover that sum.

LONDON AND NORTH-WESTERN RY. CO. v. [HINCHOLIFFE, [1903] 2 K. B. 32; 72 L. J. K. B. 530; 87 J. P. 205; 51 W. R. 556; 88 L. T. 800, 19 T. L. R. 430—Div. Ct.

69 *Third Class—Additional Charge for Seats in Reserved Carriages—Fare exceeding 1d. a mile—Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 2, Schedule—Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 2, sub-s. 1.*—Where a railway who had abolished second-class carriages and fares on their railway made an additional charge for reserved accommodation in their third-class carriages, it was held that this extra payment was a part of a "fare" within sect. 8 of the Cheap Trains Act, 1883, and was liable to duty as such under the Railway Passenger Duty Act, 1842, s. 2, and schedule, where the total sum paid for the accommodation in the third-class reserved carriages exceeded a penny a mile.

ATTORNEY-GENERAL v. FURNESS RAILWAY, [1899] 2 Q. B. 267; 68 L. J. Q. B. 623; 63 J. P. 326; 80 L. T. 710, 15 T. L. R. 289—Div. Ct.

**(iv.) Mails.**

70. *Conveyance of Mails—Remuneration—Principles of Assessment.*—For the carriage of mails by the railway company's regular trains the payment by the Postmaster-General should be that which the company could charge to ordinary traders for similar services, subject to such considerations as between two traders would justify a discrimination in favour of one over the other.

The carriage of mails by trains which the company would not run for their own purposes at all must be treated differently.

As regards trains run of which the times are merely altered to suit the convenience of the Post Office, some substantial allowance is due.

WATERFORD, LIMERICK, AND WESTERN RY. [CO. AND THE POSTMASTER-GENERAL, (1901) 17 T. L. R. 78—Ry. and Canal Com.

71. *Conveyance of Mails—Reasonable Remuneration—Charges for Travelling Sorters—Use of Premises—Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98)—Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 1.*—In calculating a reasonable remuneration to a railway company for the conveyance of mails, their ordinary scale of rates for parcels should be applied, less deductions in respect of certain differences between mails and ordinary parcels, e.g., 25 per cent. in respect of terminal services not rendered by the company in the case of mails, and 10 per cent. in respect of the regular volume of traffic, &c.

The company should be paid for the conveyance of travelling sorters and other post office servants at season ticket rates; and should also receive payment in respect of the use of their premises by the post office staff, and any assistance rendered by their own servants in the transfer of mails.

GREAT WESTERN RY. CO. v. POSTMASTER-GENERAL [1906] 12 Ry. Cas. 11—Ry. and Canal Com.

**(v.) Duty towards Passengers.**

And see NEGLIGENCE.

72. *Conditions on Tickets—"Passengers' Own Risk"—Notice of Conditions on Ticket.*—The plaintiff was a passenger on one of the defendants' steamers for an evening cruise. The passengers took their tickets when on board, and on the face of the tickets were the words "at passenger's own risk," and there were also conditions on the back. The plaintiff's hand was injured on board owing to the negligence of the defendants' servants, and, in an action in the county court to recover damages, the judge found that the plaintiff did not observe or read any notice upon the ticket, and that no reasonably sufficient notice was given to him that the ticket contained conditions. He accordingly gave judgment for the plaintiff.

HELD—that the county court judge had put the proper questions to himself, that there was evidence to support his findings, and that therefore judgment was properly entered for the plaintiff.

HOOPER v. FURNESS RY. CO., (1907) 23 T. L. R. [451—Div. Ct.

73. *Drunken Man Causing Injuries to Passenger—Liability of Railway Company.*—A drunken man, with a ticket, was admitted to a platform of the defendants' station, passing the ticket-checker at the barrier. He had been seen outside, obviously drunk, but there was no evidence that there was anything in his conduct to attract the ticket-checker's attention. He attempted to enter a first-class carriage when the station-master ordered a porter to keep him back. Whilst the porter was leading him along the platform he suddenly swung his arm and broke the window of the carriage in which the plaintiff was sitting. The plaintiff being injured by broken glass sued the defendants for damages for negligence and want of care, and at the trial there was a verdict and judgment for him.

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**HELD** (Walker, L J., dissenting)—that there must be a new trial, as the case was left to the jury on the erroneous assumption that if the drunken man was "obviously drunk," either the neglect to notice that condition or the admission of him in that condition as a passenger, rendered the defendants absolutely responsible for all that he did.

**ADDERLEY v. GREAT NORTHERN RY.**, [1905]  
[2 Ir. R. 378—C. A.]

**74. Overcrowded Platform in Railway Station—Injury Due to Overcrowding—Regulation of Crowd.**—It is a good cause of action to allege that a railway company knowingly, and without taking any steps to prevent it, permitted a greater crowd of intending passengers to congregate in a station than its platform could accommodate, and had failed to provide a sufficient staff of servants to cope with the crowd, and that in consequence, by the pressure of the crowd, the pursuer had been carried along and hurled from the platform on to the railroad and injured.

**FRASER v. CALEDONIAN RY.**, (1903) 5 F. 41 :  
[40 S. L. R. 43—Ct. of Sess.]

**75. Railway Companies not Common Carriers of Passengers—Evidence of Neglect of Due Care—Explosives brought into Carriage by Fellow Passengers—Signs of Real Nature of Parcels—Onus Probandi.**—Railway companies are obliged to use proper care and skill in the carrying of passengers. They are not carriers of passengers in the sense of being common carriers. There must be reasonable evidence of a neglect on the part of railway companies to render them liable to passengers.

The plaintiff sued the defendant company for the death of his son, who was killed by an explosion in a railway carriage. The explosion was caused by the bringing into the carriage of a quantity of fireworks. The carriage was one in which smoking was permitted; and a small charcoal stand was there for the accommodation of the smokers. The two persons responsible for bringing in the combustibles—fireworks—themselves became the victims of the explosion. The action was brought against the railway company upon the allegation that they were guilty of negligence in permitting the explosives to be brought into the carriage.

**HELD**—that as there was no proof that the parcels carried by the two passengers exhibited such signs of their real nature as ought to have called the attention of the railway servants to them, and thus prevented such dangerous goods being carried, judgment must be entered for the railway company.

*Collett v. London and North Western Ry. Co.* (1851) 16 Q. B. 984, 20 L. J. Q. B. 411; 15 Jur. (o.s.) 1053 explained.

**EAST INDIAN RY. v. KALIDAS MUKERJEE**,  
[[1901] A. C. 396; 70 L. J. P. C. 63; 84 L. T.  
210; 17 T. L. R. 284—P. C.]

**76. Right of Passenger to Break Journey.**—In the absence of special terms a railway ticket

from one station to another does not entitle a passenger to break his journey at an intermediate station, and finish it by a later train.

**ASHTON v. LANCASHIRE AND YORKSHIRE RY.**  
[Co., [1904] 2 K. B. 313; 73 L. J. K. B. 701,  
52 W. R. 655; 20 T. L. R. 482—Div. Ct.]

**77. Station—Exit for Passengers—Protection from Sparks from Engines—Duty of Railway Company.**—The plaintiff was a passenger by the defendants' railway from Liverpool to Huyton. The train arrived at the platform on the north side of Huyton station. This platform did not abut upon a public road. There were two means of exit from the platform. One was by means of subways under the line to the opposite platform and then out of the station, and if the passenger wished to go to a place on the north side of the railway he would go along a road belonging to the railway company which led under the line to a public road on the north side of the railway. The other exit from the north platform was by a narrow path belonging to the railway company, which led from the slope at the end of the platform where the engines stopped, and ran close to the line for about 150 feet, when it connected with the public road above mentioned. At the entrance to this path there was a gate over which the words "Way out" were posted, and where a ticket collector stood to collect passengers' tickets. The plaintiff left the platform by this latter path, and when he had gone a short way along it, a spark from the engine of the train by which he had come struck him in the eye as it was starting from the station, and injured him. The path was not screened from the line, and a petition had previously been presented to the company, pointing out the danger from sparks, and asking that it should be protected by a covering, but the company refused. There was evidence that engines in starting from the station were liable to emit sparks. There was no evidence of negligence on the part of the company in the construction or working of the engine. The plaintiff brought an action for damages, alleging that the company were negligent in not protecting the path by a screen, and the jury found a verdict for the plaintiff.

**HELD**—that as the defendants had provided a means of exit by this path upon their own land, and as they knew of the danger to passengers using this exit from sparks, there was evidence of negligence on their part in not providing a screen to the path, which could have been done at a small expense, and the jury were entitled to find a verdict for the plaintiff.

**ATHERTON v. LONDON AND NORTH WESTERN**  
[Ry. Co., 93 L. T. 464; 21 T. L. R. 671—C. A.]

**78. Unpunctuality of Trains—Delay caused by Company's Negligence—Non-liability—Tickets—Conditions.**—There is no limit to the conditions that may be imposed with reference to passenger traffic by railways.

The plaintiff took a workman's ticket and travelled by a workman's train. In consequence of the lateness of the train he lost his day's work. The plaintiff brought an action to recover the amount of his day's wage. The defendants relied

**Railways—Continued.**

on the following condition contained in their time-tables, to which the plaintiff's ticket referred "The hours or times stated in the company's time-book, tables, bills, and notices are appointed as those at which it is intended, so far as circumstances will permit, the passenger trains should arrive at and depart from the several stations, but their departure or arrival at the times stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding train or any other portion of their lines is not guaranteed: nor will the company under any circumstances be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The right to stop the trains at any station on the lines, although not marked as a stopping station, is reserved."

HELD—that the plaintiff could not recover, notwithstanding that the delay was caused by the negligence of the defendants.

DUCKWORTH v. LANCASHIRE AND YORKSHIRE [RY. CO., (1901) 65 J. P. 517, 49 W. R. 541; 84 L. T. 774; 17 T. L. R. 454—Div. Ct.

**79. Unpunctuality of Trains—Loss Covered by Condition Relieving from Liability.**—The train in which the plaintiff and his musical touring company were travelling arrived at Warrington, and there were only five minutes in which to uncouple the special carriage from the train in which they were travelling and shunt it from the high-level to the low-level station in order to attach it to the Buxton train. Apparently there was no time to perform that operation. The consequence was that the plaintiff and his company were delayed, and did not reach Buxton in time to catch a train from there on the Midland Railway to Miller's Dale, so as to enable them to hold their performance that night. The plaintiff thereupon sued the defendants to recover damages, and the defendants, by a condition in their time tables, said that they would not undertake that the trains would arrive at the times stated in their time tables, nor would they be accountable for any loss or inconvenience or injury arising from delays or detention. There was no evidence of negligence, either in the late arrival of the train at Warrington or in not shunting the carriage.

HELD—that, although the plaintiff's loss was caused by the delay in arriving at Warrington, and the consequent detention there, it was covered by the condition.

DRIVER v. LONDON AND NORTH WESTERN [RY. CO., (1900) 16 T. L. R. 293—C. A.

(vi) *Trespass on Railway*

**80. Station Approach—Wilful Trespass—Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), s. 16.**—The respondent, a cabdriver, drove his cab up the approach road, in front of the booking-office of the appellants' station at Dorking and refused to quit the same on being requested so to do by a properly qualified official of the company,

saying that he had as much right to be there as anyone else. An information was laid against the respondent for wilful trespass within the Railway Regulation Act, 1840, s. 16.

HELD—that, as no *bonâ fide* question of right was raised, the justices had jurisdiction to hear the information.

*Foulger v. Steadman* ((1872) L. R. 8 Q. B. 65; 42 L. J. M. C. 3, 26 L. T. (N.S.) 395) followed.

LONDON, BRIGHTON, AND SOUTH COAST RY. [CO. v. FAIRBROTHER, (1900) 16 T. L. R. 166—Div. Ct.

**81. Station—Trespass—Removal of Trespasser.**—A cabman, or any other person, but especially a cabman with a carriage and horse, must obey the orders of a railway company's authorised servants as to leaving the station, and when he is ordered to leave it he must leave it, and if he refuses and persists may be turned out.

WOOD v. NORTH BRITISH RY. CO., (1900) 2 F. I.

**82. Trespass on Line—Claim of Right of Way—Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 23.**

HELD—that under a railway company's Act a man who after warning crossed the line at a place not being a level crossing committed a "trespass," and that a magistrate could convict him thereof although he alleged that there had been a public right of way over the spot before the railway was constructed.

CALEDONIAN RY. CO. v. WALMSLEY, [1907] S. C. [1047—Ct. of Sess

(vii) *Locomotives.*

**83. Smoke—Locomotive emitting Black Smoke—Evidence—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 114—Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19.**—The appellants were summoned for allowing certain locomotives to emit black smoke for more than three minutes on various occasions. Evidence was given that the coal used was smoky coal, but no evidence was given that the locomotives were not constructed on the principle of consuming their own smoke.

HELD—that the appellants were rightly convicted under the Railway Clauses Consolidation Act, 1845, s. 114, as amended by the Regulation of Railways Act, 1868, s. 19.

SOUTH EASTERN AND CHATHAM RY. CO. v. [LONDON COUNTY COUNCIL, (1901) 65 J. P. 568, 84 L. T. 632; 19 Cox, C. C. 721—Div. Ct.

**84. Smoke—Black Smoke from Locomotive—Consumption of its own Smoke "as far as practicable"—Use of Bituminous Coal—Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 114—Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19.**—The respondents were summoned for using upon their railway a locomotive steam engine using coal or similar fuel, emitting smoke, and not then constructed on the principle of consuming, and so as to consume,

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its own smoke. The magistrate found that the engine was properly constructed within the meaning of sect. 114 of the Railways Clauses Consolidation Act, 1845; that it did not fail to consume its own smoke so far as was practicable, having regard to the coal which was used; that the use of the coal that was used was not a default of the company within the meaning of sect. 19 of 31 & 32 Vict. c. 119, such coal being a good hard steam coal, the normal coal for locomotives in some districts; that there was no other default, and that the smoke emitted by the said engine was of a darker colour, and slightly more in quantity than it would have been if Welsh coal had been used; on these findings he dismissed the summons.

**HELD**—that on the facts as found by him the decision of the magistrate was right in law.

**LONDON COUNTY COUNCIL v. GREAT EASTERN**  
[Ry. Co., [1906] 2 K. B. 312; 75 L. J. K. B. 490; 70 J. P. 356; 54 W. R. 537; 94 L. T. 586; 22 T. L. R. 513; 4 L. G. R. 925; 21 Cox, C. C. 171—Div. Ct]

**(viii.) Receivers.**

**86. Costs**—"Other Proper Outgoings" *Jurisdiction of Court—Railway Companies Act, 1867* (30 & 31 Vict. c. 127), s. 4—*Supreme Court of Judicature Act, 1890* (53 & 54 Vict. c. 44), s. 5.]—Since the passing of the Judicature Act, 1890, there can be no doubt that the Court has power to order the payment of costs of proceedings under a special Act, though the special Act contains no provision for this purpose.

A railway company incurred cost in defending an action brought by a contractor for a large sum. During the course of the proceedings a receiver and manager of the company was appointed, on the petition of a judgment creditor, and inquiries as to creditors were directed by the receivership order. Leave was given to the company to continue to attend the proceedings commenced by the contractor.

**HELD**—that the costs incurred in resisting the contractor's claim were not "other proper outgoings" within the meaning of sect. 4 of the Railway Companies Act, 1867, but that all such costs incurred since the receivership order ought to be treated as incurred in pursuance of the inquiries directed by that order, and ought to be paid in priority to any further payments to any creditors of the company who had benefited by the opposition to such claim.

Order of Byrne, J. ((1899) 80 L. T. 648; 15 T. L. R. 358) varied.

**IN RE WREXHAM, MOLD, AND CONNAH'S QUAY**  
[Ry. Co., [1900] 1 Ch. 261; 69 L. J. Ch. 291; 48 W. R. 311; 82 L. T. 33; 16 T. L. R. 169—C. A.]

**87. Judgment Debt Breach of Contract**—"Working Expenses"—"Other Proper Outgoings"—*Priority—Railway Companies Act, 1867*, (30 & 31 Vict. c. 127), s. 4.]—The reason of the passing of the Railway Companies Act,

1867, was to enable a railway company, against which a creditor had obtained a judgment for his debt, to carry on its business as a going concern, notwithstanding the judgment, partly for the benefit of the public and partly for the benefit of creditors, who were thereby more likely to get paid than if the whole undertaking was broken up and sold. The object being to protect the rolling stock and plant of the company from execution by the judgment creditor, and, further, to keep the undertaking alive, it was obviously necessary to provide for all expenses and outgoings which were absolutely essential for that purpose.

The Act plainly intended that expenses, such as common sense would show to have been for the working of the railway and for the outgoings necessary to enable it to do its service to the public efficiently, should be paid in the first place, and all the surplus applied to payment of all the debts of the company, properly so called, according to their respective rights and priorities, to be ascertained by the Court.

A receiver and manager was appointed on September 8th, 1897, on a creditors' petition, under sect. 4 of the Railway Companies Act, 1867. On December 14th, 1899, the applicants, having sustained damage to a ship loading goods at the company's wharf owing to the defective state of the berth, recovered judgment against the company and the receiver for £63 17s. 2d., damages and costs.

The applicants asked that the receiver and manager might be ordered to pay the same out of the assets of the company.

**HELD**—(1) that this was not a matter which arose from the neglect of the company to expend money in proper "outgoings"; (2) that the case only led to a moral improbability and not to a physical impossibility; (3) that the damages and costs were not "working expenses" or "other proper outgoings" in respect of the undertaking within sect. 4 of the Railway Companies Act, 1867.

*In re Eastern and Midlands Ry. Co.* ((1890) 45 Ch. D. 367; 63 L. T. 604—C. A.), *In re Wrexham, Mold, and Connaah's Quay Ry. Co.* ([1900] 1 Ch. 261; 69 L. J. Ch. 291; 48 W. R. 311; 82 L. T. 33; 16 T. L. R. 169—C. A., *supra*) and *In re Nuan and Kingscourt Ry. Co.* ((1885) 17 L. R. Ir. 398) followed.

**IN RE WREXHAM, MOLD, AND CONNAH'S QUAY**  
[Ry. Co., [1900] 2 Ch. 436; 69 L. J. Ch. 671; 83 L. T. 49—Farwell, J.]

**88. Judgment Creditors—Railway not open for Public Traffic—Jurisdiction to Appoint Receiver**—*Railway Companies Act, 1867* (30 & 31 Vict. c. 127), s. 4.]—A railway was far from completion. The contractor, who was to be paid partly in cash and partly in shares, had a strong interest in the completion of the line. A judgment creditor had seized some rails which had been brought upon the railway company's land, and which, under the agreement between the company and the contractor, had become the property of the company. A petition by judgment creditors was presented under sect. 4 of

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the Railway Companies Act, 1867, asking for the appointment of a receiver of the undertaking of the railway company.

HELD—that (without saying there is jurisdiction under sect. 4 to appoint a receiver, if the railway is not open, or about to be opened, for traffic) whether there is jurisdiction or not, it would not be right, or in accordance with the practice of the Court, to appoint a receiver who in all probability would not have any duties to perform for some considerable time, and perhaps none at all, if the railway was never opened for traffic.

*In re Manchester and Milford Ry. Co.* (1880) 14 Ch. D. 645; 49 L. J. Ch. 365; 42 L. T. 714—C. A.) explained.

Decision of Farwell, J. ((1901) 17 T. L. R. 227) reversed.

IN RE KNOTT END RAILWAY, [1901] 2 Ch. 8, [70 L. J. Ch. 463; 49 W. R. 469; 84 L. T. 433; 17 T. L. R. 353—C. A.

**89 Set-off—Unliquidated Damages—Receiver—Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4—R. S. C., Ord. 19, r. 3**—By a statute the defendant company was to take over and work the line of the plaintiff company, and was bound to keep it in repair. A receiver was appointed under the Railway Companies Act, 1867, of the defendant company. By a new agreement the defendant company was to deliver over their holding stock to the plaintiff company at a fair value.

The plaintiff company asked for a declaration that it was entitled to set off certain unliquidated damages from the defendant company or its receiver personally against a liquidated sum presently, due to the receiver for the rolling stock.

HELD—that a set-off like this was not within the statutes of set-off; that putting aside the law of bankruptcy, which was not applicable here, and treating Ord. 19, r. 3, as having statutory effect, the case did not appear to be within the rule as the plaintiff company here was not a defendant; and that the Court would not give a statutory purchaser a preference over other creditors.

LISKEARD AND LOOE RY. CO. v. LISKEARD AND CARADON RY. CO. AND FOSTER, (1902) 18 T. L. R. 1—Cozens-Hardy, J.

**90. Receiver Appointed at instance of Judgment Creditor—Money Received for Sale of Rolling Stock to another Company—Rights of Debenture-holders as against other Creditors—Railway Companies Act, 1867 (30 & 31 Vict. c. 127), ss 4, 23.**—A judgment creditor of the C. Railway Co. was appointed receiver of its undertaking; and subsequently by an agreement (confirmed by a private Act) the L. Railway Co. agreed to purchase all the rolling stock, &c., of the C. Co., together with the right of using the lines and works of that company.

HELD—that upon the true construction of sects. 4, 23 of the Railway Companies Act, 1867,

the purchase-money paid by the L. Co. must be applied first in payment of creditors having a charge upon the entire undertaking; in other words, it must be divided rateably among the first debenture-holders.

IN RE LISKEARD AND CARADON RY. CO., [1903] [2 Ch. 681; 72 L. J. Ch. 754; 89 L. T. 437; 19 T. L. R. 653—Eady, J.

**II. CANALS**

**91. Branch Canal—Part of Branch kept open for Traffic—Part closed—Obligation of Company to re-open—"Reasonable Facilities"—Grand Junction Canal Acts, 1793 (33 Geo. 3, c. lxxx.), and 1794 (34 Geo. 3, c. xxiv)—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2**—By their Act of 1793 the defendant company were empowered to make a branch cut seven miles long merely as a feeder for water; an Act of 1794 authorised them to widen and maintain it as a navigable canal, but did not impose any duty to do so upon them. It was used for ninety years as a canal, but in 1893, owing to a drought, five miles of it were emptied in order to supply the main canal with water, and had never been refilled. Certain landowners now asked that the company should be ordered to re-open the whole branch for boat traffic. It appeared that from 1883 to 1898 the traffic had very largely decreased, owing to the construction of a new railway, and that a large sum of money would have to be spent on repairs if the canal was to be re-opened.

HELD—that, as the Act of 1794 was only permissive, the question was one of "reasonable facilities": that under the circumstances it would not be reasonable to order the whole branch to be re-opened, and that the company might abandon a part only.

ROTHSCHILD AND OTHERS v. GRAND JUNCTION CANAL CO., (1904) 12 Ry. Cas. 141; 91 L. T. 386, 20 T. L. R. 503—Ry. and Canal Com.

**92. Bridge over Canal—To be specified height above Tow-Path—Subsidence—Duty of Railway Company to raise Bridge to original Height—Rhymney Railway Act, 1882 (45 & 46 Vict. c. cclx.), s. 10.**—The defendants constructed a railway under a special Act, which provided that the railways and works thereby authorised should not "when completed" interfere with the waterway, locks or towing-path of the plaintiff company, except by a bridge which "shall have a clear height of eight feet from the present level of the towing-path to the under side of the arch."

A subsidence of land took place near the bridge, which compelled the canal company to raise the tow-path in order to preserve the canal, and keep the water-way at the same level; in consequence there was only two feet of headway left under the bridge.

HELD—that it was the duty of the railway company to maintain their bridge a clear eight feet above the waterway at its present (the statutory) level, and that such duty must be enforced as soon as the canal company *bond fide*

**Canals—Continued.**

wished to resume traffic on the canal, which was at the time out of use.

Decision of C. A. (19 T. L. R. 240) affirmed.

**RHYMNEY RY. CO AND OTHERS v. GLAMORGAN [SHIRE CANAL NAVIGATION, (1904) 91 L. T. 113; 20 T. L. R. 593—H. L. (E.).**

**93. Compensation for Water — Abstraction of Water from River — Injury to Mill-owners—Action—Compensation**—A special Act authorised the construction of a canal to be supplied with water from a river, and empowered the proprietors to do anything "which they shall think necessary or convenient for . . . maintaining and using the said canal . . ." doing as little damage as might be and making compensation.

Another Act authorised the construction of a tidal basin and other works in connection with the canal, and extended to such works the powers conferred by the earlier Act.

The proprietors drew water through the canal from the river for the purpose of scouring out the tidal basin and its entrances.

**HELD**—that they were acting within their powers in so doing, and that the remedy of mill-owners upon the river, whose supply of water was interfered with, was by proceedings for compensation.

**REDLER AND OTHERS v. GREAT WESTERN RY. [Co., (1907) 96 L. T. 98—H. L. (E.).**

**93a Manchester Ship Canal — Contract — Remoteness—Uncertainty—Statutory Confirmation and Validation of Contract — "First Refusal" of Lands en bloc—Interest in Land—Injunction**—The plaintiffs were incorporated for the construction of a canal and docks, and the defendants' racecourse adjoined the canal. An agreement under seal dated March 7th, 1893, was entered into between the two companies in order to settle certain disputes with reference to a variety of matters, and by clause 3 it was agreed that, "If and whenever the lands and hereditaments belonging to the racecourse company, and now used as a racecourse, shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the racecourse company shall give the canal company the first refusal of the aforesaid lands and hereditaments *en bloc*." This agreement was scheduled to the Manchester Ship Canal (Surplus Lands) Act, 1893, and was thereby "confirmed and declared to be valid and binding upon the parties thereto."

On August 10th, 1899, the plaintiffs informed the defendants of their intention to apply to Parliament for power to acquire the racecourse for dock purposes. During the negotiations that followed the defendants informed the plaintiffs that they had been approached by other persons desirous of purchasing the racecourse.

On October 20th, 1899, the defendants conditionally offered the property to the canal company for £350,000, and the canal company refused the offer.

On December 22nd, 1899, the defendants agreed to sell the property to the Trafford Park Company for £280,000, subject to the rights of the plaintiffs under the agreement of March 7th, 1893, and other conditions.

**HELD**—(1) that clause 3 only imported that the racecourse company should, in either of the prescribed events, make a fair and reasonable offer to sell the lands to the canal company; (2) that the price of £350,000 was one which the racecourse company did not really expect to get, and that the offer made on October 20th, 1899, was not a fair and reasonable one, as the racecourse company had then determined to sell to the Trafford Park Company for a less sum; (3) that the words "first refusal" in clause 3 imported that the price at which the racecourse company should give the canal company the "first refusal" was a price at which the racecourse company would offer the land to other would-be buyers in the event of the refusal of the canal company to buy at that price, and that there was a clear infraction of the right of pre-emption given to the canal company by clause 3; (4) that every clause of the agreement had statutory validity, and it was not void for remoteness or uncertainties; (5) that the case ought to be treated on the basis of an action to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract within the principle of *Lumley v. Wagner* ((1852) 1 D. M. & G. 601, 21 L. J. Ch. 898, 16 Jur. 871); and (6) that clause 3 did not create an interest in land.

Appeal from Farwell, J. ([1900] 2 Ch. 352; 69 L. J. Ch. 850; 83 L. T. 274; 16 T. L. R. 429) dismissed with costs.

**MANCHESTER SHIP CANAL CO. v. MANCHESTER [RACECOURSE CO., [1901] 2 Ch. 37; 70 L. J. Ch. 468; 49 W. R. 418; 84 L. T. 436, 17 T. L. R. 410—C. A.**

**94. Manchester Ship Canal—Statutory Obligation to Dredge—Minimum Depth of Water—Neglect to Dredge—Tolls paid under Protest—Manchester Ship Canal Acts, 1885 (48 & 49 Vict. c. clxxxviii.), s. 88 (14), and 1896 (59 & 60 Vict. c. clxxxii.), s. 43, Sched.]**—Upon the true construction of the Manchester Ship Canal Acts, 1885 and 1896, and the Agreement of April 9th, 1896, scheduled to the latter Act, the Canal Company are bound to provide a channel with 8 feet of water at low water "springs" between Bank Quay and Howley Lock. If they fail to do so, and fail to remove any obstruction upon receipt of notice from the Borough Surveyor of Warrington, then manufacturers at Warrington have certain rights of free navigation. Individual traders can in such a case maintain an action for damages, and also recover back tolls paid under protest during such time as they were entitled to free navigation.

**CROSSFIELD & SONS, LD., AND OTHERS v. [MANCHESTER SHIP CANAL CO (1903), 19 T. L. R. 398—Byrne, J.**

**Canals—Continued.**

**95. Manchester Ship Canal—Statutory Obligation to Dredge—Neglect of—Right of Traders to Sue—Manchester Ship Canal Acts, 1885 (48 & 49 Vict. c. clxxxviii.), s. 88, sub-s. 14; and 1896 (59 & 60 Vict. c. clxxxii.), s. 43—Scheduled Agreement.]**

**HELD**—that by virtue of sect. 88, sub-sect. 14. of the Manchester Ship Canal Act, 1885, as modified by an agreement of 1896, which was confirmed by and scheduled to the Manchester Ship Canal Act, 1896, traders at Warrington are entitled to sue the Canal Company for breach of their statutory obligation to dredge the bed and banks of the Mersey so that at all times there shall be a depth of 8 ft. of water at low water of spring tides between certain specified limits.

**CROSFIELD & SONS, LD., AND OTHERS v. THE [MANCHESTER SHIP CANAL CO., (1906) 22 T. L. R. 192—C. A.**

*See also* as to Right of Actions, *Crosfield v. Manchester Ship Canal Co.*, [1905] A. C. 421; 74 L. J. Ch. 637, 69 J. P. 441; 93 L. T. 141; 21 T. L. R. 689—H. L. (E.); and **ARBITRATION**, No. 39.

**96 Right to take Water from Canal—"Manufactories"—Electric Generating Station—Construction of Statute.]**—The statute under which a canal was made gave the right to take water from it to all persons and corporations (1) "who now possess any steam engines situated within 200 yards of the said canal and used for the purposes of any manufactories, or for any corn mills, iron works, collieries, or other works," or (2) "who now do or may hereafter possess any land lying within that distance . . . and who may be disposed to erect any fire or steam engines thereupon for carrying on the above manufactories or for the use of corn mills."

The plaintiffs claimed to take water to operate an electric generating station.

**HELD**—that they had no right to do so; the words "the above manufactories" meant manufactories having engines at the date of the Act, and could not be extended to "any such manufactories as are mentioned above."

*Semble*, also, a generating station could not be regarded as *ejusdem generis* with manufactories indicated by an Act of 1835, which did not include under that head such works as corn mills, iron works, &c.

**BIRMINGHAM CORPORATION v. BIRMINGHAM [CANAL NAVIGATION, (1905) 21 T. L. R. 548; 3 L. G. R. 1287—Farwell, J.**

**97. "Waste Water"—Wrongful Abstraction—Injunction—Damages.]**—The respondent company, the Manchester Ship Canal Company, brought an action against the appellant company, the Rochdale Canal Company, claiming an injunction to restrain the defendants from abstracting or diverting water from the Rochdale Canal; or from permitting the same to be abstracted or diverted otherwise than for purposes and to the extent, and subject to the conditions allowed by the Ashton Canal Act,

1792, the Rochdale Canal Act, 1794, or the Rochdale Canal Act, 1800; or from selling such water or permitting it to be sold, or from otherwise dealing with the surplus or "waste water" so as to prevent the same flowing or being discharged into the Bridgewater Canal. In 1885 the respondent company acquired the Bridgewater Canal.

**HELD**—that the Bridgewater Canal, whose right had been transferred to the respondent company, were entitled to have the water not used in the ordinary course of navigation by the appellant company; that "waste water" in the statutes meant "all water which would come down the canal and not be required for the purpose of navigation"; that it would be *ultra vires* for the appellant company to sell their "waste water" so as to prevent themselves from fulfilling their statutory duties or their statutory obligations; and that the respondent company were entitled to the injunction claimed, and an inquiry as to damages.

*Decision of C. A. (sub nom. Manchester Ship Canal Co. v. Rochdale Canal Co (1899) 81 L. T. 472) affirmed.*

**ROCHDALE CANAL CO. v. MANCHESTER SHIP [CANAL CO., (1902) 85 L. T. 585—H. L. (E).**

### III RAILWAY AND CANAL COMMISSIONERS.

*See also* sub-heading **RATES, supra**

**98. Appeal—No Appeal on Question of Fact—Siding provided by Trades—Rebate for Station or Terminal Services not Performed—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4]**—No appeal lies to the Court of Appeal from the decision of a majority of the Railway and Canal Commissioners on a question of fact.

The plaintiffs claimed a rebate under sect. 4 of the Railway and Canal Traffic Act, 1894, in respect of rates charged for carriage and delivery of goods to and at their own sidings, on the ground that the rates included charges for station and terminal services not in fact performed. The company contended that they were not in fact charging for such services.

Two of the Commissioners found as a fact that they were so charging; whilst one held (and another suggested) that a rebate could be ordered without proof that any definite amount of terminal was included in the rate.

**HELD**—that the decision on the point of fact was final and conclusive.

**VICKERS, SONS & MAXIM, LD. v. MIDLAND [RY. CO. AND OTHERS, (1903) 87 L. T. 655; 11 Ry. & Can. Cas 247—C. A.**

**99. Appeal—Question of Law—Competency.]**—An appeal lies to a superior Court on a question of law from a decision of the Railway Commissioners when sitting in lieu of arbitrators under the provisions of sect. 8 of the Regulation of Railways Act, 1873.

Where it appears on the face of the judgments of the Commissioners that the order has been made because of a determination of a question

**Railway and Canal Commissioners—Continued.**

of law, an appeal is competent although the order itself discloses no question of law.

**NORTH EASTERN RY. CO. v. NORTH BRITISH RY. CO.**, (1897) 35 Sc. L. R. 282—*Ry. Com.*

**100. Arbitration before—Award—Attempt to Re-open.**—Where in an arbitration before the Railway and Canal Commission an award has been made based upon the figures and evidence laid before the Court, the question of the amount of the award cannot be re-opened on the ground that the evidence has been misunderstood, certainly it will not be permitted when the award only continues binding for three years.

**IN RE GREAT WESTERN RY. CO. v. POSTMASTER-GENERAL**, (1903) 19 T. L. R. 636—*Ry. & Can. Com*

**101. Differences between Railway Companies—Statutory Agreement for Arbitration—Named Arbitrator or Arbitrator appointed by Board of Trade—Death of Named Arbitrator—Jurisdiction of Railway and Canal Commissioners—Regulations of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8.**—A statutory agreement provided that differences between two railway companies as to its effect and construction should be referred to H., or, him failing, to an engineer to be appointed by the Board of Trade on the application of either party. H. having died—

**HELD**—that the proviso to sect. 8 of the Regulation of Railways Act, 1873, applied, and that the Railway Commissioners could not compel a reference under that section, since an arbitrator had in a "general or special Act been designated by his name"

**ALEXANDRA (NEWPORT AND SOUTH WALES) [DOCKS AND RY. CO. v. TAFF VALE RY. CO.]**, [1907] 1 K. B. 356; 76 L. J. K. B. 303; 96 L. T. 380—*C. A.*

**RAPE.**

*See CRIMINAL LAW.*

**RATES AND RATING.**

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*For HIGHWAY RATE see title HIGHWAYS, 79—81, 134—190; and for WATER RATE see title WATERWORKS.*

*See also BANKRUPTCY, 246; INTOXICATING LIQUORS, 37; LANDLORD AND TENANT, 69—92; METROPOLIS.*

**I. COUNTY RATE**

**1. Appeal by Parish Council against Basis and Rate made thereon—Time—Next Quarter Sessions after Cause of Appeal has arisen—Retrospective Alteration of Basis—County Rate Act, 1852 (15 & 16 Vict. c. 81), ss. 17, 22.**—A county rate basis was fixed in July, 1904. In September, 1904, certain ratepayers gave notice of appeal in respect of a poor rate assessment (on property within one of the parishes in the county) and of three several poor rates levied thereon during a period of eighteen months. In October, 1904, a precept for a county rate contribution was served upon the guardians of the union in which the said parish was comprised. In January, 1905, the appeal of the ratepayers was allowed, and the result was that there was a considerable decrease in the rateable value of the parish. On March 28th, 1905, the parish council became aware of the result of the appeal, and, on April 17th, served upon the county council notice of their intention to appeal to the next quarter sessions, against the county rate basis and against the rate made on such basis in October, 1904. The appeal was heard at the June sessions, and the basis was reduced to a figure previously agreed upon, and sessions directed that the reduction was to take effect for the period covered by the rate made in October, 1904. As to the rate, it was held that the appeal was taken to the proper Court of quarter sessions, and the appeal was allowed.

**HELD**—that the appeal against the rate was not taken to "the next quarter sessions after the cause of appeal had arisen," and, further, that quarter sessions had no power to make a retrospective alteration of the basis.

**WEST RIDING COUNTY COUNCIL v. MIDDLETON [PARISH COUNCIL]**, [1906] 2 K. B. 157; 75 L. J. K. B. 485, 70 J. P. 326, 94 L. T. 785; 22 T. L. R. 493, 1 L. G. R. 624—*Div. Ct.*

**II. DRAINAGE RATE.**

**2 Drainage Commissioners — Differential Rating of Property according to Supposed Benefit—Validity of Rate**—A drainage board, which had all the powers of commissioners of sewers, for the purpose of levying drainage rates divided the different rateable properties within their district into three classes arranged upon



**Drainage Rate—Continued.**

the principle of proportionate benefit received and danger avoided by the properties in each class, and levied a proportionate or differential rate in each class according to the supposed benefit received or danger avoided by the properties of individual ratepayers in that class.

**HELD**—that the principle of classification and proportionate or differential rating according to the supposed amount of benefit received from the drainage works by individual properties in the district, was wrong and contrary to law, and that an equal rate ought to be levied on all property in the district benefited by the works.

*Metropolitan Board of Works v. Vauxhall Bridge Co.* (7 E. & B. 964) considered.

**KNIGHT v. LANGPORT DISTRICT DRAINAGE BOARD**, [1898] 1 Q. B. 588, 62 J. P. 245, 67 L. J. Q. B. 432; 78 L. T. 260; 14 T. L. R. 253, 46 W. R. 392—Div. Ct.

**III. GENERAL DISTRICT RATE.**

*And see PUBLIC HEALTH*, 18, 142, 143.

**(a) In General.**

3. "*Land covered with Water*"—*Reservoir—Assessment at one-fourth of the net Annual Value*—*Public Health Act*, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b)—*Practice—Appeal—Criminal Cause or Matter*"—*Justices—Order for Payment of General District Rates—Case stated by Justices—Civil Debt—Judicature Act*, 1873 (36 & 37 Vict. c. 66), s. 47—*Public Health Act*, 1875 (38 & 39 Vict. c. 55), s. 256—*Summary Jurisdiction Act*, 1879 (42 & 43 Vict. c. 49), ss. 6, 35.]—The judgment of the Queen's Bench Division upon a case stated by justices on summary proceedings taken before them under sect. 256 of *Public Health Act*, 1875, for the recovery of general district rates, is not a judgment in a criminal cause or matter within sect. 47 of the *Judicature Act*, 1873, inasmuch as such rates are, by sects. 6 and 35 of the *Summary Jurisdiction Act*, 1879, enforceable only as civil debts, and an appeal, therefore, lies to the Court of Appeal.

*Seaman v. Burley* ([1896] 2 Q. B. 344; 65 L. J. M. C. 208, 60 J. P. 772; 45 W. R. 1; 75 L. T. 91—C. A.) distinguished.

A reservoir of a water company **HELD**—to be "land covered with water" within the meaning of sect. 211, sub-sect 1 (b), of the *Public Health Act*, 1875, and therefore assessable to general district rates at one-fourth of its net annual value.

*Reg. v. Birmingham Waterworks Co.* ((1861) 1 B. & S. 84; 25 J. P. 308; 4 L. T. (N.S.) 244) approved.

Decision of C. A. ([1899] 1 Q. B. 273; 68 L. J. Q. B. 207; 63 J. P. 100; 47 W. R. 177; 80 L. T. 1—C. A.) confirmed.

**HAMPTON URBAN DISTRICT COUNCIL v. SOUTH-WARK AND VAUXHALL WATER CO.**, [1900] A. C. 3; 69 L. J. Q. B. 72; 43 W. R. 209; 81 L. T. 547; 16 T. L. R. 60—H. L. (E.).

4. *Improvement Act—Limit of Rate—Abolition of Maxima—Extension of Area—Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 207, 216.]—By the County of Devon (Crediton) Confirmation Order, 1894, which was made by the Local Government Board on October 20th, 1894, under the provisions of sect. 36 of the *Local Government Act*, 1894, and sect. 57 of the *Local Government Act*, 1888, the urban district of Crediton was extended by the addition thereto of the part of the parish of Crediton which had theretofore formed part of the rural district of Crediton, and what was, therefore, without and beyond the limits of the Crediton Improvement Act, 1836.

Upon September 22nd, 1896, the Crediton District Council made a rate headed "The Crediton Improvement Rate for the year ending Midsummer, 1897." The rate exceeded the amount in the £ limited by the Improvement Act, 1836.

**HELD**—that by the conjoint operation of sects. 207 and 216 of the *Public Health Act*, 1875, the maxima of rates under the Act of 1836 were abolished, and since that year no limit upon the amount of the Crediton Improvement Rate had existed, and that the order of October 20th, 1894, carried to the added area all the powers and jurisdiction the improvement commissioners then exercised over their limits before they were extended, and therefore the rate was a good rate and was rightly headed.

**HILL v. CREDITON URBAN DISTRICT COUNCIL**, [(1899) 80 L. T. 861—C. A.]

5. "*Other Charges at present collected therewith*"—*Exemption in Scheme of 1894—Extent of Exemption—Rate for Education—Education Act*, 1902 (2 Edw. 7, c. 42), s. 18.]—A municipal borough was created by charter in 1894, subject as regards certain matters to a scheme settled by a committee of the Privy Council, pursuant to the *Municipal Corporations Act*, 1882. By this scheme it was provided that a harbour included in the area of the borough should "not in future pay to the borough or be assessed for any rates or charges . . . at a higher rate of assessment in the pound than at present, that is to say threepence in the pound per annum (exclusive of the rate for the relief of the poor and the other charges at present collected with the poor rate within the urban district)," so long as the said harbour should, out of its own revenues, pay as at present for its own lighting, cleansing, and repairing of public roads, ways, and places in the said harbour. The district containing the harbour had hitherto contributed towards school attendance committee expenses.

In 1903 the harbour was assessed at threepence in the pound apart from any rate for education.

**HELD**—that the harbour was not exempted from assessment to the rate for the expenses of education under sect. 18 of the *Education Act*, 1902.

**WHITEHAVEN HARBOUR COMMISSIONERS v. WHITEHAVEN UNION ASSESSMENT COMMITTEE**, (1906) 70 J. P. 89; 94 L. T. 504; 4 L. G. R. 128—Div. Ct.

**General District Rate—Continued.**

6. *Publication—Rate good upon the Face of it—Objection on a Summons for a Distress Warrant—Derby Improvement Act, 1901, s. 180.*—Sub-sect. (1) of sect. 180 of the Derby Improvement Act, 1901, enacts that certain rates shall be "made, assessed, and levied by the overseers in the same manner and under the same provisions (including the provisions as to . . . and appeals) as in the case of the poor rate." Sub-sect. (2) enacts that in such case "the overseers shall recover and enforce the poor rate in the same manner as the general district rate is recoverable and enforceable under the Public Health Act, 1875."

HELD—that sub-sect (1) placed the rates in question on the same footing as the poor rate, and subjected them to the same liabilities. Sub-sect. (2) only provided for obtaining payment of a valid rate by a particular mode of procedure. Publication of such a rate was therefore necessary, as in the case of the poor rate, pursuant to sect. 1 of 17 Geo. 2, c. 3, and an objection on the ground of want of publication might be taken on a summons for a distress warrant, although the rate was good upon the face of it.

BEE-SON v. DERBY OVERSEERS, (1903) 67 J. P. [282; 89 L. T. 47; 1 L. G. R. 624—Div. Ct.

7. *Rate leviable by Instalments—Payment of Two Instalments—Subsequent Amendment of Valuation List—Reduction in Rateable Value—Right of Ratepayer to deduct from Third Instalment Amount overpaid—Hastings Improvement Act, 1885 (48 & 49 Vict. c. cxvii.), ss. 75, 330—Waterworks (Clauses) Act, 1847 (10 & 11 Vict. c. 17), ss. 68, 70.*—The respondents were summoned for non-payment of the balance of the third instalment of general district and water rates and special rates in the nature of general district rates leviable by sect. 75 of the Hastings Corporation Act, 1885, which provides that the corporation may levy any rate by any number of instalments, and that all the powers of the corporation for recovering any such rate shall apply to each instalment thereof, as if the same were a separate rate. After the payment of the first and second instalments the valuation list was, on notice of objection by the respondents, amended by reducing both the gross estimated rental and the rateable value, and the rates were altered accordingly. When a demand was made upon the respondents for payment of the amount claimed to be payable in respect of the third instalment and calculated upon the reduced rateable value, the respondents claimed to be entitled to deduct from the third instalment the difference between the sums paid by the respondents in respect of the first and second instalments and the sums which would have been payable in respect of the first and second instalments if they had been calculated upon the reduced rateable value.

HELD—that the four instalments were not four separate rates, but four instalments of one

rate, and that the respondents were entitled to make the deduction claimed.

HASTINGS CORPORATION v. QUEEN'S HOTEL, [Co. L.D., (1907) 71 J. P. 369; 97 L. T. 310, 5 L. G. R. 1158—Div. Ct.

8. *Reduction of Valuation—Issue of Summons within Six Months from Time Rate made—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 221, 256.*—Where, on appeal against an assessment for the poor rate, the rateable value of premises is reduced, and the amount of the general district rate is in consequence altered so as to agree with such reduced valuation, a summons may be issued to enforce a demand made for the payment of arrears of the amended district rate if the demand for such amended rate has been made within six months of the issue of the summons.

The right to demand the reduced amount of the amended rate comes into operation for the first time when the amended rate is made in accordance with the reduced valuation, and the fact that a demand for the payment of arrears of the district rate on the higher valuation had been made more than six months previous to the issue of the summons does not cause the claim in respect of which the summons was issued to be barred by virtue of sect. 11 of the Summary Jurisdiction Act, 1848.

KEETON v. SHEFFIELD COAL CO., [1901] 2 [K. B. 26; 70 L. J. K. B. 374; 65 J. P. 341; 49 W. R. 349; 84 L. T. 387—Div. Ct.

**(b) Exemption.**

9. *"Building used exclusively or mainly for the Purposes of a Voluntary School"—Day School—Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5), ss. 3, 4.*—By sect 3 of the Voluntary Schools Act, 1897, "No person shall be assessed or rated to or for any local rate in respect of any land, or buildings, used *exclusively or mainly* for the purposes of the schoolrooms offices, or playground of a voluntary school"; and by sect 1 "voluntary school" means "a public elementary day school not provided by a school board."

The Royal Victoria Patriotic Asylum is an institution for the maintenance and education of the daughters of soldiers, sailors, and marines.

HELD—that although "day school" is probably used in opposition to "evening school," not to "boarding school," yet the asylum was not exempt from payment of rates, for it could not be said to be "mainly" used as a voluntary school within the meaning of sect. 3.

ROYAL COMMISSIONERS OF THE PATRIOTIC FUND v. MAYOR OF WANDSWORTH, (1903) 67 J. P. 311, 88 L. T. 865; 19 T. J. R. 517; 1 L. G. R. 711—Div. Ct.

10. *Light Railway—"Land used only as a Railway"—"Railway constructed under the Powers of an Act of Parliament"—Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 12—Public Health Act, 1875 (38 & 39 Vict. c. 55),*

**General District Rate—Continued.**

s. 211 (1) (b).]—The owners of a light railway, constructed under an order made under the Light Railways Act, 1896, and laid in the public streets, had, by the terms of the order, the exclusive use of the railway for carriages with flange wheels, without prejudice to the right of passage by the public over the highway with other carriages. Physically the light railway resembled a tramway.

**HELD**—that by virtue of the Act of 1896 the light railway was a railway to which sect. 211 (1) (b) of the Public Health Act, 1875, applied, and that the owners thereof were occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the section, and were, therefore, assessable to the general district rate in respect of the railway at one-fourth part only of its annual value.

Decision of Div. Ct. ([1906] 2 K. R. 140; 75 L. J. K. B. 388, 70 J. P. 275; 54 W. R. 495, 94 L. T. 543, 22 T. L. R. 454, 4 L. G. R. 607) affirmed.

**WAKEFIELD AND DISTRICT RY. CO. v. WAKEFIELD CORPORATION**, [1907] 2 K. B. 256; 76 L. J. K. B. 634; 71 J. P. 254; 96 L. T. 622; 23 T. L. R. 404; 5 L. G. R. 595—C. A.

**11. Limit of Amount and partial Exemption by Proviso in a Section of a Local Act—Limit removed by Public Act—Exemption unaffected.]**

—By a proviso in a section of a local Act an exemption from three-fourths of the rating was conferred upon the defendants in respect of a certain sum below the limit which the Act fixed. By sect. 227 of the Public Health Act, 1875, the limit was taken away.

**HELD**—that the proviso was an enactment operating as a protection to the defendants, and that it was not taken away.

**BINGLEY URBAN DISTRICT COUNCIL v. MIDLAND RY. CO.**, (1899) 80 L. T. 725—Div. Ct.

**12. Partial Exemption—Land used as a Railway for Public Conveyance—Lines, Sidings, and Sheds—Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.), s. 36 (1).]**—By the Liverpool Corporation Act, 1893, s. 36, it was provided that "land used as a railway under the provisions of any Act of Parliament for public conveyance" should not be rated to the general district rate in any greater proportion than one-fourth of the net annual value.

The respondents were the owners and occupiers of a certain goods station and premises, consisting of a number of railway lines, sidings, and sheds, which were connected with the main line of the respondents, permission having been given to the respondents to use the dock railway, and lay a tramway across the street. All the lines of rails on the premises in question were used for the conveyance of any goods which the public sent by rail to or from the premises in question.

**HELD**—that the respondents were not entitled to the partial exemption in sect. 36 of the Liverpool Corporation Act, 1893, as the premises in

question were not in fact "land used as a railway," and, further, that they did not constitute "a railway made under the powers of an Act of Parliament for public conveyance."

Judgment of Q. B. D. ([1899] 2 Q. B. 197; 68 L. J. Q. B. 883, 63 J. P. 661; 80 L. T. 803; 15 T. L. R. 409) reversed.

**WILLIAMS v. LONDON AND NORTH WESTERN RAILWAY**, [1900] 1 Q. B. 760, 69 L. J. Q. B. 531; 82 L. T. 287; 16 T. L. R. 292—C. A.

**13. Total Exemption of Building used for Education of the Poor—Clothing, maintaining, and instructing.]**—The Liverpool Corporation Act, 1893, s. 36, provided "that no person shall be rated in respect of any building used for the education of the poor exclusively."

**HELD**—that the provision meant that no person was to be rated in respect of a building used for the education of the poor and for nothing else, and that where an institution was used for the purpose of receiving boys between two and seven and girls between two and sixteen years, and the managers undertook to receive, clothe, maintain, instruct, and provide them with medical attendance at a fixed sum per head per week, it did not come within the provision.

**HADFIELD v. LIVERPOOL CORPORATION**, (1899) [80 L. T. 566—Div. Ct.

**14 "Tramroad"—"Land used as a Railway"—Blackpool and Fleetwood Tramroad Acts, 1896 and 1898—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (1) (b).]**—The appellants had constructed under a special Act a tramroad connecting two tramways. This tramroad, except where it passed over roads by means of level crossings which the appellants were authorised to make, was constructed on lands the exclusive property of the appellants, and these lands were fenced off from the adjoining lands. The rails were laid on sleepers in the manner usual with railways, and physically the tramroad resembled an ordinary railway. The special Act incorporated, as regards the tramroad, certain provisions of the Railways Clauses Act, 1845, and provided that, for the purposes thereof, the tramroad should be deemed to be a railway, and it also applied to the tramroad certain provisions of the Railways Clauses Act, 1845, and certain provisions of the Railways Clauses Act, 1863, as if the same were a railway.

**HELD** (Buckley, I. J. doubting)—that the tramroad track was "land used as a railway" within the meaning of sect. 211 of the Public Health Act, 1875, and was entitled to the partial exemption from rating allowed by that section.

Decision of Div. Ct. (70 J. P. 77, 94 L. T. 254; 22 T. L. R. 138; 4 L. G. R. 324) reversed.

**BLACKPOOL AND FLEETWOOD TRAMROAD CO. v. THORNTON URBAN DISTRICT COUNCIL**, [1907] 1 K. B. 568, 76 L. J. K. B. 492; 71 J. P. 177; 96 L. T. 209; 23 T. L. R. 267; 5 L. G. R. 422—C. A.

**General District Rate—Continued.**

15. *Volunteer Drill Hall—No exclusive User—Summons to enforce Rate—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 211, 256—Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 26*—The respondent, the commanding officer of a volunteer regiment, was the owner and occupier of certain premises used as a drill hall and armoury. When not in use as such it was let for concerts and other entertainments. A general district rate had been assessed upon the premises, and such assessment had not been appealed against. On a summons to recover such rates:

**HELD**—that, as the premises were not used by the Crown solely for the Crown, they were not exempt, and the justices were bound to issue process.

**HELD**, further, that the justices could not enter upon the question of the amount of the assessment.

RAYNER *v.* DREWITT, (1900) 64 J. P. 567, 82 [L. T. 718—Div. Ct.]

**(c) Occupation.**

16. *House occupied in Summer Months—Fittings left in House—Occupation—Liability to Rate—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 2*—The respondent was the lessee of a house which she had furnished for the purpose of receiving lodgers in the summer. She did not herself live there. In December, 1900, she removed her furniture and effects from the house, leaving only certain fittings which she had agreed to hire from the previous occupier. She intended to return to the house in the summer. In May, 1901, she refurnished the house.

**HELD**—that she had the beneficial occupation during the whole period, and was liable for the general district rate.

GAGNE *v.* WREN, (1902) 87 L. T. 271; 18 T. L. R. [699; 67 J. P. 32—Div. Ct.]

17. *Shop closed during Winter Months—Occupation—Liability to Rate—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 2*—The respondent held under an agreement for a term of years from the appellants a shop on the pier at Southend-on-Sea at an annual rent. By the terms of the agreement no one was to sleep on the premises. The respondent used the shop during the summer season, but before the winter he removed all the stock, leaving certain shelves and mirrors in the shop, which was then locked up and left unoccupied during seven months.

**HELD**—that the respondent was liable to be rated for the time the shop was left shut up.

SOUTHEND-ON-SEA CORPORATION *v.* WHITE, [(1901) 65 J. P. 7; 83 L. T. 408; 17 T. L. R. 5—Div. Ct.]

*And see No. 92, infra.*

18. *Sporting Rights—Arable, Meadow, Pasture Grounds and Woodlands—Occupation for Shooting Purposes—Assessment—Rating Act, 1874 (37 & 38 Vict. c. 54), ss. 3, 6 (2)—Public*

*Health Act, 1875 (38 & 39 Vict. c. 55), ss. 211, 256.*—The respondent rented the shooting rights over certain land, being arable, meadow, or pasture ground and woodlands in the district of the appellants. A general district rate having been made, the respondent contended that he was liable for only one-fourth part of the full amount assessed on his sporting rights by virtue of the exception in sect. 211 of the Public Health Act, 1875.

**HELD**—that the respondent was not the occupier of land used as arable, meadow, or pasture ground or woodland, but was the occupier of a special incorporeal hereditament made rateable by the Rating Act, 1874, and was liable for the full amount of the rate.

ALTON URBAN DISTRICT COUNCIL *v.* SPICER, [[1904] 1 K. B. 678; 73 L. J. K. B. 280; 52 W. R. 624; 68 J. P. 256; 90 L. T. 576, 20 T. L. R. 296; 2 L. G. R. 507—Div. Ct.]

**(d) Retrospective Rate.**

19. *Estimate including Charges incurred more than Six Months before Rate—Right of Appeal—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 210, 218, 269.*—By sect. 210 of the Public Health Act, 1875, a general district rate, which when collected forms part of the general district fund, is to be levied in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate; in calculating the period of six months during which the rate may be made retrospectively, the time during which any appeal or other proceeding relating to such rate is pending is to be excluded.

By sect. 269 a general right of appeal is given.

By sect. 218 every urban authority, before proceeding to make a general district rate, shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, and the estimate so made is forthwith to be entered on the rate-book, and be kept at their office, open to public inspection, "but it shall not be deemed part of the rate, nor in any respect affect the validity of the same."

**HELD**—that there is an express statutory prohibition against allowing the inclusion of retrospective payments beyond the period of six months; that the effect of the words the estimate "shall not be deemed part of the rate, nor in any respect affect the validity of the same" is not that a person has no right of appeal in respect of an allegation that the rate includes the payment of a charge more than six months old.

SMITH *v.* SOUTHAMPTON CORPORATION, [1902] [2 K. B. 244; 71 L. J. K. B. 639; 50 W. R. 651; 87 L. T. 171; 67 J. P. 5—Div. Ct.]

20. *Special Expenses—Judgment Debt—Rate for—Mandamus—Delay—Discretion of Court—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 230.*—An urban district council entered into

**General District Rate—Continued.**

a contract for the supply of water to a rural district council. In May, 1895, the urban district council claimed the payment of £93 for water supplied. The rural district council claimed a larger sum from the urban district council for damages for a breach of the contract. After long correspondence the urban district council brought an action in March, 1897, to enforce their claim. The rural district council counter-claimed, but in May, 1897, consented to judgment for the plaintiffs for £63. In October, 1897, the urban district council obtained a rule *nisi* for a *mandamus* to the rural district council to take the necessary steps for levying a rate to pay the amount of the judgment debt, and this rule was afterwards made absolute.

HELD—that there was nothing in the Public Health Act, 1875, to prohibit the making of a rate under sect. 230 to satisfy the judgment debt, and that the Court had therefore power to grant the *mandamus*.

HELD, also, that the delay of the urban district council in bringing their action had been justified by the circumstances of the case, and that the *mandamus* had been rightly granted.

REG. v. LEIGH RURAL DISTRICT COUNCIL, [1898] 1 Q. B. 836; 62 J. P. 355; 67 L. J. Q. B. 562; 78 L. T. 604; 14 T. L. R. 325; 46 W. R. 471—C. A.

**21. Rate for Special Expenses—Mandamus—Discretion—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 229, 230.]**—By an agreement made in 1900 between the plaintiffs and the defendants under sect. 28 of the Public Health Act, 1875, certain sewers in the defendants' district were to be connected with the plaintiffs' sewage system, and the defendants agreed to pay to the plaintiffs a certain sum in the pound on the rateable value of all property within the part of the parish affected which should be liable to contribute to the rates for special expenses under the Sanitary Acts, such sum to be payable quarterly. For some years, by a common mistake, the defendants only paid a sum calculated on the rateable value of the houses actually connected with the plaintiffs' sewage system, and in 1906 the plaintiffs, on discovering the mistake, brought an action to recover the arrears due under the agreement, and for a *mandamus* to the defendants to cause a rate to be levied to satisfy the arrears.

HELD—that, though the plaintiffs were entitled to judgment for the amount of the arrears, yet, even if the debt could be said to accrue at the date of the judgment, the Court would not, in its discretion, order the levy of a rate, the effect of which would be to throw upon the rates of one year an expense with which that year had no connection.

CROYDON CORPORATION v. CROYDON RURAL [DISTRICT COUNCIL, [1908] 1 Ch. 222, 77 L. J. Ch. 138, 72 J. P. 13; 24 T. L. R. 91—Neville, J.

**IV. METROPOLITAN RATING.**

**22. Company to pay all Consolidated, Sewer and other Rates on Lands and Buildings during Construction of Railway—Buildings pulled down before Company acquired Land—Liability of Company to pay Rates on Houses—Great Northern and City Railway Act, 1892.]**—A railway company acquired certain land by virtue of sect. 69 of the Great Northern and City Railway Act, 1892, which enacted: "The company shall, in respect of all lands and buildings acquired by them under the powers of this Act, be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant, and shall continue liable to and pay all such consolidated sewer and other rates and contributions until the undertaking shall be completed, and assessed or liable to be assessed to the before-mentioned rates and contributions, or until such of the said lands and buildings as may not be required for the purpose of the undertaking shall have been otherwise duly assessed or liable to be assessed and become liable to the before-mentioned rates and contributions." Buildings formerly existed on such land, but had been pulled down before the railway company acquired any interest in the land.

HELD—that the railway company were not liable to be rated in respect of such buildings under sect. 69; and that such objection could not be entertained by the justices on application for a distress warrant as it went to the jurisdiction to rate, and was not merely a matter of appeal.

ST. STEPHEN (CHURCHWARDENS AND OVERSEERS OF) v. GREAT NORTHERN AND CITY RY. CO., (1902) 66 J. P. 373; 50 W. R. 395; 86 L. T. 390; 18 T. L. R. 350—Div. Ct.

**23. Consolidated Rate—Statutory Exemption—New Rate—52 Geo. 3, c. 49—2 & 3 Will. 4, c. 66—City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.).]**—By 52 Geo. 3, c. 49, s. 3, it was provided that two sums of £220 12s. 10½d. "shall yearly and every year for ever hereafter be paid out of consolidated customs to the respective collectors for the time being of the rates and assessments" in respect of premises forming the old custom house and legal quays. Sect. 4 provided that, whereas the premises were public property and exempt from the payment of all rates and assessments, that the said premises "shall be and be deemed and considered to be to all intents and purposes free and exempt from the payment of all and all manner of rates and assessments, although the same and each and every of the said premises may become private property by the sale or assignment thereof to individuals. . . ." By 2 & 3 Will. 4, c. 66, s. 2, it was provided that after the premises ceased to be public property

**Metropolitan Rating—Continued**

so much of the Act of 52 Geo. 3, c. 49, as directed the payment of the said two sums of £220 12s. 10½d out of the consolidated customs should be repealed. Sect. 3 provided that it should be lawful for the collectors of the said sums for the time being to collect and receive the same and no more from the occupiers of the premises for the time being. The premises having been sold by the Crown.

HELD—that (1) the exemption provisions applied to future as well as to existing rates; (2) that the exemption was not taken away as regards the consolidated rate by the wording of the City of London Sewers Act, 1848, and that, therefore, (3) the occupiers of the premises for the time being were only liable to pay the two sums of £220 12s. 10½d., and were not liable to be assessed to the consolidated rate and sewer rate imposed by the City of London Sewers Act, 1848.

*Swon College v. City of London* ([1901] 1 K. B. 617; 70 L. J. K. B. 369, 65 J. P. 324; 49 W. R. 361; 84 L. T. 133—C. A. See METROPOLIS, No. 113) distinguished.

Decision of C. A. (68 J. P. 377; 2 L. G. R. 840) affirmed.

LONDON CORPORATION *v.* NETHERLANDS [STEAMBOAT CO., [1906] A. C. 263; 75 L. J. K. B. 771; 69 J. P. 443; 93 L. T. 566; 3 L. G. R. 1087—H. L. (E.).

**24. Decision of Assessment Committee—Appeal—Appearance of Assessment Committee—Consent of Guardians—Costs—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 2—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 39, 48.]**—On an application by a ratepayer to quarter sessions for leave to appeal against a decision of a London assessment committee against a valuation under the Valuation (Metropolis) Act, 1869, the assessment committee, with the consent of the Westminster City Council, appeared and opposed the application. The application was granted; and, no further consent having been given by the council, the assessment committee at the hearing of the appeal were represented by counsel, but took no part on the hearing of the appeal, except to oppose an application which, when the appeal had been allowed, the appellant made for an order that the assessment committee should be ordered to pay his costs. Quarter sessions made the order asked for.

HELD—that the quarter sessions had no jurisdiction to make this order as to costs in the absence of proof that the council had given their consent to the assessment committee appearing as respondents to the appeal, as prescribed by sect. 2 of the Union Assessment Committee Amendment Act, 1864.

REX *v.* LONDON JJ., EX PARTE ST. GEORGE'S, [&C., ASSESSMENT COMMITTEE, (1907) 71 J. P. 322, 97 L. T. 247, 5 L. G. R. 704—Div. Ct.

**25. Deficiency in Rates—Lands taken for Board School—Making good Deficiency during Construction—Amalgamation of General Rate and Poor Rate into one Rate—Lands Clauses Consolidation Act, 1815 (8 & 9 Vict. c. 18), s. 133—London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10, sub-s. 2.]**—By sect. 133 of the Lands Clauses Consolidation Act, 1815, the promoters of an undertaking when lands are taken shall be liable to make good the deficiency in the poor rate until the works shall be completed. By sect. 10, sub-sect. 2, of the London Government Act, 1899, the general rate and the poor rate are to be assessed, made, and levied as one rate, called the general rate, which shall be assessed, made, collected, and levied as if it were a poor rate, and all enactments applying or referring to the poor rate shall be construed as applying or referring also to the general rate.

HELD—that the promoters of an undertaking are only bound to make good the deficiency in that part of the general rate which represents the poor rate, or was chargeable to the poor rate, and not the whole deficiency in the general rate.

Decision of Wright, J. ([1902] 2 K. B. 701, 71 L. J. K. B. 852; 51 W. R. 255; 87 L. T. 177; 18 T. L. R. 657) affirmed.

ISLINGTON CORPORATION *v.* LONDON SCHOOL [BOARD, (1903) 72 L. J. K. B. 677; 89 L. T. 53; 19 T. L. R. 589; 68 J. P. 35; 62 W. R. 115—C. A.

**26. Maximum Rate of Deductions—Houses or Buildings Let Out in Separate Tenements—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), Sched. III.]**—The expression “houses or buildings let out in separate tenements” in the third schedule to the Valuation (Metropolis) Act, 1869, includes houses or buildings let out in separate rateable hereditaments, and in their case excludes the application of the maximum rate of deductions, fixed by that schedule, for calculating rateable value from gross value.

WESTERN *v.* KENSINGTON ASSESSMENT COMMITTEE, [1907] 2 K. B. 323; 76 L. J. K. B. 790, 71 J. P. 306; 97 L. T. 215; 5 L. G. R. 666—Div. Ct.

**27. Poor Rate—Assessment—Increase of Rental—Revision of Valuation List—Arrangement between Assessment Committee and Appellant's Predecessor—Metropolis Valuation Act, 1869 (32 & 33 Vict. c. 67), ss. 46, 47.]**—A substantial increase of the rent of premises may, apart from any increase in their value, warrant their inclusion in a supplemental valuation list. The Court may take into consideration an arrangement made between the appellant's predecessor and the committee for a reduction which should only be temporary.

KLABER *v.* CITY OF WESTMINSTER ASSESSMENT [COMMITTEE, (1904) 68 J. P. 136—Qr. Sess.

**28. Rector's Rate—“House”—“Inhabitant” “Occupier”—House Occupied otherwise than as Dwelling-house—Parish of St. Paul, Covent Garden, Acts, 1660 (12 Car. 2, c. 37), and 1811 (51**

**Metropolitan Rating—Continued.**

Geo 3, c. cl.]—By the Parish of St. Paul, Covent Garden, Act, 1811, after reciting an Act of 1660, whereby a yearly sum of £250 was charged upon the "houses of the inhabitants" of the parish of St Paul, Covent Garden, for the support and benefit of the rector, curate, clerk and sexton for the time being of that parish, that charge of £250 was repealed, and in lieu thereof a yearly sum of £520 was charged upon all "houses" within the said parish, to be assessed by the churchwardens and paid by the occupiers of such houses respectively.

**HELD**—that buildings used as places of business, in which no one sleeps, and which were originally occupied as dwelling-houses and have been converted into business premises, and which are capable, with slight internal alterations, of being fitted for use as dwelling-houses, are "houses" within the meaning of the Act, and that the occupiers are assessable to the rate in respect thereof

*Surman v. Darley* ((1845) 14 M. & W. 181) considered and distinguished

Decision of C. A. ([1905] 1 K. B. 669; 74 L. J. K. B. 406, 69 J. P. 128; 53 W. R. 406, 92 L. T. 486; 21 T. L. R. 287; 3 L. G. R. 449) reversed.

*LEWIN v. END*, [1906] A. C. 299; 75 L. J. K. B. [473; 70 J. P. 268; 54 W. R. 606, 94 L. T. 649; 22 T. L. R. 504; 4 L. G. R. 618—H. L. (E).

**29. Valuation List—Appeal—Name ordered to be Struck Out**—"Alteration" in Assessment—*Recovery of Rates paid—Valuation (Metropolis) Act, 1869* (32 & 33 Vict. c. 67), s. 44.]—In the supplemental valuation list made for a parish in the metropolis the plaintiff was rated as the occupier of an advertising station. He appealed to quarter sessions on the ground that he was not the rateable occupier, and the quarter sessions held, subject to a case for the opinion of the High Court, that he was the occupier. The High Court held that he was not the occupier, and the quarter sessions accordingly ordered the plaintiff's name to be struck out of the valuation list. While these proceedings on appeal were pending, the plaintiff was required to pay, and had paid several rates, two of which had been recovered after summonses to enforce the same had been taken out.

**HELD**—that the plaintiff was entitled, under sect. 44 of the Valuation (Metropolis) Act, 1869, to recover the whole of the rates so paid by him, as in consequence of the appeal there had been an "alteration," which altered the amount of the assessment within the meaning of that section.

*BURTON v. BLOOMSBURY VESTRY*, [1901] 1 Q. B. 650; 70 L. J. Q. B. 127; 65 J. P. 167; 49 W. R. 334, 83 L. T. 30; 17 T. L. R. 163—Mathew, J.

**30. Valuation List—Distress Warrant—Appeal—No Notice of Alteration in Value—Class of Objections entertained on Application for Distress**

*Warrant—Valuation (Metropolis) Act, 1869* (32 & 33 Vict. c. 67), ss. 9, 45.]—The appellants in 1901 made a general rate and published it as overseers of a parish under and by virtue of the London Government Act, 1899. In this rate the respondents were assessed in respect of their premises upon the rateable value as stated in the quinquennial valuation list for the parish made in 1900 under the Valuation (Metropolis) Act, 1869. The respondents refused to pay the amount demanded as no notice of an alteration in value in accordance with sect. 9 of the Valuation (Metropolis) Act, 1869, had been served on them. Application was made to a magistrate for the issue of a distress warrant.

**HELD**—that the objection taken was not one of the class that the magistrate ought to entertain when application is made to him for a distress warrant, as it was one which went to the validity of the right to assess or rate at a sum of money all the persons named in the assessment and ought to be raised on appeal, and if not raised by appeal it could not be raised on the application for the distress warrant.

*WESTMINSTER CORPORATION v. ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY, LD.*, [1902] 2 K. B. 125, 71 L. J. K. B. 546; 66 J. P. 727; 50 W. R. 631, 87 L. T. 78—Div. Ct.

**31. Valuation List—Premises exempt from Poor Rate—Insertion of Gross and Rateable Value in List—Rateable Value omitted—Mandamus—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 11, 13, 32, 51; *Sched. II., Par. 1.*]—By an Act, 7 Geo 3, c. 37, certain hereditaments in the city of London were exempt from payment of poor rate, though not, as has been held, exempt from payment of the consolidated rate. The overseers of the poor of the parish in which such hereditaments were situated inserted in the valuation list a figure for the gross value of such hereditaments, but instead of inserting a figure for the rateable value they entered such hereditaments as "exempt," and the valuation list was approved by the assessment committee in that form. The corporation of the city, who were a rating authority, applied for a *mandamus* ordering the assessment committee to insert the rateable value of the hereditaments in the valuation list.**

**HELD**—that a writ ought not to be granted because the corporation had a right of appeal against the valuation list under sect. 32 of the Valuation (Metropolis) Act, 1869; and, even if the corporation had not that right of appeal, the remedies by way of appeal given by the statute to those persons primarily interested were sufficient to safeguard the interests of all persons concerned, and therefore, there was a sufficient remedy independently of proceedings for *mandamus*.

*REX v. CITY OF LONDON ASSESSMENT COMMITTEE*, [1907] 2 K. B. 764; 76 L. J. K. B. 1087; 71 J. P. 377; 97 L. T. 346, 23 T. L. R. 502, 5 L. G. R. 819—C. A.

## V. POOR RATES.

## (a) In General.

**32. Form of Rate—Statement of Period for which Estimated—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 14.**—A poor rate stated in the heading that it was estimated to meet all expenses to be incurred "before March 25th next." It did not mention the date at which the expenses began.

**HELD**—that it sufficiently stated "the period for which the same is estimated" as required by sect. 14 of 32 & 33 Vict. c. 41.

**CHENEY v. TALLOWIN**, [1904] 2 K. B. 763; 73 [L. J. K. B. 943; 68 J. P. 528; 91 L. T. 552—Div. Ct.

**33. Objection to Valuation List**—"*Person Aggrieved*"—*Wrong Person's Name in Rate Book*—*Person Bound to Reimburse Him*—*Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18*—The words "any person who may feel himself aggrieved by any valuation list" in sect. 18 of the Union Assessment Committee Act, 1862 (which gives a right to object before the assessment committee), are not confined to a person actually entered in the rate book as a ratepayer, but include a person who, by virtue of an agreement, is under an obligation to refund to the person actually rated any rates which he may in consequence be called upon to pay.

**R. v. BRENTFORD UNION ASSESSMENT COMMITTEE**, (1907) 71 J. P. 281; 96 L. T. 704; 5 L. G. R. 1188—Div. Ct.

**34. Precept for Rates—Enforcement—Legality of Charges—Jurisdiction of Justices.**—Justices to whom application is made to enforce a precept for rates have no jurisdiction to question the legality of the charges for which the precept is issued.

**READ v. PUNTER**, (1898) 14 T. L. R. 455—Div. Ct.

## (b) Appeal.

## And see MAGISTRATES

**35. Appeal from Special Sessions—Power of Quarter Sessions to deal with Costs incurred at Special Sessions—Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 6.**—Where quarter sessions allow an appeal against a decision of special sessions, they have power under sect. 6 of the Parochial Assessments Act, 1836, not only to deal with the costs of the appeal to them, but also to vary the order made as to the costs "below" by special sessions.

**R. v. CORNWALL JJ.**, [1903] 2 K. B. 178, 72 [L. J. K. B. 622; 67 J. P. 290; 52 W. R. 31; 88 L. T. 775; 19 T. L. R. 501, 1 L. G. R. 605—Div. Ct.

**36. Appeal to "next" General or Quarter Sessions—Next Practicable Sessions—Notice of Objection to Assessment Committee given "at any Time"—Assessment Reduced—Repayment of Excess—Currency of Rate—Poor Relief Act, 1743 17 Geo. 2, c. 38), s. 4—Union Assessment Com-**

**mittee Act, 1862 (25 & 26 Vict. c. 103), ss. 18, 24—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1—Poor Rate Act, 1801 (41 Geo. 3, c. 23), s. 8.**—A poor rate was made upon April 21st, for expenses up to March 31st in the following year, payable by two instalments—in May and November. Appellants gave notice to the assessment committee of their objections to assessments of their hereditaments in the valuation list. Their notice was given in October, after two meetings of the assessment committee, in May and August, and one court of quarter sessions in June had been held, and after the first instalment of the rate was due from them, and had been paid. Their objection was heard at the third meeting of the assessment committee, after the making of the rate, in November, and failing to get relief, they appealed to the next quarter sessions after November, on January 2nd of the following year, notice of appeal having been given on December 5th. On the appeal the committee objected that the jurisdiction of the court of quarter sessions was ousted, as the company had not appealed to the next quarter sessions as required by sect. 4 of the Poor Relief Act, 1743. The recorder overruled the objection, heard the appeal on the merits, and reduced the assessments; but, as the company had not taken steps as they might have done to appeal against the rate at an earlier date, refused to order that the excess paid by the company in respect of the first instalment should be refunded to them.

**HELD**—(1) that as the objection was heard and determined, and the appeal brought within the period of the current rate, although the company might have lodged their objection at one or two earlier meetings of the assessment committee, yet as it had not been proved that they had been guilty of unreasonable delay the jurisdiction of quarter sessions was not ousted, and (2) that by sect. 8 of the Poor Rate Act, 1801 (41 Geo. 3, c. 23), the recorder was bound to order repayment of the excess paid in respect of the first instalment of the rate.

**R. v. Yorkshire JJ.** ((1858) E. B. & E. 713—Q.B.) followed.

Decision of Div. Ct. ([1905] 1 K. B. 89, 74 L. J. K. B. 57; 69 J. P. 9; 53 W. R. 319; 91 L. T. 691, 21 T. L. R. 67) affirmed

**IMPERIAL AND GRAND HOTELS CO., LD. v. CHRIST CHURCH UNION**, [1905] 2 K. B. 239; 74 L. J. K. B. 768; 69 J. P. 303, 53 W. R. 627; 92 L. T. 847; 21 T. L. R. 545; 3 L. G. R. 895—O. A.

**37. Appearance by Assessment Committee as Respondents—Consent of Guardians—Notice of Meeting of Guardians—Union Assessment Committee (Amendment) Act, 1864 (27 & 28 Vict. c. 29), s. 2—Divided Parishes and Poor Law (Amendment) Act, 1882 (45 & 46 Vict. c. 58), s. 12.**—The notice to be given to every guardian before consent can be given to the appearance of the assessment committee of the union as respondents to a rating appeal, by virtue of sect. 2 of the Union Assessment Committee (Amendment) Act, 1864, need not be the fourteen



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days' notice provided for by sect. 12 of the Divided Parishes and Poor Law (Amendment) Act, 1882. Such fourteen days' notice is only required in cases where under statutory enactments the consent in writing of a majority of the guardians of a union is required.

Decision of Div. Ct. (68 J. P. 82; 89 L. T. 607) affirmed.

SMITH v. LEIGH UNION ASSESSMENT COM-  
[MITTEE, [1904] 1 K. B. 484; 73 L. J. K. B.  
185; 68 J. P. 210; 52 W. R. 340; 89 L. T.  
607; 90 L. T. 240; 20 T. L. R. 215; 2 L. G. R.  
288—C. A.

**38. Failure to obtain Relief from Assessment Committee—Condition Precedent to Right of Appeal—Lapse of Twelve Months since failure to obtain Relief—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1.]**—Under sect. 1 of the Union Assessment Committee Amendment Act, 1864, if a person has been before the assessment committee, and has failed to obtain the relief to which he thinks he is entitled in respect of the matter which he is making the subject of an appeal, he need not go before the committee again; but, unless that be the real state of things, it is a condition precedent to his right to appeal that he should have gone to the assessment committee and failed to obtain from them the relief he seeks.

*Reg. v. Great Western Ry. Co.* ((1869) L. R. 4 Q. B. 323, 38 L. J. M. C. 89; 17 W. R. 670; 20 L. T. (N.S.) 481) followed.

*Reg. v. Denbighshire JJ.* ((1885) 15 Q. B. D. 451; 54 L. J. M. C. 142; 33 W. R. 784; 53 L. T. 388—Div. Ct.) distinguished.

Proceedings before the assessment committee in respect of a rate made in May, 1900, were all over. There was a rate made in October which possibly might have been appealed against, and that rate was paid. In May, 1901, another rate was made, and the appellants were minded to raise the question of their assessment again, but they had not given a second notice to the assessment committee that they objected to the valuation.

**HELD**—that the rate of May, 1901, was not the same rate in respect of which the appellants had been before the assessment committee, as a period of twelve months had elapsed, and poor rates are made from year to year; that they had a right to appeal again if they thought fit; but they must comply with the provisions of sect. 1 of the Union Assessment Committee Amendment Act, 1864, as to notice.

REX v. ESSEX JJ., [1902] 1 K. B. 180;  
[71 L. J. K. B. 148; 66 J. P. 261; 50 W. R.  
188; 85 L. T. 678—Div. Ct.]

**39. Gross estimated Rental—Net Rateable Value—Evidence by Rating Authority to increase gross value in rate-book—Admissibility of—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.]**—Where, upon an appeal to quarter sessions against a poor rate, the ratepayer accepts the gross estimated rental in the rate-book as correct,

but contends that the net rateable value is too high by reason of insufficient deductions having been allowed, the rating authority are not entitled, for the purpose of showing that the rateable value is not too high, to adduce evidence that in fact both the gross and net values are understated in the rate-book, as in such a case they are concluded by the amount of the gross estimated rental as so appearing, and cannot give any evidence the effect of which would be to show that the gross estimated rental is too low.

HORTON & SON, LD. v. WALSALL UNION, [1898]  
[2 Q. B. 237; 62 J. P. 437; 67 L. J. Q. B. 804;  
78 L. T. 684, 14 T. L. R. 391; 46 W. R. 607  
—Div. Ct.]

**40. Notice of Appeal to Parish Council—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (c) (i).]**—In case of an appeal against a rate or assessment made for the relief of the poor, the parish council should be served with notice. Where proper notice has not been served on the parish council, the sessions have no jurisdiction either to hear or to enter and respite such an appeal.

REG. v. KENT JJ., EX PARTE LONDON, CHATHAM  
[AND DOVER RY. CO., (1899) 80 L. T. 622—  
Div. Ct.]

**41. Notice of Appeal to Parish Council—Condition Precedent—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 6—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6.]**—In the case of an appeal to special sessions against a poor rate the notice of appeal, which had formerly to be given to the overseers, must now in a rural parish be given to the parish council (if any); and is a condition precedent to the right to be heard on appeal; and (*semble*) the justices have no power to adjourn, in order to allow notice to be given.

REX v. TEWKESBURY JJ., [1903] 1 K. B. 39; 72  
[L. J. K. B. 41; 67 J. P. 54; 51 W. R. 285;  
87 L. T. 583, 1 L. G. R. 66—Div. Ct.]

**42. Service of Notice—Town Council—Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 4—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33.]**—The service of notice on the town council of a municipal borough is not a condition precedent to the hearing by the quarter sessions of appeals from a poor rate.

*Reg. v. Kent JJ.* ((1899) 80 L. T. 622—  
Div. Ct.) not followed.

REG. v. DE GREY, [1900] 1 Q. B. 521; 69 L. J.  
[Q. B. 341; 64 J. P. 375; 48 W. R. 348; 82  
L. T. 324; 16 T. L. R. 182—Div. Ct.]

**(c) Assessment.**

**43. Board School Buildings—Mode of Assessment—Rent that a Tenant would give.]**—A London School Board school was inserted in the supplemental valuation list for the parish at a gross value of £1,074, and a rateable value of £895. The gross value was arrived at by adding

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4 per cent. of the sum given by the Board as the value of the land on which the school was built, to 5 per cent. of the sum given by the Board as the capital value of the buildings. In the case stated by the justices of London sitting in quarter sessions, it was stated that if the buildings were vacant a tenant or tenants could be found to give on an annual letting a rent sufficient to support the assessment. The case further found that the board had borrowed the money for building the school and purchasing the land on which it stood from the county council at the rate of £2 13s. per cent. The quarter sessions upheld the assessment.

**HELD**—that the case was unarguable as the appellants had been stated out of Court because it was found in the case that if the schools were vacant a tenant could be found to give a rent sufficient to support the assessment.

**SCHOOL BOARD FOR LONDON v. ASSESSMENT [COMMITTEE OF WANDSWORTH AND CLAPHAM UNIONS, (1900) 16 T. L. R. 137—Div. Ct**

**44 Breakwater and Landing Stage—Principle of Valuation.**—The proper principle of valuing for assessment to the poor rate of a breakwater and landing stage constructed by commissioners under statutory authority, and of value for the protection of shipping in a harbour from which the commissioners received certain dues, is by taking a percentage on the value of the breakwater, &c., as a structure, and not by taking into account the dues.

**CATTEWATER HARBOUR COMMISSIONERS v. [ASSESSMENT COMMITTEE OF PLYMPTON ST. MARY UNION, (1899) 63 J. P. 297—Devon Qr. Sess**

**45. Coal Mines—Evidence—Profits or Annual Value—Gross and Rateable.**—At the hearing of an appeal against a rate on a colliery, the colliery company put forward evidence that the best and only fair method of arriving at the net annual value was that of ascertaining the receipts in the year, and then deducting therefrom the proper deductions, in fact, rating it like a railway. If this was admissible, it worked out substantially correct. It was contended that this evidence was not admissible, but that it should be rated on the annual rent obtainable.

**HELD**—that the evidence was admissible.

**HELD**, further, that where in a rate the gross and rateable value are entered at the same figure, the gross is to be treated as an ascertained figure, and such deductions as can be properly made may be made therefrom.

**DENABY AND CADEBY COLLIERY CO v. DONCASTER UNION, (1898) 62 J. P. 343; 78 L. T. 388; 14 T. L. R. 347—Div. Ct.**

**46. Coal Mine—Permanent Roads and Airways—Expenses of Keeping in Repair.**—“Repairs”—*Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1*—The annual expenses of keeping in repair the permanent main roads,

airways, working places and temporary roads in a coal mine, when such expenses are necessary for the working of the mine and maintaining it in a state to command the rent, are “repairs” within the meaning of sct. 1 of the *Parochial Assessment Act, 1836*, and are not working expenses of the mine, and must be deducted under that section in arriving at the rateable value, and consequently where the mine extends underground into a parish, and the parts of the mine within that parish consist of these permanent main roads, airways, &c., the shafts or pits being outside that parish, the rating authority, in rating the part of the mines within that parish, must deduct from the gross estimated rental the cost of these repairs before arriving at the rateable value.

**JOHN BROWN & Co., LD. v. ASSESSMENT [COMMITTEE OF ROTHERHAM UNION, (1900) 64 J. P. 580; 83 L. T. 193—Div. Ct.**

**47. Deduction of Rent-charge imposed for Sea Defence Purposes—Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.**—In accordance with the requirements of a private Act, the owners of a portion of the lands situate in a certain level, who at the date of the passing of the Act were liable to maintain and repair a sea-wall for the protection of their lands from the inroads of the sea, commuted their liability in consideration of an annual rent-charge charged on the lands to which the liability attached and payable to the Commissioners of Sewers. The sea-wall also protected other lands in the level which were subject to no such liability or rent-charge. The tenant of a farm which formed part of the lands subject to the rent-charge claimed that, in arriving at the rateable value of the farm, an apportioned part of the rent-charge, having regard to the extent and annual value of the other lands subject thereto, ought to be deducted as an expense necessary to maintain the farm in a state to command the rent thereof.

**HELD** (Vaughan Williams, L.J. dissenting)—that such apportioned part of the rent-charge ought not to be so deducted.

*Quære*—whether some deduction, less than the entire apportionment, might be allowed.

*R v. Tange* ((1842) 3 Q. B. 242) followed.

Decision of Div. Ct. ([1906] 2 K. B. 147; 75 L. J. K. B. 586; 70 J. P. 337; 95 L. T. 114; 4 L. G. R. 773) affirmed.

**NEWPORT UNION v. STEAD; NEWPORT UNION [v. GREEN, [1907] 2 K. B. 460, 76 L. J. K. B. 753; 71 J. P. 263, 97 L. T. 413; 5 L. G. R. 892—C. A.**

**48. Dock Company—Warehouses in different Union—Docks in different Parishes in same Union—Machinery—Cranes—Deductions.**—The London and India Docks, the appellants, had certain warehouses situate outside the respondent union in connection with and for the purposes of their undertaking. These warehouses were separately assessed in the union in which they were situate.

**HELD**—that the net receipts from such ware-

**Poor Rates—Continued.**

houses should be deducted from the net receipts derived by the appellants from their whole undertaking inclusive of such warehouses in order to ascertain the rateable value of the premises of the appellants situate in the respondent union.

The appellants also used cranes worked by hydraulic power communicated to them by means of mains laid under the surface of the quays in and through the appellants' lands. The cranes could be made to travel along the rails upon which they rested either by means of hand gearing attached to them or hydraulic capstans and levers. When in use, such cranes were firmly and securely attached, by means of a flexible tube capable of resisting a pressure of 700 lbs to the square inch, to the hydraulic main by the side of the rails. The cranes could be moved from one quay to another, but in order to do so new lines of railway would have to be laid down, or they could be transported by floating derricks.

HELD—that the cranes were to be included as enhancing the rateable value, and should be treated as landlord's fixtures.

The system of the appellants' docks was situated in different parishes in the same union.

HELD—that the rateable value ought to be ascertained on the parochial principle laid down in *Sculcoates Union v. Hull Dock Co* ([1895] A. C. 136; 64 L. J. M. C. 49, 59 J. P. 612; 43 W. R. 623; 71 L. T. 642, 11 R. 74—H. L. (E)).

The appellants were an amalgamation, under an Act of Parliament, of two dock companies.

HELD—that the expenses of the one company, such as superannuation allowances made payable owing to the amalgamation, ought not to be deducted from the receipts in order to arrive at the net revenue of the undertaking.

LONDON AND INDIA DOCKS *v* POPLAR UNION,  
[1901] 64 J. P. 820, 83 L. T. 371—Div Ct.

**49. Docks—Occupation by Harbour Trustees—Harbour Dues—Whether connected with Occupation of Land—Swansea Harbour Acts, 1854** (17 & 18 Vict. c. cxxvi), ss. 58, 60, 125, 126, 127; 1874 (37 & 38 Vict. c. civ), and 1896 (59 & 60 Vict. c. cxli), ss. 4, 17.]—Before 1791 the river Tawe came down to Swansea Bay by a channel which included the water area of the present North Dock Basin, the Town Float or North Dock, and the Half Tide Basin. In 1791 the predecessors of the respondents (the Swansea Harbour Trustees) were empowered to deepen the bar by cutting a channel through it, to make stop-gates across the river Tawe, and to convert it into a floating harbour. In 1836 further powers were given to make a navigable cut, to construct locks and weirs near the mouth of the cut, and to make other ancillary works. By the Swansea Harbour Act, 1854, the respondent body was incorporated. By that Act certain powers of charging harbour dues and tonnage rates on vessels and rates on goods were

conferred, and it was recited therein that the predecessors of the respondents had constructed piers at the entrance to the harbour, and had converted the bed of the river Tawe into a floating dock, called the Town Float, with two iron swing bridges over the same, and had made a navigable cut and deepened and improved the bed of the river, and made other works in the port or harbour and communicating therewith. Additional works were authorised by the Act. Before 1857 a company called the Swansea Dock Co. had, under statutory powers, constructed a dock known as the South Dock, and in 1857 that dock was transferred to the respondents, and is now their property. In 1874 power was obtained to construct another dock and to improve the entrance channel, and in 1896 the respondents were authorised to, and did subsequently, construct a new entrance to the Half Tide Basin at the south end of the Town Float, and they were authorised to levy certain additional rates upon vessels using the Town Float after the construction of the new entrance. The bed of the river was, subject to the provisions and operations of the various Acts, owned by the Duke of Beaufort. It was admitted by the respondents that they were in occupation of certain docks and entrances, but they contended that there was no rateable occupation of the water-covered area of the Town Float and the basins connected therewith.

It was held by the King's Bench Division, that apart from the question of legal ownership of the bed of the river, the respondents had a *de facto* occupation of the Town Float and the basins connected therewith during the whole of the rateable year, and were accordingly rateable in respect of such occupation. That decision was not appealed against.

HELD—that the respondents were not the owners of the soil of the harbour as a whole, but only of certain portions thereof, and that certain harbour dues mentioned in the case were not paid to them in respect of and directly connected with the rateable hereditaments in their occupation, and that where a toll or rate is taken without any distinction as to the occupation of the land used for the carriage of goods, the toll or rate must be treated as a toll or rate in gross wholly unconnected with the occupation of the land, and the occupation of the land by the person entitled to levy the toll or rate must be treated as a mere accident.

HELD, therefore, that as the harbour dues were in the nature of tolls in gross, although the occupation by the respondents of dock and wharves largely increased the number of ships entering the harbour, and therefore the harbour dues, yet such occupation of the rateable hereditaments not being necessary to the right to demand such dues, the harbour dues could not be taken into consideration in assessing the rateable value of the land occupied by the respondents.

Decision of C. A. (70 J. P. 305; 94 L. T. 627; 22 T. L. R. 433, 4 L. G. R. 882) affirmed.

SWANSEA UNION ASSESSMENT COMMITTEE *v*.  
[SWANSEA HARBOUR TRUSTEES, (1907) 71 J. P. 497; 5 L. G. R. 1240—H. L. (E)]

**Poor Rates—Continued.**

**50. Gravel Pit—Partially Exhausted—Mode of Assessment**—A company took from the owner of a tract of land with gravel in it some three acres, with the right to win the gravel therefrom, which they worked at the rate of two acres per annum. At the date of the rate two-and-a-half acres had been extracted, and the land was used for storage purposes only. The gravel in the remaining acre was in process of being extracted when the rate was made.

**HELD**—that what the special sessions had to ascertain was, what would be given for the land with the right to exhaust the gravel found there by an hypothetical tenant from year to year, and that the test was not what the value was in the preceding year, but what a tenant would give in the coming year.

*Rev v. Bedworth* ((1807) 8 East, 387, 9 R. R. 476) followed.

The rule laid down by Lord Esher, M.R. in *Hoyle v. Oldham Union* ([1894] 2 Q. B. 372, at p. 378; 63 L. J. M. C. 178; 58 J. P. 669; 70 L. T. 741) applied.

Judgment of Bucknill, J. ((1900) 64 J. P. 390; 48 W. R. 376; 82 L. T. 123; 16 T. L. R. 199—Div. Ct.) upheld.

**FARNHAM FLINT, GRAVEL, AND SAND CO. v. [FARNHAM UNION]**, [1901] 1 Q. B. 272; 70 L. J. Q. B. 130, 65 J. P. 102; 83 L. T. 660; 17 T. L. R. 150—C. A.

**51. Lairage—Tenant's Trade—Structural and Land Value—Particular Occupation—Restriction and Amplitude of Trade—Actual Receipts and Expenditure—Surrounding Circumstances—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.**—By sect. 1 of the Parochial Assessment Act, 1836, the overseers are to make the poor rate "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

**HELD**—that by sect. 1 (1) the overseers had to solve a simple question of fact; (2) the tenant's trade is excluded from valuation by the terms of the statute; (3) elaborate calculations of how much the building cost to erect, and when erected what would be the value of it, are unnecessary, (4) all the circumstances of the particular occupation, including the business that has been done on the premises, are to be looked at, and all the circumstances affecting either the restriction or the amplitude of the trade are all legitimate subjects of inquiry; (5) the only question of law is whether the particular tribunal has followed the line indicated.

The recorder of Birkenhead did not assess the rate upon the profits of the tenant, but used them together with other evidence to test the

values given by the appellants and respondents respectively. He took into consideration all the evidence as to the actual receipts and expenditure of the occupiers who carried on the business—the nature of the business and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances. He accepted those values as the nearest to the true gross values he could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration of the evidence before him.

**HELD**—that the recorder was not wrong as he had not included anything which he ought to have excluded, nor excluded anything which he ought to have included, and that it was immaterial what became of the amount which was the result of carrying on the business on the hereditaments after paying the expenses and outgoings, *e.g.*, whether it was applied for public uses, or the payment of debts or other charges, or whether it went into the pockets of the occupiers.

The decision of C. A. ([1900] 1 Q. B. 143; 69 L. J. Q. B. 260, 64 J. P. 36, 48 W. R. 259; 81 L. T. 798; 16 T. L. R. 78) affirmed.

**MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE**, [1901] A. C. 175; 70 L. J. K. B. 584; 65 J. P. 579; 49 W. R. 610; 84 L. T. 542; 17 T. L. R. 445—H. L. (E.).

**52. Licensed Premises—Covenant to sell Owner's Beer—Admissibility—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.**—In assessing the rateable value of a public-house, the fact that a brewer competing with other brewers would probably give a higher rent than would another tenant should be taken into consideration, but not the fact that the house is worth more to a brewer because he can make more profits in his business by subletting the house, subject to a covenant to sell no beer but his.

Per Channell, J.: The higher rent to be considered is the higher rent which the brewer would give as tenant from year to year simply, not as tenant from year to year intending himself to occupy the premises.

**WHITE v. BRADFORD-ON-AVON ASSESSMENT COMMITTEE**, [1898] 2 Q. B. 630; 62 J. P. 533; 67 L. J. Q. B. 643, 78 L. T. 758, 14 T. L. R. 447, 46 W. R. 603—Div. Ct.

**53. Licensed Premises—Evidence of Trade and Profits—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.**—When assessing licensed premises for the poor rate, the existence of the licence and the amount of business done thereon is proper matter of inquiry and consideration. Evidence of the actual profits made by the occupier is also admissible, but is to be avoided where possible.

*Dodds v. South Shields Union* ([1895] 2 Q. B. 133; 64 L. J. Q. B. 508, 59 J. P. 452, 43 W. R. 532—C. A.) commented on.

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Decision of C. A. ([1899] 1 Q. B. 667; 68 L. J. Q. B. 455; 15 T. L. R. 208) affirmed.

CARTWRIGHT *v.* SCULCOATES UNION, [1900] [A. C. 150, 69 L. J. Q. B. 403; 64 J. P. 229; 48 W. R. 394; 82 L. T. 157; 16 T. L. R. 238—H. L. (E.)

**54. Licensed Premises—Deduction of Expenses necessary to Maintain Premises in State to Command Rent—Compensation Charge—Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3.]—**The probable average annual amount of a charge imposed by quarter sessions in respect of an existing renewed on licence under the Licensing Act, 1904, as a contribution to the compensation fund, does not come within sect. 1 of the Parochial Assessments Act, 1836, as part of the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain the hereditaments in a state to command the rent at which they might reasonably be expected to let from year to year, and, therefore, is not to be deducted in estimating the rateable value of the licensed premises for the purposes of the poor rate.

WADDLE *v.* SUNDERLAND UNION ASSESSMENT COMMITTEE, [1906] 2 K. B. 899; 76 L. J. K. B. 16; 71 J. P. 1; 95 L. T. 784; 23 T. L. R. 7; 4 L. G. R. 1155—Div. Ct.

Affirmed [1908] 1 K. B. 642, 24 T. L. R. 259; 72 J. P. 99—C. A.

**55. Machinery placed on Premises but not attached thereto—Permanency of Machinery—Suitability of Premises for Machinery—Machinery enhancing Value of Premises.]—**In estimating the rateable value of premises used as a factory, machinery placed on the premises for the purpose of making the premises fit for the particular trade or manufacture carried on there, and intended to remain there permanently, and the suitability of the premises for the machinery, ought to be taken into account as enhancing the value of the premises, though such machinery is not attached to the premises; but the machinery must not be separately valued, and a percentage thereon added to the rateable value of the buildings.

CROCKETT AND JONES *v.* NORTHAMPTON [UNION ASSESSMENT COMMITTEE, (1902) 18 T. L. R. 451; 72 L. J. K. B. 320—Div. Ct.

**56 Machinery—Enhancement of Rateable Value of Premises.]—**The appellant was the tenant from year to year upon terms contained in an expired agreement of tenancy of some engineering works upon which there were a number of machines forming no part of the freehold, but making the premises fit as premises for the particular purpose for which they were used.

**HELD—**that the presence of the tenant's machinery on the premises, whether affixed to the freehold or not, might be taken into consideration as enhancing the rateable value of the premises.

*Tyne Boiler Works v. Longbenton* ((1886) 18 Q. B. D. 81; 56 L. J. M. C. 8; 51 J. P. 420; 35 W. R. 110, 55 L. T. 825—C. A.) followed and applied

Decision of C. A. (66 J. P. 345; 93 L. T. 383; 21 T. L. R. 618; 3 L. G. R. 884) affirmed.

KIRBY *v.* HUNSLET UNION, [1906] A. C. 43, 75 [L. J. K. B. 129; 70 J. P. 50; 94 L. T. 36; 22 T. L. R. 167; 4 L. G. R. 144—H. L.

**57. Railway—Directly or Indirectly Productive Part—Signal-box.]—**For the purposes of parochial rating a signal-box, which forms part of a railway, is not to be treated as part of the running line, the directly productive portion of the railway which is assessed upon its net earnings, but it is to be treated as part of the indirectly productive portion, and to be, therefore, separately assessed upon its structural cost.

MIDLAND RAILWAY *v.* PONTEFRAC T. ASSESSMENT COMMITTEE, [1901] 2 K. B. 189, 70 L. J. K. B. 691; 65 J. P. 455; 84 L. T. 536; 17 T. L. R. 439—Div. Ct.

**58. Railway—Duplicated Lines—Whether Directly Productive or Indirectly Productive.]—**

A number of lines of rails were used for the purpose of traffic between collieries and the sea. The output of the collieries was regular, but the loading of coal into ships was irregular, and the purpose for which the lines in question were used was the relief of the main running lines by providing lines on which coal waggons going down to, or coming back from, the sea could pass one another so as to proceed in the order in which they were required, and lines on which coal waggons could, if necessary, wait until a ship was ready to receive them. Eighty-five per cent. of the railway company's total gross receipts in the parish was earned by waggons which traversed one or more of the lines in question.

The arbitrator found as a fact that the lines in question were directly productive of profit, and held that they must be assessed with reference to the profits made thereon within the parish, subject to a deduction for the part of the system (wherever situated) which was only indirectly productive of profit.

**HELD—**that the question as to what was the primary use of the lines was one of fact for the arbitrator, and that his decision upon the facts as found by him was right.

Decision of Bigham, J. (70 J. P. 534; 95 L. T. 455; 4 L. G. R. 932) affirmed.

IN RE TAFF VALE RY. CO. *v.* CARDIFF UNION [ASSESSMENT COMMITTEE, (1907) 71 J. P. 529—C. A.

**59 Railway—Lines at Station—Station Appurtenances—Running Lines or Sidings.]—**In addition to the four main lines passing through a railway station, certain other lines were made at the station and used, some for the purposes of through traffic when the main lines were occupied, or likely to be occupied, and others for the purposes of carrying goods into the railway company's warehouse and into a

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private coal yard adjoining the station, and for the making up and departure of local passenger trains. These lines were also used for the standing of empty trains without engines.

Upon a case stated by a court of quarter sessions for the opinion of the High Court, the question being whether these lines were to be rated as running lines or sidings:—

**HELD**—that the primary and principal purpose for which the lines in question were made and used was the carrying of passenger and goods traffic, and that they were running lines and should be rated accordingly.

Judgment of the Queen's Bench Division (reported 66 L. J. Q. B. 781; 77 L. T. 214) affirmed.

**STOCKPORT UNION v. LONDON AND NORTH WESTERN RY. CO.**, (1898) 62 J. P. 244, 67 L. J. Q. B. 335, 78 L. T. 180—C. A.

**60. Railway—Lines into Goods Station—“Directly Productive”—Earnings in Parish—Central Point—Lines used as Waiting Station—Delay caused by Reasons outside Parish—“Indirectly Productive.”**—Where there are several lines of rails, used primarily for the purpose of carrying traffic into and from a warehouse or goods yard, they are all to be regarded for the purposes of assessment to poor rate as directly productive, and therefore must be assessed by allotting to the parish a proportionate part of the earnings of the whole railway undertaking. The case of *Stockport Union v. London and North Western Ry. Co.* ((1898) 67 L. J. Q. B. 335; 62 J. P. 244; 78 L. T. 180—C. A.) is not a decision that only one of such lines is to be so regarded.

Where there are several places in a parish to which goods go, a central or average point may be taken for the purpose of arriving at the proportionate part of the earnings of the whole undertaking attributable to that parish.

Duplicated or multiplied lines are only to be treated as directly productive so far as they are required for meeting difficulties which arise in the parish in which such lines are situated. When such lines are used as a waiting and sorting station for traffic which is delayed, owing to difficulties arising outside the parish, they are to be treated as indirectly productive, and must be separately assessed.

*Stockport Union v. London and North Western Ry. Co.*, *supra*, and *Great Eastern Ry. Co. v. Fletton Overseers* ((1882) Boyle and Humphreys-Davies on Rating, 2nd ed. appendix), distinguished.

**IN RE GREAT NORTHERN RY. CO. v. EDMONTON [UNION AND OTHERS]**, (1905) 69 J. P. 179, 816, 93 L. T. 479; 21 T. L. R. 638, 3 L. G. R. 1359—Channell, J.

**61. Railway—Line Connecting Two Railway Systems—Enhancement of Main Line Traffic—Basis of Valuation—Parochial Principle—Interest on Cost of Construction**—A short railway line connecting the Great Central Railway system with the Great Western Railway system was recently constructed by the Great Central

Railway Company, in accordance with an arrangement with the Great Western Railway Company, for the more convenient interchange of traffic, with money advanced to them for the purpose by the Great Western Railway Company at 3½ per cent interest. The traffic on the link line wholly consisted of through traffic from the Great Central Railway to the Great Western Railway, and *vice versa*, and the value of the line depended on the existence of the arrangement between the two companies.

**HELD**—that in the circumstances the rating authority in ascertaining the rateable value of the line passing through any particular parish were not bound to adopt as the sole basis of valuation the actual net earnings within the parish calculated on the mileage proportion of receipts, but were entitled to take into account as an element of calculation the interest on the cost of the construction of the line.

*South Eastern Ry. Co. v. Dorking* ((1854) 3 E. & B. 491) applied.

Decision of Div. Ct. ([1906] 1 K. B. 597; 75 L. J. K. B. 165; 70 J. P. 38; 51 W. R. 470, 94 L. T. 310; 22 T. L. R. 148; 4 L. G. R. 84) reversed.

**GREAT CENTRAL RY. CO. v. BANBURY UNION**, [1907] 1 K. B. 717; 76 L. J. K. B. 577, 71 J. P. 157; 96 L. T. 243; 23 T. L. R. 283; 5 L. G. R. 328—C. A.

**62. Railway—Line Leased to Several Companies—Basis of Assessment—Parochial Principle—Competitive Value—Contributive Value.**—The appellants were the lessees of a railway passing under the Thames and connecting the systems of several railway companies. The rental amounted to £30,000 per annum under the terms of a private Act of Parliament, and the working of the railway had always resulted in a loss to the lessee companies. In assessing the rateable value quarter sessions disregarded the amount of the rent, but took into consideration the value of the line to a hypothetical tenant in view of its position, connections and the accommodation thereby afforded.

**HELD**—that quarter sessions, in assessing the rateable value, acted on the right principle.

**EAST LONDON RAILWAY JOINT COMMITTEE v. [GREENWICH UNION]**, (1907) 71 J. P. 460; 97 L. T. 404; 5 L. G. R. 922—Div. Ct.

**63. Railway—Parochial Principle—Contributive Value to Rest of Railway System—Prime Cost—Evidence as to—Remoteness.**—A line from Bletchley to Bedford was constructed by the London and Birmingham Railway Company under an Act of Parliament, and an independent company (the Bedford Railway Company) was formed by the same Act, with a capital of £125,000, which was the estimated cost of making the said line, and it was provided that from and after the completion of the line the London and Birmingham Railway Company should pay to the Bedford Railway Company a rent equal in amount to four per cent. on the £125,000. This sum having been expended, and

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the line being incomplete, the London and Birmingham Railway Company spent a further sum of £240,000 on finishing its construction. The London and Birmingham Railway Company and the Bedford Railway Company were subsequently, with other companies, amalgamated into one company under the name of the London and North Western Railway Company. Various competing lines were subsequently built by other railway companies, and it was admitted that none of those railway companies would have given more for the line than the appellants.

**HELD**—that, for the purpose of rating the line from Bletchley to Bedford, the rateable value of that portion of the line within the respondents' union ought to be ascertained by taking the receipts and expenses within the union and making the usual allowances, and that the original cost of the line and the benefits it might contribute to other parts of the appellants' system ought not to be taken into account.

Decision of Div. Ct. (70 J. P. 46; 94 L. T. 314, 4 L. G. R. 92) affirmed.

**LONDON AND NORTH WESTERN RY. CO. v. [AMPTHILL UNION ASSESSMENT COMMITTEE, (1907) 71 J. P. 545—C. A.]**

**64. Railway—Signals and Levers necessary for the Safe Working of the Line—Directly Productive.**—Certain signal-boxes contained levers which worked simultaneously the points or crossings and the signals. The signals were as necessary for the safe working of the line as were the points or crossings.

**HELD**—that although the signal-boxes themselves might be rated as indirectly productive property, and not as part of the running line, the levers and signals should be rated as directly productive property, and as part of the running line.

**SOUTH EASTERN AND CHATHAM RY. CO.'S [MANAGING COMMITTEE v. ST. SAVIOUR'S UNION ASSESSMENT COMMITTEE, (1901) 65 J. P. 441—County of London Sessions.]**

**65. Separate Assessment of different Portions of one Property.**—The fact that different portions of a property are capable of being made separate hereditaments does not oblige the rating authority to separately assess and rate the respective portions.

The only exception to the rule that if a given area consists of one hereditament it must be rated in one lump sum is where the entire thing is unprofitable, in which case that which can be profitably occupied is taken out and assessed.

Whether the whole of the different portions of a property are one hereditament or more is a question of fact.

The appellants were the owners of a property comprising the greater part of what is known as York Station, including running lines, sidings, passenger stations, sheds, shops, works, goods yards, &c. The whole of the premises formed one continuous area under the control of the railway company, and was completely fenced round

except where the main lines passed through. There was access from every part to every other part, and the whole was closed at night by the locking and watching of the gates, so that none of the public could enter without permission. It was possible to distinguish part of the premises at separate areas, and such areas were capable of being occupied separately from the railway by persons other than the railway company, although in such case arrangements would have to be made defining the user and area of occupation. As laid out the premises were only adapted for the use of the railway company. The rating authority had rated the premises as one area, and the railway company had appealed against such assessment to an arbitrator, who upheld the rating authorities.

**HELD**—that the arbitrator was right and the premises could be assessed as one continuous area.

**NORTH EASTERN RY. CO. v. YORK UNION, [1900] 1 Q. B. 733; 69 L. J. Q. B. 376; 64 J. P. 437; 82 L. T. 201—Div. Ct.]**

**66. Sewage Farm**—A sewerage board, for the purpose of carrying out their statutory duties, bought a farm which they converted into a sewage farm, and let to an agricultural tenant who covenanted to dispose of the sewage delivered by the board on to the farm. The rent payable by the tenant was a fair rent for the advantages which he got under the lease, including the manurial value of the sewage, and in these circumstances the court of quarter sessions held that the actual rent was the true basis on which the farm should be rated; and their decision was affirmed by the Divisional Court.

**HELD**—that the rating authority ought to have taken into account, beyond the rent payable by the tenant, the annual value of the facilities afforded to the sewerage board in the discharge of their duties by the user of the farm as a sewage farm, thus regarding the board as a hypothetical tenant for the farm.

Decision of Div. Ct. ([1906] 1 K. B. 214; 75 L. J. K. B. 237; 70 J. P. 63; 54 W. R. 455, 94 L. T. 282; 4 L. G. R. 287) reversed.

**DAVIES v. SEISDON UNION, [1907] 1 K. B. 630; [76 L. J. K. B. 472; 71 J. P. 153; 96 L. T. 315; 23 T. L. R. 251; 5 L. G. R. 306—C. A.]**

**67. Tramway—Parochial System—Mileage System.**—A tramway company owned a system of tramways which extended over several parishes. The company claimed that, as it was impossible by direct evidence to arrive at the actual receipts and expenses in any particular parish, a fair method of ascertaining the rateable value of the undertaking in any one parish was to take the rateable value of the whole undertaking and divide it among the several parishes in which the undertaking was situate according to the number of car miles run in each parish during a period of twelve months. The rating authority of one of the parishes objected that this mode of valuation disregarded the difference in the earning capacity of a car mile in the different parishes. Quarter sessions approved

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the method put forward by the tramway company.

**HELD**—that this method of valuation could not be said to be an infringement of the parochial principle; that it was an admissible method; and that the question which of two possible methods of valuation was the better was for the quarter sessions, and that consequently the Court would not interfere with their decision.

Decision of Div. Ct. (70 J. P. 225; 4 L. G. R. 465) affirmed.

**LONDON UNITED TRAMWAYS, LD v. BRENT-FORD UNION ASSESSMENT COMMITTEE**, (1907) 71 J. P. 249; 96 L. T. 528; 5 L. G. R. 682—C. A.

**68. Waterworks—User of Intake from River—Special Fitness of the Land and Structure for Intake—Large Sums paid for Privilege of taking Water from River.**—The appellant company had by statute a very valuable right of appropriating water drawn from the river Lea. It was absolutely necessary for them to get access to the river Lea in order to appropriate that water in the given quantities, and the point at which they took it was fixed by statute, and was presumably the point best adapted to their needs. The land and structure which they occupied for the purpose of securing and passing the water into their system had an added value by reason of its special fitness for this purpose. Large sums had been exacted by successive Acts of Parliament from the appellant company, presumably in return for the privileges conferred upon them.

**HELD**—that no sum paid for a privilege not annexed to the land proposed to be rated was an element in arriving at the rateable value of the channel into which it was diverted; that there was an added element of value in this case by reason of the special fitness of the land and structure for a particular profitable purpose; and that the case must go back to the sessions for rehearing and determination.

\* Decision of Div. Ct. ([1901] 2 K. B. 620; 70 L. J. K. B. 710; 65 J. P. 726; 49 W. R. 619; 85 L. T. 132; 17 T. L. R. 571) reversed.

**NEW RIVER CO. v. HERTFORD UNION**, [1902] 2 K. B. 597; 71 L. J. K. B. 827; 66 J. P. 724; 51 W. R. 49; 87 L. T. 360; 18 T. L. R. 780—C. A.

**69. Waterworks and Reservoir—Capital Expenditure—Cost of Construction.**—A reservoir and waterworks constructed by the appellants under a private Act of Parliament, enabling them for the purposes of such construction to submerge the sites of a parish church, vicarage and schools, and to stop up and divert certain roads, on condition that they should provide another church, vicarage and schools, and make new roads and bridges, ought to be rated on the basis of including as part of the capital expenditure the cost of the new church, vicarage and schools, and the new roads

and bridges, as well as of the actual reservoir and waterworks themselves.

**LIVERPOOL CORPORATION v. LLANFYLLIN [ASSESSMENT COMMITTEE]**, [1899] 2 Q. B. 14; 68 L. J. Q. B. 762; 63 J. P. 452; 80 L. T. 667; 15 T. L. R. 349—C. A.

**(d) Distress.**

**70. Application for Warrant—Objection that Rate retrospective.**—An objection that a rate is partly retrospective, because made after the commencement of a half year to meet the expenses of the whole half year, cannot be raised upon the hearing of an application for a distress warrant.

**R v. Kingston** ((1858) E. B. & E. 256) followed.

**CHENEY v. TALLOWIN**, [1904] 2 K. B. 763; 73 [L. J. K. B. 943; 68 J. P. 528—Div. Ct.

**71. Compounding—Proportioning Rate—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 3–16.**—A poor rate was made and allowed on June 19th, 1897, and was expressed on the face of it to be estimated to meet all expenses to be incurred before September 29th, 1897. The vestry, acting under sect. 4 of the above Act, had ordered the owners of premises not exceeding £8 per annum to be rated instead of the occupiers. Twelve newly built dwelling houses (all of which were under that value) which had been completed and occupied just prior to the date of the rate, were owned by one owner, who, on June 18th, agreed with the overseers to pay the rates demanded in respect thereof of the twelve houses, whether occupied or not. A demand for a rate of £5 8s. was subsequently made on her, which she refused to pay. On a summons being taken out to enforce the rate, the justices refused to issue a distress warrant for a greater sum than for £4 1s. 0½d., on the ground that as the twelve houses were not occupied till June 12th, the full amount of the rate, which was current for the period from March 25th, 1897 to September 29th, 1897, could not be properly demanded. The Court remitted the matter back to the justices with the expression of opinion that a warrant for the full amount demanded should issue—holding that sect. 16 of 32 & 33 Vict. c. 41, did not apply.

**R. v. TEMPEST, EX PARTE TOWNSEND**, (1898) [14 T. L. R. 199—Div. Ct.

**72. Demand for Rate—Occupier Ceasing to Occupy during Currency of Rate—No fresh Demand for Apportioned Rate—Distress Warrant for Apportioned Part—Validity—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2—Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), Sched. Form C. 1.—Poor Rate Assessment and Collection Acts, 1869 (32 & 33 Vict. c. 41), s. 16, and 1882 (45 & 46 Vict. c. 20), s. 3**—The appellant was rated in October, 1904, for the half-year ending March, 1905, in the sum of £9 7s. 3d., as the occupier of a house and other hereditaments. The said rate was demanded in November, 1904, and not paid. The appellant continued to occupy the house for



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the whole period of the rate but was only in occupation of the other hereditaments until November 25th, 1904. No fresh demand for a proportionate part of the rate was made, but an application was made for a distress warrant, in which the sum of £6 5s. 8d. was named as the apportioned rate. The justices found as a fact that the sum of £3 10s. 3d. was the amount due and issued a warrant accordingly.

**HELD**—that no fresh demand of the actual amount due was necessary and that the justices had jurisdiction to ascertain the amount due and issue a distress warrant for the same.

**MANSELL v. ITCHEN OVERSEERS**, [1906] 1 K. B. 221; 75 L. J. K. B. 232; 70 J. P. 148; 54 W. R. 456; 94 L. T. 320; 22 T. L. R. 228, 4 L. G. R. 279—Div. Ct.

**73. "Keeping Possession" of Goods—Man in Possession—Goods Stored at Police Station—Costs—Distress (Costs) Acts**, 1817 (57 Geo. 3, c. 93), s. 1, *Sched.*, and 1827 (7 & 8 Geo. 4, c. 17)—*Police Act*, 1890 (53 & 54 Vict. c. 45), s. 23.]—The Home Secretary, acting under sect. 23 of the *Police Act*, 1890, approved a table of fees payable to constables in respect of the service of summonses, the execution of warrants, and the performance of other occasional duties. The table of fees allowed a constable, when making a distress, 1s. per day for "keeping possession of" the goods.

By sect. 1 of the *Distress (Costs) Act*, 1817, which applied to distresses for rent, but was made applicable to poor rates by the *Distress (Costs) Act*, 1827, the charges specified in the schedule were the only charges allowed, and in the schedule a charge of 2s. 6d. per day for a "man in possession" was allowed.

A constable executed a warrant of distress for the recovery of a poor rate not exceeding £20, and removed the goods to a police station, where they were locked up in a cupboard, the key of which was kept hanging up in the station, for five days, when they were sold by auction. The constable claimed from the person distrained upon the sum of 5s., being at the rate of 1s. a day for "keeping possession" of the goods distrained.

**HELD**—that the constable had kept possession of the goods, that the words "man in possession" in the schedule to the *Distress (Costs) Act*, 1817, meant in possession of the goods, and were not confined to possession of the goods on the premises on which they were distrained; and that therefore the constable was entitled to the sum claimed.

**SCOTT v. DENTON**, [1907] 1 K. B. 456; 76 L. J. K. B. 330; 71 J. P. 66; 95 L. T. 760; 23 T. L. R. 73; 5 L. G. R. 251—Div. Ct.

**74. Non-payment—Distress Warrant—Right of Appeal—Poor Relief Act**, 1601 (43 Eliz. c. 2), s. 6—*Poor Relief Act*, 1743 (17 Geo. 2, c. 38), ss. 4, 7.]—No appeal lies to quarter sessions, before levy, from the order of a magis-

trate directing a distress warrant to issue for non-payment of poor rates.

**REG. v. LONDON JJ, EX PARTE BAYNE**, [1899] 1 Q. B. 532; 68 L. J. Q. B. 383; 63 J. P. 388; 47 W. R. 316; 80 L. T. 286; 15 T. L. R. 196—Div. Ct.

**75. Reasonable Charges of taking, keeping, and selling the Distress—Action for recovery of Excess—Jurisdiction of County Court—Distress (Costs) Act**, 1817 (57 Geo. 3, c. 93), ss. 2, 4—*Distress (Costs) Act*, 1827 (7 & 8 Geo. 4, c. 17)—*Distress for Rates Act*, 1849 (12 & 13 Vict. c. 14), s. 1.]—The remedy of a person aggrieved where a bailiff has exceeded the reasonable charges of taking, keeping, and selling a distress for poor rates is not confined to an application to justices for an order under sect. 2 of the *Distress (Costs) Act*, 1817, but the county court has jurisdiction to try an action for the recovery of any excess over such reasonable charges.

**R. v. PHILBRICK AND ANOTHER**, [1905] 2 K. B. 108; 74 L. J. K. B. 464; 69 J. P. 221; 53 W. R. 527; 92 L. T. 571; 3 L. G. R. 679—Div. Ct.

**76. Sum under £20—Sale—"Reasonable Charges of Selling"—Distress (Costs) Act**, 1817 (57 Geo. 3, c. 93, and *Sched.*)—*Distress (Costs) Act*, 1827 (7 & 8 Geo. 4, c. 17)—*Distress (Costs) Act*, 1849 (12 & 13 Vict. c. 14), s. 1.]—A warrant under 12 & 13 Vict. c. 14 was obtained by the respondents, directing them to make a distress of the goods of the appellant, and to sell the same if within the space of five days after the distress the sum of £1 then due and owing by the appellant in respect of the poor rate and the further sum of 5s. 1d., the cost of obtaining the warrant, were not duly paid by the appellant. The appellant paid the amount claimed less 1s. of the amount due for poor rate. The respondents sold the appellant's goods to satisfy the unpaid balance of the rate, and gave the appellant a statutory notice of costs and charges as required by 57 Geo. 3, c. 93, including auctioneer's charges 14s.

**HELD**—that the respondents were not limited to the costs and charges as provided by 57 Geo. 3, c. 93, as applied to a levy for poor rate by 7 & 8 Geo. 4, c. 17, but that the respondents were entitled to deduct the "reasonable charges of selling" as provided by 12 & 13 Vict. c. 14, s. 1.

**HILL v. PANNIFER AND OTHERS**, [1904] 1 K. B. 811; 73 L. J. K. B. 556; 68 J. P. 261; 52 W. R. 588; 90 T. L. 511; 20 T. L. R. 324; 2 L. G. R. 381—Div. Ct.

Overruled in *Coster v. Headlund*, No. 77, *infra*.

**77. Sum not exceeding £20—Expenses—Distress (Costs) Act**, 1817 (57 Geo. 3, c. 93), s. 1, *Sched.*—*Distress (Costs) Act*, 1827 (7 & 8 Geo. 4, c. 17)—*Distress for Rates Act*, 1849 (12 & 13 Vict. c. 14), s. 1.]—The *Distress (Costs) Act*, 1817, as applied by the *Distress (Costs) Act*, 1827, to distresses for poor rate is not impliedly repealed by the *Distress for Rates Act*, 1849, and, therefore, where a distress is levied for poor

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rate for an amount not exceeding £20, only such costs and charges as are specified in the schedule to the Distress (Costs) Act, 1817, can be taken as the costs and charges of the levy and disposition of such distress.

*Hill v. Pannifer* ([1904] 1 K. B. 811; 73 L. J. K. B. 556; 68 J. P. 261; 52 W. R. 588; 90 L. T. 511; 20 T. L. R. 324—Div. Ct., No. 76, *supra*) overruled.

Decision of C. A. ([1905] 1 K. B. 219; 74 L. J. K. B. 210; 69 J. P. 90; 92 L. T. 98; 21 T. L. R. 123; 3 L. G. R. 174) affirmed.

*COSTER AND ANOTHER v. HEADLAND*, [1906] [A. C. 286; 75 L. J. K. B. 483; 70 J. P. 249, 94 L. T. 582; 22 T. L. R. 441; 4 L. G. R. 589 —H. L. (E.).

**78. Tender of Part of Rate—Issue of Distress Warrant for whole Amount—Warrant of Commitment—Jurisdiction of Magistrate—Discretion—**(12 & 13 Vict. c. 14), s. 1, *Sched., Form A. (1.)* ] —The applicant had refused to pay part of a rate, having a conscientious objection to the payment of it. He tendered part of the rate accordingly to the overseers, who refused to accept it. On a summons being issued before a magistrate he again tendered part of the rate in court, but the magistrate issued a distress warrant for the full amount. The applicant tendered part of the rate to the bailiffs, who refused it, and reported to the overseers that there were not sufficient goods on the premises to satisfy the distress warrant. The overseers applied to the justices for a warrant of commitment, who made it accordingly.

**HELD**—that the justices had jurisdiction to issue the warrant of distress for the whole amount, and it was a matter entirely within their discretion.

*EX PARTE WYLES (OR WILES)*, (1904) 73 [L. J. K. B. 112; 68 J. P. 13; 90 L. T. 225; 20 T. L. R. 150; 20 Cox, C. C. 602—Div. Ct.

**79. Tender of Part of Rate — Refusal of Overseers to Accept — Summons — Issue of Distress Warrant for the Whole Amount of the Rate less Part tendered in Court—Jurisdiction of Magistrate—**12 & 13 Vict. c. 14, s. 1, and *Sched.*]—A ratepayer on demand being made on him for £41 8s. 9d in payment of rates, tendered £416 to the overseers, and declined to pay the rest on the ground that it would be applied to purposes to which he had a conscientious objection. The overseers refused to accept part payment, and the magistrate issued a summons. At the hearing of the summons the sum of £416 was again tendered in court, and the magistrate refused to issue a distress warrant for more than £25 8s. 9d., the balance of the rate.

**HELD**—that the magistrate had jurisdiction to do so.

*R. v. GILLESPIE, EX PARTE WEST HAM OVERSEERS*, [1904] 1 K. B. 174; 73 L. J. K. B. 106; 68 J. P. 11; 52 W. R. 367; 90 L. T. 15; 20 T. L. R. 113; 2 L. G. R. 59—Div. Ct.

**(e) Occupation.**

**80. Aqueduct—Branch Main to supply Adjoining Authority—Main under Control of Owners of Aqueduct.]**—The appellants were the owners of a reservoir and aqueduct for supplying the city of L, and they had power to supply any local or sanitary authority within twenty miles of the aqueduct. They agreed to supply the W. urban district council. Under the terms of such agreement the W. urban district council obtained the necessary powers, under the Public Health Act, 1875, for the laying of a main from the appellants' aqueduct, and the main was constructed by the appellants, who had the entire control and management of it, and the sole right to make connections therewith. The W. urban district council paid 1 per cent. of the cost of providing the main.

**HELD**—that the appellants were the occupiers of the main, and were rateable in respect thereof.

*LIVERPOOL CORPORATION v. BIRKENHEAD [UNION]*, (1906) 70 J. P. 146, 94 L. T. 509, 4 L. G. R. 273—Div. Ct.

**81. Change of Occupation—Period for which Rate Made—Period from Allowance by Justices]** —The appellant was summoned on a complaint preferred by the overseers, to show cause why he had not paid a certain poor rate. The rate in question was allowed by the justices on October 21st, 1898, and was intended for the period from September 29th, 1898, up to March 25th, 1899. The premises in respect of which the appellant was rated were occupied by him from before September 29th, 1898, up to November 30th, 1898, and the complaint was in respect of the portion of the rate from September 29th to November 30th.

**HELD**—that the appellant was only liable to pay the rate from the time it was allowed by the justices, namely, from October 21st, 1898, to November 30th, 1898.

*DAVIS v. WOODFIELD*, (1900) 64 J. P. 215; 81 [L. T. 782—Div. Ct.

**82. Beneficial Occupation — Caretaker or Serrant.]**—The appellant was rated to a poor and general district rate as the occupier of a house of which he was also the owner. The appellant was also the owner of fifty or sixty houses he was building or had built in the vicinity. L., a building foreman in the service of the appellant at a wage of £2 15s. per week, inhabited the said house with the exception of one bedroom, which he could have used had he wished. All the furniture in the house was L.'s, who paid no rent and remained subject to removal to any other of the appellant's said houses at twenty-four hours' notice. L.'s duty was to supervise the workmen building, to answer inquiries, and generally to look after the appellant's property. During L.'s residence constant efforts were made to sell or let the premises. On a summons for a distress warrant for the poor rate, and for an order for payment of the general district rate, the justices stated that they were satisfied that £2 15s. was the full wage of

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a building foreman, and they held that the appellants occupied the said house through his servant L.

HELD—that the Court could not interfere with the decision of the justices.

BERTIE *v.* WALTHAMSTOW OVERSEERS, (1904)  
[68 J. P. 545; 2 L. G. R. 1178—Div. Ct.]

**83. Land used for Exhibition of Advertisements—Advertisement Contractor—“Permitting” Land to be so used—Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27), s. 3.]**—An advertisement contractor hired from builders and owners of land the right to affix advertisements upon the hoardings erected by the builders during building operations, and affixed thereto the advertisements of the persons whose advertisements he had agreed to exhibit.

HELD—that the advertisement contractor was not a person who “permitted” the land on which the hoardings stood to be used for the exhibition of advertisements within the meaning of sect. 3 of the Advertising Stations (Rating) Act, 1889, and that he was not rateable, as beneficial occupier, in respect of such land.

BURTON *v.* ST. GILES’ AND ST. GEORGE’S  
[ASSESSMENT COMMITTEE, [1900] 1 Q. B.  
389; 69 L. J. Q. B. 184; 64 J. P. 213; 82  
L. T. 24—Div. Ct.]

**84 Lease of a Toll Bridge—Occupation by Lessee for Rating Purposes—Rights reserved to the Lessors.]**—The corporation of York by a lease demised to P. the tolls of a certain bridge and the toll house adjoining the bridge for three years. P. covenanted to pay all rates and taxes, and not to put any placards upon the bridge without permission. The corporation reserved the right of free passage for their servants and vehicles, and the right of entry in order to do any repairs, and also the right to open the bridge at certain hours to allow vessels to pass through.

HELD—that P. was “occupier” of the bridge, and as such liable to be rated in respect of it.

PERCY *v.* HALL, (1903) 67 J. P. 293; 88 L. T.  
[830; 19 T. L. R. 503; 1 L. G. R. 613—  
Div. Ct.]

**85. Sewage Farm—Lease—Right of Entry for Repair of Works on Farm—Occupation by Drainage Board—Rateability of Lessors.]**—The appellants, under their statutory powers, were the owners of a sewage farm on which they had erected certain sewage works, plant and carriers. The farm was then demised by them to a tenant with a reservation of a right of entry thereon for the purpose of maintaining, altering, and repairing the works as might be necessary to use the farm as a sewage farm. The tenant was to irrigate by means of certain carriers and sluices, and keep the same properly flushed and cleansed. The surveyor and agent of the board from time to time entered on the land in order to see that the sewage was properly treated and distributed, and to do the necessary repairs. The quarter

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sessions found, as a matter of fact, that the sewage works, plant and carriers were not in the occupation of the drainage board, and that the appellants were not rateable in respect thereof.

HELD—that it was impossible for the Court to say, on the facts before it, that the sessions were bound to hold that the drainage board were occupiers.

STOURBRIDGE MAIN DRAINAGE BOARD *v.*  
[SEISDON UNION, (1902) 66 J. P. 372; 86  
L. T. 415—Div. Ct.]

**86. Warehouse—Removal of Working Appliances, &c., for Period during Currency of Rate—Notice of Cessation and Resumption of User—Intention to use in Certain Event—Liability for Rate.]**—For a certain period after the making and during the currency of a rate a self-contained warehouse was emptied of goods and working appliances and closed, the water supply for working a hoist being cut off. During the period a notice was displayed on the premises stating that they were to let. At the commencement of the period the respondents, who were the keepers of the warehouse, gave notice to the superintendent collector of rates that they had gone out of occupation and invited inspection, and at the end of the period they gave notice that they had reopened the warehouse. During the period the respondents were able to get the supply of water put on at any moment, and the working appliances were stowed in an adjoining warehouse, whence they could be got whenever they were required. Subject as above, the warehouse was ready for receipt of goods at any minute, and the respondents were at all times throughout the period prepared to receive applications for the hire of storage room, and ready and willing to reopen the warehouse, provided that enough goods were offered to fill half the whole capacity of the warehouse. With this proviso they were prepared to reopen the warehouse, and let either the whole of it, or separate floors or separate rooms, or to let floor space at a tonnage or package rent.

Upon an application for a distress warrant in respect of an unpaid portion of the rate for the said period, the respondents contended that they were not in occupation of the warehouse during such period, and were, therefore, not liable to pay the rate in respect thereof.

HELD—that upon the facts the respondents had retained control of the warehouse during the period in question, and had always intended to utilise the premises for the purpose of their business whenever the opportunity offered, and that therefore they had not ceased to occupy and were liable to pay the rate during that period.

*Booth Overseers v. Liverpool Warehousing Co.* ((1901) 65 J. P. 740; 85 L. T. 45, No. 92, *infra*) distinguished.

Decision of the Div. Ct. (reported *sub nom.* *R. v. Henderson and Other Justices* (1905) 69 J. P. 294; 92 L. T. 662, 3 L. G. R. 756) reversed.

*R. v. MELLADEW & SON*, [1907] 1 K. B. 192;  
[76 L. J. K. B. 262; 71 J. P. 125; 96 L. T.  
189; 23 T. L. R. 207; 5 L. G. R. 177—C. A.]

**Poor Rates—Continued.**

**87. Weekly Tenant**—“Term not exceeding Three Months”—Amount payable by Occupier—*Poor Rate Assessment and Collection Act, 1869* (32 & 33 Vict. c. 41, ss. 1, 2.)—The appellant was a tenant of premises from week to week, and had been so for six months. By sect. 1 of the *Poor Rate Assessment and Collection Act*, “The occupier of any rateable hereditament let to him for a term not exceeding three months shall be entitled to deduct the amount paid by him in respect of any poor rate . . .” from the rent due to the owner, and by sect. 2 “No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year.”

**HELD**—that an occupier “for a term not exceeding three months” was an occupier who had not got an assured tenancy for more than three months, and that the appellant as a weekly tenant was entitled to the benefit of the Act.

**HAMMOND v. FARROW**, [1904] 2 K. B. 332; 73 [L. J. K. B. 726; 68 J. P. 352; 91 L. T. 77, 20 T. L. R. 497; 2 L. G. R. 817—Div. Ct.]

**(f) Rateability.**

**88. Additional Burial Ground**—Apart from Churchyard—Fees received by Incumbent—Sale of Graves—Beneficial Occupation—Exemption—“Exclusively appropriated to Public Religious Worship”—*Church Building Acts, 1818* (58 Geo. 3, c. 45), s. 33, and 1845 (8 & 9 Vict. c. 70), s. 13—*Poor Rate Exemption Act, 1833* (3 & 4 Will. 4, c. 30), s. 1.]—A rector is not rateable in respect of the churchyard; and the same exemption applies to an extension thereof, even though not contiguous to it.

A churchyard having been closed in 1854, in 1855 and 1883 two additional pieces of ground contiguous to one another, and distant about 300 yards from the church, were acquired as burial grounds under the *Church Building Acts*, and were conveyed to the Ecclesiastical Commissioners as additions to the burial ground of the parish, and to be devoted to ecclesiastical purposes for ever. These grounds were consecrated for interments according to the rites of the Church of England, and the rector of the parish received fixed fees for the performance of burials and for the purchase of plots for interment and for the erection of monuments. It was attempted to rate the rector as the beneficial occupier of the burial ground.

**HELD**—that these additional burial grounds were in the same position as an ordinary churchyard, and that the rector was not rateable in respect of them.

**NORTH MANCHESTER OVERSEERS v. WINSTANLEY** [1907] 1 K. B. 27; 76 L. J. K. B. 33, 71 J. P. 48, 95 L. T. 796; 23 T. L. R. 35, 5 L. G. R. 7—Div. Ct.]

Reversed C. A., February 28th, 1908, 24 T. L. R. 388

**89. Construction of Railway Line**—Movable Buildings erected by Contractors for the Housing

of Workmen—Whether rateable—43 Eliz. c. 2 ]  
—The respondents were contractors constructing a line of railway. In order to house the men employed upon the work they erected movable structures divided into sleeping and dining rooms. At the time of the appeal the structures had been in the same situation for a year.

**HELD**—reversing the decision of Qr. Sess., that the structures were rateable.

Decision of Qr. Sess. (68 J. P. 55) reversed.

**MITCHELL BROS. v. WORKSOP UNION**, (1905) [69 J. P. 53; 92 L. T. 62; 21 T. L. R. 156; 3 L. G. R. 44—Div. Ct.]

**90. Construction of Statutory Exemption—Rateability of Old Serjeants' Inn—Parliamentary Bargain—Competence of Parties—Cesser of Society—Extent of Exemption—Rates imposed by later Statutes.**]—A private Act of Parliament was passed to carry into effect an agreement between the Society of Serjeants' Inn and the overseers of the parish of St. Dunstan in the West, which agreement provided that the society should pay to the overseers £80 a year to be applied to the relief of the poor, and that this annual sum should be a full discharge of all poor rates and other parochial rates, assessments or burthens from time to time, and that the inn should be exempt from all rates for the parish to the utmost extent to which the parties were competent to consent. The society having ceased to exist :

**HELD**—(1) per Lord Alverstone, C.J., and Ridley, J., that the individual properties of which the inn was composed were not now exempt from the poor rate; and (2) per Lord Alverstone, C.J., and Darling, J., that, assuming that there was such exemption, it did not include exemption from rates created by subsequent statutes and added to the poor rate merely for purposes of collection.

**JONAS v. OVERSEERS OF ST. DUNSTAN**, (1907) [71 J. P. 33, 95 L. T. 787; 23 T. L. R. 13, 5 L. G. R. 147—Div. Ct.]

**91. Deaf and Dumb Home—Exemption—Voluntary Schools Act, 1897** (60 & 61 Vict. c. 5), ss. 3, 4—*Elementary Education (Blind and Deaf Children) Act, 1893* (56 & 57 Vict. c. 42).]—A deaf and dumb home certified under the *Elementary Education (Blind and Deaf Children) Act, 1893*, for the education, boarding, and lodging of fifty-four deaf children of both sexes, and for the education of twenty of such children as day pupils, and in receipt of contributions from various school boards and a grant from the Education Department, is not a voluntary school within the meaning of sect. 4 of the *Voluntary Schools Act, 1897*, and, therefore, not exempt from rates.

**JEWS' DEAF AND DUMB HOME, WANDSWORTH** [(TRUSTEES OF) v. WANDSWORTH AND CLAPHAM UNION ASSESSMENT COMMITTEE (1901), 65 J. P. 137—County of London Qr. Sess.]

**Poor Rates—Continued.**

**92. Empty Warehouses—Occupation—Liability to Rates.**—The respondents, the owners of certain warehouses, gave notice to the overseers (the appellants) before the making of certain rates, that they intended to keep certain warehouses empty and unoccupied during the year for which such rates were to be made, and they would claim exemption from such rates in respect thereof. All the goods in such warehouses were removed before the making of the rate, and the warehouses had remained locked up, unused and unoccupied since then. They continued to be advertised in the list of warehouses to be let by the respondents. Each warehouse was one of a block through which a continuous shafting passed, and at the end of the block was a notice, "For storage apply to the Liverpool Warehousing Company." One of the warehouses in respect of which notice had been given to the appellants had been advertised as to let by a notice affixed on the warehouse itself.

HELD—that the justices were justified in coming to the conclusion that there was no occupation of the warehouse so as to render the respondents liable to be rated in respect thereof.

*Southend-on-Sea Corporation v. White* ((1900) 65 J. P. 7, 83 L. T. 408—Div. Ct., see No. 17, *supra*) distinguished.

**BOOTLE OVERSEERS v. LIVERPOOL WAREHOUSING CO.; THE SAME v. WEBSTER (J AND T.)** (1901) 65 J. P. 740; 85 L. T. 45; 17 T. L. R. 550—Div. Ct.

**93. Free Library—Land belonging to Society for Purposes of Science, Literature, or Fine Arts—Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1.**—A free library owned and occupied by a municipal corporation through a library committee is not exempt from being rated, either on the ground that there is no beneficial occupation, or that it is land owned by a society for the purposes of science, literature, or the fine arts under sect 1 of the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36).

**LIVERPOOL CORPORATION v. WEST DERBY UNION,** (1905) 69 J. P. 277; 53 W. R. 633, 92 L. T. 467; 21 T. L. R. 469; 3 L. G. R. 647—Div. Ct.

**94. Land acquired by a Canal Company—Canal not in Use—No Beneficial Occupation—Special Act—Construction.**—By their special Act a canal company were to be rated in respect of the lands taken by them "in the same proportion as other lands and grounds lying near the same are or shall be rated, and as the same lands . . . would be rateable in case the same were the property of individuals in their natural capacity." A particular length of the canal became dangerous and had to be closed for traffic, and was and is a source of annual loss to the company.

HELD—that, nevertheless, upon the wording of the above provision, the length of canal in

question must be rated as if it were capable of being used, and was in fact in use, for traffic.

**GLAMORGANSHIRE CANAL NAVIGATION Co. v. [MERTHYR TYDFIL UNION, (1903) 67 J. P. 52; 88 L. T. 85; 1 L. G. R. 34—Div. Ct.]**

**95. Museum—Established by Statute—Admission of Public—Beneficial Occupation—Rateability.**—The object of an institution or trust, established by statute, was to perpetuate the name and memory of Sir John Soane, who wished that certain curiosities, architectural designs and drawings which he had should remain as they were during his lifetime. The museum was to be "opened for two days in every week throughout the months of April, May, and June, and at such other times in the same and other months as the said trustees shall direct, to amateurs and students in painting, sculpture, and architecture," and to "such other persons as shall apply for and obtain admission thereto at such hours and in such manner and under such regulations for consulting and inspecting and benefiting by the said collections as the said Sir John Soane shall have established previous to his decease or as the said trustees shall establish relating thereto." Two rooms were to be allowed for the use of the curator and he was allowed to live there, and he collected the rents of a house settled as an endowment of the museum.

HELD—that the museum was not exempt from rateability.

*Lambeth Overseers v. London County Council* ([1897] A. C. 625; 66 L. J. Q. B. 806; 61 J. P. 580; 46 W. R. 580, 76 L. T. 795—H. L. (E.)) distinguished.

**TRUSTEES OF SIR J. SOANE'S MUSEUM v. ST. GILES' AND ST. GEORGE'S VESTRY,** (1900) 83 L. T. 248, 16 T. L. R. 440—Div. Ct.

**96. Police Station—Officers' Residence**—Certain premises erected by a county council for the purpose of a police station, in addition to the cells for prisoners and other offices constituting the police station, comprised also three dwelling-houses exclusively occupied by the superintendent, inspector, and sergeant respectively, and their families for their domestic use, all three dwelling-houses being enclosed within the boundary wall of the police station; the front door of each of the three houses opened into the street, and there was access from each house to the station, and a communication by a speaking tube from a bedroom in the superintendent's house. Any of these dwelling-houses might be visited and inspected at any time. In respect of these three residences, there was deducted from the salaries of these officers certain sums of money yearly as rent. The officers might be required by the authorities to move elsewhere at any moment, but whilst attached to the particular station it was necessary that they should reside within, or adjacent to, the station for carrying on the work of the station, and when appointed they were compelled to reside in such dwelling-houses. There was frequent communication passing between these officers and those in charge of the prisoners, and no prisoner

**Poor Rates—Continued.**

could be locked up, bailed, or remanded unless the superintendent, inspector, or the sergeant were present.

**HELD**—that the dwelling-houses in question were a part of the police station, and were therefore, together with the police station, exempt from rateability to poor rate.

**CROSS AND OTHERS v. WEST DERBY UNION**,  
[(1900) 64 J. P. 182, 81 L. T. 645; 16 T. L. R. 120—Div. Ct.]

**97. Police Residence—Chief Constable's House—Exemption of Premises used for Police Purposes.**—Premises used for police purposes are none the less used for such purposes because part consists of the chief constable's house where he resides with his family. The whole premises, therefore, are exempt from assessment to the poor rate.

**LEICESTER COUNTY COUNCIL v. LEICESTER [ASSESSMENT COMMITTEE]**, (1898) 78 L. T. 463; 14 T. L. R. 357; 46 W. R. 585—Div. Ct.

**98 Police Residences—Crown Purposes—Exemption.**—The respondents were the owners of certain premises which formerly had been the lodge of an old prison, now pulled down. The premises had been used as a police station with two cells, and were now used for the residence of two members of the county constabulary, and the cells were retained for the detention of prisoners. A certain sum was deducted from the pay of the constables as rent, in respect of their occupation of part of the premises. The whole of the premises were subject to the inspection of the Government inspector of police.

**HELD**—that the premises were not exempt from poor rates as being used for police purposes.

**MONMOUTH OVERSEERS v. MONMOUTHSHIRE [COUNTY COUNCIL]**, (1902) 66 J. P. 788; 87 L. T. 64—Div. Ct.

**99 Sewage Carrier—Parts above Ground—Parts under Ground—Disseverance—Payments to Owners for use of Sewer**—The authorities which decide that certain underground sewers of public bodies are not liable to be rated are to be regarded as anomalies and will not be extended.

All sewers which, on general principles, are *prima facie* rateable, and which are not protected by prior decisions, should be held rateable, unless the two features following are found to exist in relation to them: (1) They are quite underground, so that the surface under which they run is not occupied or in any way affected by them, and (2) no payment is made to the owners of the sewers for the use of them by others. A new sewage carrier was to a great extent above or on the surface, and even as to the part not immediately on the surface it could not be said that it was so far below the surface as in no way to affect it. It was one continuous construction. The owners received substantial yearly payments from other local bodies for the use of the sewage carrier by those bodies, and the cost of constructing and maintaining the

carrier was to a large extent defrayed out of those payments.

**HELD**—that the sewage carrier must be dealt with as a whole, and that it would not be right, as to the part below the surface, to dissever the sewer, and to say as to that part that it was to be taken as an independent sewer, and be separately treated for the purpose of rating; that the sewage carrier did not fall within the protection of the anomalous authorities, and that on principle it clearly ought to be rated.

**London County Council v. Erith Churchwardens, &c.** ([1893] A. C. 562; 63 L. J. M. C. 9; 57 J. P. 821; 42 W. R. 330; 69 L. T. 725—H. L. (E.)) discussed.

Appeal from the judgment of Div. Ct. ([1900] 1 Q. B. 365; 69 L. J. Q. B. 280; 64 J. P. 293; 48 W. R. 382, 82 L. T. 58; 16 T. L. R. 142) dismissed.

**YSTRADYFODWG AND PONTYPRIDD MAIN [SEWERAGE BOARD v. NEWPORT ASSESSMENT COMMITTEE]**, [1901] 1 K. B. 406, 70 L. J. K. B. 318; 65 J. P. 307; 49 W. R. 292; 84 L. T. 40, 17 T. L. R. 226—C. A.

**100. Society instituted for Purposes of the Fine Arts exclusively—Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1**—The Royal College of Music was incorporated by charter for the purposes of the advancement of the art of music by means of a central teaching and examining body and of rewarding with degrees and otherwise persons worthy of such distinction, and of the promotion and supervision of such musical education, in schools and elsewhere, as might be thought most conducive to the cultivation and dissemination of the art of music, and generally of the encouragement and promotion of the cultivation of music as an art.

The college was partly supported by voluntary contributions, but more than half its income was derived from fees paid by pupils. Some members of the college were paid out of its funds for their services as teachers. The laws of the college prohibited any dividend, gift, division, or bonus in money being made to or between the members.

**HELD**—that the college was entitled to exemption from rates, under sect. 1 of the Scientific Societies Act, 1843, it being a society instituted "for the purposes of the fine arts exclusively," within the meaning of the section, and making no dividend, gift, division, or bonus in money, to or between its members, within the meaning of the section.

Decision of Div. Ct. ([1898] 1 Q. B. 304; 62 J. P. 53; 67 L. J. Q. B. 80; 77 L. T. 627; 14 T. L. R. 136) affirmed.

**ROYAL COLLEGE OF MUSIC v. WESTMINSTER [VESTRY]**, [1898] 1 Q. B. 809, 62 J. P. 357; 67 L. J. Q. B. 540, 78 L. T. 441; 14 T. L. R. 350—C. A.

**101. Society instituted for Purposes of Science, Literature, or Fine Arts, supported wholly or in part by "Voluntary Contributions"—Grants in Aid by Board of Education and County Council—**

**Poor Rates—Continued.**

*Exemption—Scientific Societies Act, 1843* (6 & 7 Vict. c. 36), ss. 1, 2.]—The appellants were the committee of an institution established and carried on for the purposes of the fine arts, and of encouraging, advancing, and disseminating the same exclusively. The expenses were defrayed by the fees of the students and grants by the Board of Education and the county council of Middlesex, and a certificate had been given by the Registrar of Friendly Societies that the institution was entitled to the benefit of the Scientific Societies Act, 1843.

**HELD**—that the institution was in part supported by “voluntary contributions,” and could therefore claim exemption from the poor rate.

*Sacrey Overseers v. Art Union of London* ([1896] A. C. 296; 65 L. J. M. C. 161, 60 J. P. 660; 45 W. R. 34, 74 L. T. 497—H. L.) and *Royal College of Music v. Westminster Vestry* ([1898] 1 Q. B. 809; 67 L. J. Q. B. 540; 62 J. P. 357; 78 L. T. 441 (*supra*)—C. A.) applied and followed.

**HORNSEY SCHOOL OF ART v. EDMONTON UNION** [ASSESSMENT COMMITTEE AND OTHERS, (1906) 70 J. P. 121; 94 L. T. 203; 4 L. G. R. 178—Div. Ct.]

**102. Unauthorised Use of Exempted Land—Imposition of Corporation Rates—Effect on Exemption.**]—By 20 Geo. 3, c. 1v, certain land, called P. Park, was vested in trustees for the benefit of the inhabitants of P, and was exempted from the poor rate; and by the same Act the purposes for which the land might be used were set out. The trustees used part of the land for purposes, and let the rest of it on a lease unauthorised by 20 Geo. 3, c. 1v.

**HELD**—that this did not prevent the exemption granted by 20 Geo. 3, c. 1v., from attaching to the land both in the trustees' and in their tenants' hands.

By 38 & 39 Vict. c. lxxxii, P. Park was made liable for all rates imposed by the corporation of P. By sect. 211 of the Public Health Act, 1875, the assessment of poor rate is to precede the levying of any general district rate.

**HELD**—that 38 & 39 Vict. c. lxxxii. did not impliedly repeal the exemption contained in 20 Geo. 3, c. 1v.

**PONTEFRAC T ASSESSMENT COMMITTEE v. [PONTEFRAC T PARK TRUSTEES; THE SAME v. HARTLEY, (1898) 78 L. T. 738—C. A.]**

**103. Volunteer Drill Hall vested in Commanding Officer—Part of Premises occasionally Let for Performances, Entertainments, &c—Occupation—Volunteer Act, 1863** (26 & 27 Vict. c. 65), s. 26—Certain freehold premises were used as a drill hall, storehouse, sergeant instructor's residence, officers' and non-commissioned officers' quarters. The whole was vested in, and in the occupation of, the commanding officer. Certain portions of the premises were occasionally let for lectures, trade exhibitions, concerts, balls, dramatic and other performances, but such letting was subservient to the use of the hall for military pur-

poses. The appellant was the caretaker, who looked after, but did not reside on, the premises, but the musical and theatrical licences for the part of the premises occasionally let were taken out in the name of the appellant. The appellant was rated in respect of such parts of the premises as were not used exclusively for volunteer purposes.

**HELD**—that the appellant, being only a servant, was not the proper person to be rated, but that those portions of the premises which were occasionally let out were not exempt from rates under sect. 26 of the Volunteer Act, 1863.

**LEWIS v. DURHAM UNION ASSESSMENT COMMITTEE, (1904) 68 J. P. 220, 90 L. T. 383; 20 T. L. R. 227, 2 L. G. R. 533—Div. Ct.**

**VI. SEWER RATE.**

**104. Commissioners of Sewers—Jurisdiction over certain Area—Part of Area incorporated into County Borough by Act of Parliament—Right of Commissioners to still levy Sewer Rate within the Borough**]—By a commission dated April 19th, 1858, commissioners were appointed for the lower level of the county of Gloucester, to repair certain ditches, banks, and other defences by the sea coast, which were in a bad state of repair, and power was given to them to “tax assess charge distrain and punish” persons within the area after the quantity of their lands as to the commissioners might seem most convenient.

By the Bristol Corporation Acts of 1895, 1901, 1902 and 1904, the city of Bristol was extended so as to include certain parts of county parishes which were included in the area of the commissioners and over which the commissioners had power to levy rates for drainage and other purposes.

**HELD**—that the fact that the lands had been brought within the extended city did not, upon the construction of the Acts referred to, take them out of the jurisdiction of the commissioners or exempt them from a tax or rate assessed by the commissioners.

**BRISTOL CORPORATION v. COMMISSIONERS OF [SEWERS FOR LOWER LEVEL OF GLOUCESTERSHIRE, (1906) 70 J. P. 528, 95 L. T. 183—Buckley, J]**

**RATIFICATION.**

*See AGENCY.*

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*See also* EXECUTORS; LIMITATION OF ACTION, 32—42; PERPETUITIES; POWERS; SALE OF LAND; SETTLEMENTS, TRUSTS AND TRUSTEES; WILLS.

## I GENERAL.

1. *Recovery of Land—Title by Possession—Devisable Interest in Land—Statutory Title.*—H. C. in 1863 took possession of certain premises on the death of his father, who had left the same to his son David, who never asserted any title to the property since a house was built thereon with H. C.'s money. H. C. devised the property to his two sisters and his niece respectively for life, and after the death of the survivor to his nephew H. C. The sisters and niece, after the death of the testator H. C. in 1876, lived in the premises until the death of the last survivor, which took place in 1898. The defendant, a step-son of one of the tenants for life, lived for part of the time with them, and remained in possession. The testator's nephew H. C. died during the lifetime of the tenants for life, intestate and a bachelor, and his father, as heir-at-law, conveyed the premises to his son the plaintiff.

HELD—that the possession of H. C. the testator was adverse to his brother David, and that the interest was devisable by him by will, that he had exercised his power by devising it; that his sisters had taken possession under that will, and had recognised it, and that a statutory title had been acquired in H. C. and his devisees; that the remainderman's title accrued on the death of the last tenant for life in 1898, and that the plaintiff had established his title to the remainderman's interest in the property and was entitled to recover possession of the premises with mesne profits.

*Asher v. Whitlock* (1865) 1 L. R. 1 Q. B. 1. 35 L. J. Q. B. 17, 11 W. R. 26 followed.

*CALDER v. ALEXANDER* (1900) 16 T. L. R. 291 [—Phillimore, J.

2. *Interpretation—Meaning of "Income"—Deductions—Outgoings—Tithes—Rent-charges—Voluntary Abatement of Rent—Property not—Property personally occupied*—In calculating the amount of "income"—as the word is used in a popular sense—actually derived from landed estates for any particular year, it is right to deduct from the gross receipts sums payable by way of tithe and of rent-charges under the Improvement of Land Act, 1864, created by the predecessor in title of the person whose "income" is being calculated; and also such voluntary abatements of rent to tenants as are fully necessitated by the circumstances of the case. The owner of the "income" is not to be credited with rent for any part of the property which happens to be unlet during the particular year.

Decision of Kekewich J. (64 J. P. 248; 48 W. R. 165; 81 L. T. 675) affirmed.

*LADY BATEMAN v. FABER*, (1900) 48 W. R. [625; 83 L. T. 7—C. A.]

3. *Gavelkind—Partibility—Heirs of the same Degree—Collaterals—Degrees of Remoteness—Question of Law.*—The custom of gavelkind is not against the common law, but is in fact the common law of the land in Kent and is a question of law and not a question of fact. According to the custom of gavelkind, the partibility among heirs of the same degree extends to all degrees of remoteness. It does not stop at the relationship of brothers and their issue.

*IN RE CHENOWETH, WARD v. DWELLEY*, [1902]

[2 Ch. 488, 71 L. J. Ch. 739; 50 W. R. 663; 86 L. T. 890; 18 T. L. R. 702—Fairwell, J.]

4. *Chattels Real—Rent-charge on Leaseholds—Vendor's Lien for unpaid Purchase-money—Intestacy—Real Estate Charges Acts, 1854 (17 & 18 Vict. c. 113), s. 1, and 1877 (40 & 41 Vict. c. 34), s. 1.*—On the true construction of the Real Estate Charges Act, 1877, a chattel real (e.g., a rent-charge on leaseholds) passes upon an intestacy to the next of kin subject to a primary liability for any mortgage, or lien, by a vendor for unpaid purchase-moneys.

Decision of Byrne, J. ([1904] 1 Ch. 111; 73 L. J. Ch. 98; 20 T. L. R. 71) affirmed.

*IN RE FRASER, LOWTHER v. FRASER*, [1904]

[1 Ch. 726, 73 L. J. Ch. 481, 52 W. R. 516; 91 L. T. 48, 20 T. L. R. 414—C. A.]

5. *Presumption of Lost Grant—Covenant by Landlord to pay Quit-Rent—In Fact paid by Tenant for many Years.*—In 1708, H. who held lands subject to a quit-rent granted then to D. in fee subject to a rent, but H. covenanted to pay the quit-rent.

Since 1780 however, D.'s successors had in fact always paid this quit-rent.

HELD—that, in the absence of any explanation of these payments made by persons not apparently liable for them during 120 years, the Court would presume some lost grant under which such liability had in fact arisen.

*BOMFORD v. NEWVILLE* [1904] 1 Ir. R. 174—C. A.]

## II. ESTATES TAIL.

### (a) General

6. *Tenant in Tail—Maintenance during Minority—Direction to accumulate Surplus Income— upkeep of Family Mansion— upkeep of Establishment—Subscriptions to Local Charities*—A testator, the great-grandfather of the plaintiff, settled very large estates, about 12,000 a year in land and some half a million in personality, which was to be invested in land to be settled to uses similar to those devised by the will and directed that the trustees should out of the rents and profits of the same estates, raise and levy, for the maintenance, education, or benefit of any tenant in tail, a sum not exceeding



**Estates Tail—Continued.**

£500 in any one year until he attained the age of eighteen years, and for the residue of his minority the sum of £600 in any one year, and that the trustees should invest and accumulate the surplus of the yearly rents and profits for the benefit of such tenant in tail if he should attain full age.

**HELD**—that, as there were no negative words in the will forbidding the trustees to exercise their discretionary power of managing the estate by keeping up the family mansion-house as a home for the benefit of the infant tenant in tail and his family, an application asking that the trustees might be permitted to expend some £4,000 a year in keeping up the principal mansion-house on the property, and in paying the mother of the infant plaintiff a sum of money to enable an establishment to be kept up at the mansion-house, where the infant in tail, ten years old, and his three brothers might reside, and in expending out of the said sum a sum of £100 per annum for local charities, should be acceded to.

**IN RE WALKER, WALKER v. DUNCOMBE**, [1901]  
[1 Ch. 879; 70 L. J. Ch. 417; 49 W. R. 394;  
84 L. T. 193—Farwell, J.]

**7. Scottish Law of Entail—Provision for Widow—Restriction—Deductions from free Yearly Rent—What Deductions allowable—Entail Provisions Act, 1824** (5 Geo. 4, c. 87), s. 1.]—It is provided by sect. 1 of the Aberdeen Act, 1824, that the annuity to the widow of a deceased heir of entail shall not exceed one-third of the free yearly rent of the entailed estate after making certain specified deductions.

**HELD**—that in calculating a widow's annuity under this section the heir of entail in possession was not entitled to deduct the expense incurred by him in keeping up and managing the estate, such outgoings not being "burdens . . . affecting and burdening" the estate within the meaning of the statute.

Decision of Ct. of Sess. ((1903) 5 F. 48) affirmed.

**GALLOWAY v. GALLOWAY**, [1904] A. C. 50; 20  
[T. L. R. 58—H. L. (Sc.).]

**(b) Disentailing.**

**8. Real Estate—Income to A for Life—On A's Death Capital to be invested in Land to be held in strict Settlement—Disentailing Assurance of Money—Fines and Recoveries Act, 1833** (3 & 4 Will. 4, c. 74), ss. 1, 71.]—Under a will there was a strict settlement of certain real estate. The testator dealt with his personal estate, and he gave that subject to the payment of his debts and legacies and annuities to trustees upon trust to convert and invest and to pay the annual income thereof for the benefit of his sons J. H. and E. K. H. in equal shares during their joint lives, and upon the decease of either of them to pay the whole to the survivor for life, and upon the death of the survivor upon trust to convert and lay out and invest the moneys arising therefrom in the purchase of land to be settled in the

same strict settlement as his real estate. A disentailing deed was executed during the lifetime of E. K. H. by the tenant in tail with the consent of the person who, if E. K. H. had died and the money had been laid out in land, would have been tenant for life of the land so purchased. J. H. died without ever having had issue.

**HELD**—that according to the true construction of the will of the testator, and in the events which had happened, the disentailing assurance was effectual to bar the entail in the moneys of E. K. H. directed to be laid out in land.

**Fordham v. Fordham** ((1864) 34 Beav. 59; 13 W. R. 197; 11 Jur. (N.S.) 28) followed.

**IN RE HARVEY, HARVEY v. HARVEY**, [1901] 2  
[Ch. 290, 70 L. J. Ch. 694; 49 W. R. 695, 85  
L. T. 36—Byrne, J.]

**9. Alternative Gifts in Remainder—"After the Determination or in Defeasance of any such Estate Tail"—Unascertained Persons—Representation—Fines and Recoveries Act, 1833** (3 & 4 Will. 4, c. 74), s. 15.]—A testator by his will devised real estates to trustees on trust after providing for the management of the estates, &c., to pay surplus rents to the testator's widow for her life. The testator directed that after the decease of his widow the surplus rents should be accumulated for the purpose of paying off certain mortgages on the said estates, and further directed the trustees, after the determination of the period of accumulation and subject to his widow's life estate, to convey and assure the said real estates so that the same should stand limited to the use of G. in tail male, but if G. should be dead to the use of the person who should be the first heir male of the body of G. in tail male, with remainder to the person who should be entitled to the title of Earl of C. in tail male, with remainder to the testator's right heirs. By a codicil to his will the testator, after reciting the devise to the said G., thereby revoked the said devise and gave and devised the said estates after the death of the testator's widow to R. in tail male, with all the limitations as testator's will mentioned. The trust for accumulations being treated by the Court for the purpose of the application as at an end, and R., with the consent of the testator's widow, having barred the estate tail in a fund in Court representing the proceeds of the sale of part of the said estates, and assigned the same to trustees subject to the widow's life interest—

**HELD**—that R. took a vested estate tail in remainder expectant on the death of the testator's widow, that subsequent estates had been barred by the disentailing assurance as being estates to take effect in a certain event after, if not in defeasance of, the vested estate in tail male in remainder of R., and that the fund in Court might be paid out to the assignees of the testator's widow and R.

**LADY CARDIGAN v. CURZON HOWE** (2), [1901]  
[2 Ch. 479; 70 L. J. Ch. 763; 49 W. R. 715;  
17 T. L. R. 655—Byrne, J.]

**10. Fraud on Tenant in Tail in Remainder—Action to set aside Deed—Parties.**]—Assuming that a tenant in tail in remainder may under

**Estates Tail—Continued.**

some circumstances be entitled to have set aside a disentailing deed (and subsequent dealings with the estate) by a preceding tenant in tail as being obtained by fraud, yet the Court will not entertain his action unless the heir or devisee of the disentailing tenant be a party.

CORNEWALL *v* PRIOLEAU AND ANOTHER, (1904)  
[20 T. L. R. 606—Walton, J.]

**11. Consent of Protector—Given after Death of Tenant in Tail—Validity—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 15, 34, 40, 41, 42.]**—Where a tenant in tail executes a disentailing deed and dies, the consent of the protector can be effectively given after his death, so long as it is given in time for the deed to be enrolled within six months of its execution.

*In re Pier's Estate* ((1863) 14 Ir. Ch. Rep. 452) followed.

WHITMORE-SEARLE *v.* WHITMORE-SEARLE,  
[1907] 2 Ch. 332, 76 L. J. Ch. 576; 97  
L. T. 160—Kekewich, J.

**12. Recovery by Tenant in Tail—Uses declared—Resulting Use—Evidence—Interlineation and Alteration in a Deed—Presumption.]**—When uses are declared upon a recovery by a tenant in tail, which do not exhaust the fee, the use so far as unexhausted results to the recoveror.

*Tanner v. Radford* ((1833) 6 Sim. 21) explained and followed.

By settlement dated October 29th, 1800, executed on the marriage of P. L. and J. L., the lands of B. were granted to trustees to the use of P. L. for life with remainder to the use of the first and every other son of the marriage in tail male with remainders (as was held by the Court) to the heirs male of J. L., T. L., and P. L. (uncles of the husband).

In 1833 C. L., the eldest son of P. L. and J. L., married, and two deeds were then executed, both dated June 10th, 1833. By the first of these, after reciting that C. L. was desirous of barring the entail and acquiring the fee for the purposes thereafter mentioned, P. L. and C. L. granted the lands to G. for the joint lives of P. L. and G. to the intent that the said G. might become tenant of the freehold of the said lands in order that a recovery might be suffered. It was thereby declared that, after judgment should have been obtained and seisin taken upon such recovery, the lands should enure to W. J. and P. J. in fee simple for the uses of the settlement of equal date and for no other uses or purposes whatsoever.

By the settlement of equal date, the lands were conveyed to W. J. and P. J. in fee simple, to the use of C. L. for life, with remainder in tail male, with divers remainders over, but the settlement did not contain any ultimate limitation of the fee. It declared the uses of the recovery to be that the estate tail of C. L. and all reversions and remainders over might be barred, and that after judgment upon the recovery the lands should enure to W. J. and P. J. for ever for the uses and trusts therein before expressed, and for no other use, intent,

or purpose whatsoever. A recovery was duly suffered.

C. L. died in 1897, without issue, and all the other remainders under the settlement of 1833 failed. The plaintiff as heir of one of the remaindermen in the settlement of October 29th, 1800, brought an action against the devisees under the will of C. L., claiming to be entitled on the ground that as there was no limitation of the fee contained in the settlement of June 10th, 1833, the recovery only barred the entail for the purposes of the settlement, leaving a resulting use in favour of the prior settlement.

HELD by C. A. (affirming the decision of Porter, M.R.)—that the estate tail was barred absolutely, and the ultimate use in fee resulted in C. L.

LYNCH *v.* CLARKIN, [1900] 1 Ir. R. 178—M.R.

**13. Grant from the Crown—Reversion in Crown—If for Consideration cannot be barred—When Consideration will be presumed—If Voluntary may be barred—Annuity charged on Fee Farm Rents—King de jure—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 18—31 & 35 Hen. 8, c. 20, s. 2.]**—A grant of an annuity of £100 out of "certain fee farm and other rents" in the hands of trustees to the widow of P. and after her death to the heirs of the body of P. is of the nature of real estate and well entailed.

*Giffard v. Worthington* ((1846) an unreported suit in connection with the same matter) followed.

If the Crown for good consideration (*e.g.*, services rendered) grants an estate tail with reversion to the Crown, the reversion cannot be barred, for the Fines and Recoveries Act, 1833, does not apply to tenants in tail within the Act, 34 & 35 Hen. 8, c. 20.

If there was no consideration, the Act of 1833 applies, and the estate tail may be barred: unless, however, the grant shows clearly that there was no consideration, the Court will infer consideration from lapse of time.

Services rendered to a king *de jure*, but a fugitive, are a good consideration for a grant made by him afterwards when king *de facto*.

ROBINSON *v.* GIFFARD, [1903] 1 Ch. 865; 72  
[L. J. Ch. 757; 11 W. R. 551; 88 L. T. 348;  
19 T. L. R. 337—Farwell, J.]

**14. Protector—Owner of Prior Estate—Void Accumulation Clause—Heir—Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), s. 1—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 22, 27.]**—H. devised lands to trustees during the lives of three persons upon trust to pay annuities to them out of the rents and to accumulate the surplus until the death of the last of them for the benefit of his grandchildren; upon the death of the last survivor the lands were devised to J. in tail. After twenty-one years, when the trust for accumulation became void, the heir took the surplus pending the death of the last surviving annuitant.

Before such death occurred J. executed a disentailing deed.

HELD—that such deed was effective since neither the heir nor the grandchildren could be

**Estates Tail—Continued.**

regarded as protectors of the settlement. the former was excluded by sect 27 of the Fines and Recoveries Act, 1833, and the latter were not persons who "would have been entitled if no absolute disposition had been made."

IN RE JOHN HUGHES, [1906] 2 Ch. 642, 75 [L. J. Ch. 784, 95 L. T. 379—Eady, J.

**15. Estate settled by Statute—Coal Duties—Redemption by Annuity—Sale of Annuity for Lump Sum—Power to lay out Money in Land to be held for same Estates—Power to bar Entail—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 15, 18.]—**Certain duties on coal shipped or sold out of the Tyne were granted by Charles II. by letters patent to the first Duke of Richmond and the heirs of his body, by subsequent statutes the duties were exchanged for an annuity, and the latter sold for a lump sum, which was laid out in the purchase of land to be held to the same persons and for the same estates as the original duties. One of the statutes expressly provided that in default of heirs of the body of the first duke the annuity should revert to the Crown, and in one or more others the Crown's reversion was specially mentioned.

HELD—that the coal duties were entailable as being a "tenement" within the statute *de Donis*, that the mere fact that the estate tail was created or governed by an Act of Parliament did not prevent the tenant in tail from barring the entail under sect. 15 of the Fines and Recoveries Act, 1833; that the Duke of Richmond for the time being was "actual tenant in tail" within that section and could bar the entail, and the fact that the Crown's reversion was specially mentioned in some of the Acts did not take away the power to bar that reversion.

ATTORNEY-GENERAL v DUKE OF RICHMOND [AND OTHERS (No. 2), [1907] 2 K. B. 940; 76 L. J. K. B. 1049, 22 T. L. R. 742—Bray, J.

**III. LAND TRANSFER.**

**16. Jurisdiction of Court—Application under Part I. of Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2).]**—The exclusive jurisdiction of the senior judge under the Land Transfer Act of 1897 is limited to Part II. of that Act.

IN RE WALBECK, [1904] W. N. 204—Kekewich, J.

**17 Registration—Rectification—Fraud—Indemnity—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7.]**—The solicitor for the registered owner of a charge upon certain land forged the signature of the owner to a transfer of the charge and to an authority to the transferee to pay the money to the solicitor. The transfer was duly registered. Neither the owner nor transferee was guilty of any negligence. The owner, upon discovering the fraud, obtained from the Court an order for rectifying the register by removing the name of the transferee therefrom. The transferee thereupon claimed indemnity under sect. 7 of the Land Transfer Act, 1897, out of the insurance fund provided by the Act.

HELD—that the transferee, not having had a transfer from some person previously on the register, and therefore not having relied upon the register, had no claim to be indemnified.

The act of the registrar in putting a transferee's name on the register is merely ministerial, and confers on him no right which he has not acquired previously; it is not a judicial act, as in the case of the registration of a person first registered as the proprietor of land.

Decision of Kekewich, J. (53 W. R. 541, 92 L. T. 621, 21 T. L. R. 458) reversed.

ATTORNEY-GENERAL v. ODELL, [1906] 2 Ch. [47; 75 L. J. Ch. 425; 54 W. R. 566; 94 L. T. 659; 22 T. L. R. 466—C. A.

**IV. MERGER.**

**18. Equitable Estates—Intention—Expressed Grant of Fee—Leasehold Title in Equity—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 63.]**—As regards estates which are purely equitable the question as to merger is one of intention.

H. was entitled to certain houses for terms of ninety-nine years (less one day) by way of mortgage. W. was entitled to the same houses for the terms of ninety-nine years subject to H.'s mortgage and the sub-demise contained therein; and H. was entitled to the reversion in fee expectant on the determination of the terms of ninety-nine years. H. conveyed his reversion to W. Two days afterwards W. conveyed the houses, "subject to and with the benefit of the" terms which had been granted to the plaintiffs. Three months afterwards, on July 12th, 1893, W. assigned the equity of redemption in the terms of ninety-nine years to H. On December 20th, 1894, H. conveyed the houses to the defendant in fee by way of mortgage. The defendant had no notice of the plaintiffs' title.

HELD—that H. and W. dealt with one another on the footing that the leases were, or were to be deemed to be, in existence, that it would be inequitable to allow W. to treat the leases as at an end, and as the plaintiffs purchased from W. expressly subject to the leases, they could be in no better position in equity.

HELD, also, that as the defendant had offered to accept from the plaintiffs legal leases of the houses on the same terms as the old, the defendant was entitled in equity to the houses for the respective residues of the terms, but subject to the payment of the respective rents and to the observance and performance of the respective covenants and conditions.

THELLUSSON v. LIDDARD, [1900] 2 Ch. 635; 69 [L. J. Ch. 673; 49 W. R. 10, 82 L. T. 753—Stirling, J.

**19. Equitable and Legal Estates—Equitable Tenants in Common—Assignment to them of a Legal Estate as Joint Tenants—Equal and Co-extensive Estate—Shadowy Difference.]**—The rule that where equitable and legal estates, equal and co-extensive, unite in the same persons the former merges, or, in other words, a person

**Merger—Continued.**

cannot be trustee for himself, applies to a case where such estate unites in two or more persons.

A testator bequeathed a leasehold messuage to a trustee in trust for two of his daughters in equal shares as tenants in common. The trustee assigned the messuage to the daughters as joint tenants at their request.

**HELD**—that the difference in interest between the two estates was so small and shadowy it raised no presumption against merger, and that the assignment created a joint tenancy in law and equity.

*Selby v. Austen* ((1797) 3 Ves. 339; 1 R. R. 10) followed and extended.

**IN RE SELOUS, THOMSON v. SELOUS**, [1901] 1 Ch. 921; 70 L. J. Ch. 402; 49 W. R. 440; 84 L. T. 318—Farwell, J.

**20 Intention**—A. being entitled to an estate for life in the lands of B., subject to (among others) a first incumbrance for £900, and a charge for younger children, with power to mortgage, purchased the incumbrance, which was conveyed to a trustee for him. He mortgaged the lands subject to the charges. By his will he directed certain other lands to be sold for the purpose of paying off the charges and incumbrances on the lands of B., and he empowered his trustees, during the minority of his son (to whom he devised the lands of B., and bequeathed his residuary personal estate), to apply the surplus rents of all the lands, and also to sell his personal estate, and apply the proceeds thereof, for the same purpose. By a codicil he increased the amount of the charge for younger children.

**HELD**—that the charge of £900 merged.

**IN RE LLOYD'S ESTATE**, [1903] 1 Ir. R. 144—[Ross, J.]

**21. Intention—Life Tenant paying off Charge—Erroneous Belief—Presumption of Intention to keep Charge alive**—A life tenant of land, believing himself to be owner in fee paid off a charge and took an absolute release of the estate in the lands with the intention of extinguishing the charge. On discovering his mistake he took legal advice as to his power to keep the charge alive for his own benefit; but when advised to take legal proceedings, he declined to do so.

**HELD**—that the life tenant was entitled on discovering his error, to keep the charge alive, and that his subsequent acts and declarations as proved in evidence, established sufficiently his intention to do so.

*CONNOLLY v. BARTER* [1904] 1 Ir. R. 130—(C. A.)

**22 Intention—Unraised Portion charged on Land—Death of Portioner—Landowner his Next of Kin—No Administration of his Estate**—A. was entitled to an unraised portion charged upon an estate of which his father was owner in fee simple. A died intestate and his father never took out letters of administration.

**HELD**—that as, upon the facts, it would have been to the father's interest to merge the charge, his interest therein subject to A.'s debts must be deemed to have merged in the land.

*Swabey v. Swabey* ((1846, 1848) 15 Sim. 106, 502) followed.

*In re Radcliffe* ([1892] 1 Ch. 227; 61 L. J. Ch. 186; 40 W. R. 323, 66 L. T. 363—C. A.) distinguished.

**IN RE FRENCH-BREWSTER, WALTERS v. [FRENCH-BREWSTER]**, [1904] 1 Ch. 713; 73 L. J. Ch. 405; 52 W. R. 377; 90 L. T. 378—Eady, J.

**23. Intention—Equitable Tenant for Life with Contingent Remainder in Fee—Lands subject to Charge—Subsequent Vesting of Charge in Life Tenant—Direction to Sell and Devise of Principal Sum to be realised by the Sale.**—Under a settlement made in 1871, P. was entitled, as equitable tenant for life, to certain lands, with remainder in fee in the event of his dying without issue, subject to an interposed life estate in his wife. At the time of the settlement the lands were subject to a charge in favour of A. In 1878 P. made his will, wherein, after reciting that by his marriage settlement he had given his wife a life estate in the lands, he proceeded as follows: "But if it please Providence that I leave no child, then, from and after the decease of my said wife, I will bequeath and direct that the said lands . . . shall be sold . . . and I hereby leave and bequeath the principal sum to be realised by the sale of said property" upon certain trusts. A died in 1879, bequeathing the charge on the said lands to P., who as her sole executor obtained probate. Subsequently P. executed three codicils to his will, by each of which he disposed solely of sums of Government stock, leaving them to his wife for life, and after her death, upon trusts similar to those declared in his will. P. died in 1884. On a question subsequently arising as to whether the charge was still subsisting—

**HELD** first, that on the evidence the inference to be drawn was that P. intended the charge to merge; and secondly, that (apart from this question) the words in the will 'principal sum to be realised by the sale' were sufficient to pass the entire net proceeds of sale, including the charge.

**IN RE BUTLIN'S ESTATE**, [1907] 1 Ir. R. 159—[Wylie, J.]

**RECEIPT.**

See EVIDENCE REVENUE 74—77

**RECEIVERS.**

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### III. IN GENERAL . . . . . COL. 279

See also AGENCY, 57; BANKRUPTCY, CHOSE IN ACTION; COMPANIES, 34, 230—238; LUNATICS, MORTGAGES; RAILWAYS AND CANALS, 85.

#### I. IN PARTNERSHIP PROCEEDINGS.

1 *Bankruptcy of One Partner—Solicitors—Conduct of Action—Practice.*—A receiver appointed on the application of the plaintiff in a partnership action cannot be represented by the plaintiff's solicitors in matters in which his interests as such receiver conflict with the plaintiff's interests.

BLOOMER v. CURRIE, (1907) 51 Sol. Jo. 277—[Joyce, J.]

2. *Dissolution—Receiver and Manager—Management—Interference—Injunction.*—The plaintiff, one of two brothers who carried on a business in partnership, brought an action for dissolution of partnership against the other, of whose mismanagement he complained. An order was made appointing a receiver and manager, who dismissed the defendant from the management, and afterwards an order was made for the dissolution of the partnership, the taking of the partnership accounts, and the realisation of the partnership effects.

The defendant set up and managed a rival business under a similar name, which he alleged belonged to his sons as partners, and for which his wife and her sisters advanced the capital.

On a motion by the plaintiff for an injunction to restrain the defendant from interfering with the receiver's management of the old business, it was proved that the defendant had spread rumours to the effect that the old business would shortly be closed and sold by auction, and had induced some of the employes of the old business to leave, after giving due notice, and to enter the employment of the new business and also had attempted to obtain from the landlord the tenancy of a field which had long been in the occupation of the old partnership, and used in the old business.

HELD—that any act calculated to injure property under the control of the receiver and manager was an interference with the management of the receiver and manager, whom the Court was bound to protect; and an injunction was granted restraining the defendant from interfering with the management of the receiver and manager.

DIXON v. DIXON, (1903) 89 L. T. 272, [1904] [1 Ch. 161; 73 L. J. Ch. 103—Eady, J.]

3. *Dissolution—Surviving Partner appointed Receiver—Remuneration—Receiver indebted to Partnership.*—A surviving partner who was appointed receiver by the Court upon the usual terms proved to be indebted to the partnership.

HELD—that he was nevertheless entitled to be paid his remuneration and costs as receiver out

of the moneys received by him, although he was unable to pay his debt to the partnership.

DAVY v. SCARTH, [1903] 1 Ch. 55; 75 L. J. Ch. [22; 54 W. R. 155—Farwell J.]

#### II. EQUITABLE EXECUTION.

4. *Book Debts—Charge on—Debts already Received.*—The defendant had charged certain book debts in favour of the plaintiffs, who now applied for a receiver. It being shown that the defendant had already got in the debts and spent the proceeds—

HELD—that no order could be made.

HARPER v. MCINTYRE, (1907) 51 Sol. Jo. 701—[Pickford, J.]

5. *Contract for Sale of Land—Creditor of Purchaser appointing Receiver—Contract rescinded upon Payment of Money by Vendor to Purchaser—Rights of Receiver.*—In 1901, A., who had agreed to buy land of B., paid his deposit and took possession; in 1902 a judgment creditor of A. got himself appointed receiver of A.'s interest in the land, and gave notice to B., but did not perfect his security as receiver till May, 1903. In the meantime, in January, 1903, after litigation, B. agreed to rescind the contract, and A. agreed to give up possession upon receiving £110 (such sum not to be considered as part repayment of the deposit).

HELD—(1) that, as the contract fell through before conveyance, B.'s relationship to A. between 1901-3 never became that of trustee and *cestui que trust* (*Rayner v. Preston* ((1881) 18 Ch. 1; 50 L. J. Ch. 472; 45 J. P. 829; 29 W. R. 546; 44 L. T. 787—C. A.) followed), and that therefore the receiver had no charge upon the land.

(2) That in the case of personalty, a receiver's title does not, upon his perfecting his security, date back to the date of his appointment, and that, therefore, as he was not in a position in January, 1903, to give a receipt for the £110, he could not now claim it from B.

RIDOUT v. FOWLER, [1904] 1 Ch. 658, 73 L. J. [Ch. 325; 90 L. T. 147—Farwell, J.]

Affirmed—on the ground that A., the purchaser, never had any interest in the land, and that the £110 was paid to him on the basis that he had no such interest.

[1904] 2 Ch. 98; 73 L. J. Ch. 579; 53 W. R. 42; [91 L. T. 509—C. A.]

6. *National Schoolmaster—Instalment of Salary actually due—Public Policy.*—The Court has jurisdiction to appoint a receiver over an instalment of a National schoolmaster's salary which has actually become due.

It is not against public policy that an instalment of such a salary, when actually due, should be liable to execution.

PICTON v. CULLEN, [1900] 2 Ir. R. 612—C. A.

7. *Order appointing—Charge or Sale—“Actual Delivery in Execution”—Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 1.*—The

**Equitable Execution—Continued.**

defendants in a probate action having been condemned in costs, the plaintiff obtained an order from the Probate Division for the appointment of a receiver of the rents and profits of real estate vested in remainder in the defendants. On an application in the Chancery Division by the plaintiff for a charge on and sale of such remainder:—

**HELD**—that no such charge or sale could be enforced, as the appointment of a receiver did not constitute an “actual delivery in execution” of the remainder within the meaning of sect. 1 of the Judgments Act, 1864.

IN RE HARRISON AND BOTTOMLEY, [1899] 1 [Ch. 465; 68 L. J. Ch. 208; 47 W. R. 307, 80 L. T. 29—C. A.

**8 Receivership Order—Subsequent Stop Orders and Charging Orders—Priority**—The residuary legatee under a will brought an action to administer the estate. She had encumbered her interest under the will up to its full value. The personal estate was realised and the proceeds paid into Court. Before the administration action was commenced, one of the encumbrancers who had recovered judgment obtained a receivership order by way of equitable execution and gave notice thereof on the same day to the executor of the will. Subsequently some of the other encumbrancers obtained stop orders and charging orders on the fund in Court.

**HELD**—that the creditor who had obtained the receivership order had priority over the other encumbrancers.

IN RE MARQUIS OF ANGLESEY, DE GALVE v. GARDNER, [1903] 2 Ch. 727; 72 L. J. Ch. 782; 19 T. L. R. 719; 52 W. R. 124; 89 L. T. 584—Eady, J.

**9. Recovery of Land—Judgment—Writ of Possession—Leave of Court**—Where a mortgagee of leaseholds has obtained the appointment by the Court of a receiver, the lessor who by leave of the Court brings an action for recovery of the land against the lessee, and recovers judgment, cannot proceed to enforce the judgment as against the receiver in possession by writ of possession without the leave of the Court.

MORRIS v. BAKER, [1901] 73 L. J. Ch 143; 52 [W. R. 207—Buckley, J.

**III. IN GENERAL.**

**10. Indemnity against Personal Loss—Costs of defending Action—Benefit of Estate—Allegations of Fraud**—An action was brought against a receiver, making against him charges of misconduct in regard to the administration of the trust estate

**HELD**—that he was not entitled to be indemnified out of the trust estate against the costs incurred by him in successfully defending such action. The trust estate did not, and could not, benefit by his defending the action; and it is only on the ground of benefit to the estate that a receiver is entitled to be indemnified in respect

of the costs incurred by him in defending actions or otherwise discharging his duties.

Walters v. Woodbridge ((1873) 7 Ch. D. 504; 47 L. J. Ch 516; 26 W. R. 469; 38 L. T. 83) applied.

IN RE DUNN, BRINKLOW v. SINGLETON, [1904] [1 Ch. 648; 73 L. J. Ch. 425; 52 W. R. 345; 91 L. T. 135—Byrne, J.

**11. Rent of Premises—Action for Use and Occupation—Liability.**—A receiver and manager appointed by the Court is not personally liable for rent, nor for use and occupation.

JUSTICE v. JAMES, (1898) 14 T. L. R. 385—[Ridley, J.

**12. Rights and Duties—Receiver appointed in Partition Action—Mortgagee selling by Leave of Court—Purchase by Receiver—Trustee.**—One of four owners of a house was appointed receiver in a partition action: by leave of the Court a mortgagee sold the house under his power of sale and the receiver bought it.

**HELD**—that although the sale did not take place under a decree in the action, she was not at liberty to do so without leave of the Court; that she was entitled to a charge on the house for purchase-money and interest, but subject thereto was a trustee for herself and her co-owners.

Aken v. Bond (Falc. & K. 196, 213, 214) applied.

NUGENT v. NUGENT, [1907] 2 Ch. 293; 76 L. J. [Ch. 614; 97 L. T. 279; 23 T. L. R. 660—Eady, J.

**RECEIVING STOLEN GOODS.**

See CRIMINAL LAW AND PROCEDURE.

**RECOGNISANCES.**

See CRIMINAL LAW AND PROCEDURE.

**RECREATION GROUNDS.**

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**RECTIFICATION OF INSTRUMENTS.**

See CONTRACTS.

**REFORMATORIES.**

See PRISONS AND REFORMATORIES.

**REGISTRATION OF BIRTHS,  
MARRIAGES, AND  
DEATHS.**

See HUSBAND AND WIFE, INFANTS,  
EXECUTORS AND ADMINISTRATORS;  
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**REGISTRATION OF LAND.**

See CHARITIES; REAL PROPERTY AND  
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**REGISTRATION OF VOTERS.**

See ELECTIONS.

**RELEASE.**

See CONTRACT; REAL PROPERTY; TRUST.

**REMAINDER.**

See REAL PROPERTY AND CHATTELS  
REAL.

**RENT.**

See LANDLORD AND TENANT.

**RENT CHARGES AND  
ANNUITIES.**

I. RENT CHARGES . . . . .	COL. 281
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**I. RENT CHARGES.**

1. *Creation—Use upon a Use—Express Trust.*]  
—A rent charge may be created after a use, so

as not to transgress the rule that a use cannot be limited upon a use. The gift of a "rent" by a limitation of a use upon a use does not necessarily create a trust or equitable estate, but may create a new legal estate and give the seisin in the "rent" to the annuitant, and such a "rent" will not be deemed a "use upon a use"

HANLEY v. CARROLL, [1907] 1 Ir R. 166—C. A.

2. *Reservation and Grant of Rent Charge in the same Deed—Construction—Exemption from Part of Land—Apportionment of Rent Charge—Value or Acreage.*—By a deed of feoffment made in 1840, A., in consideration of the rent thereinafter reserved, enfeoffed land to B. and his heirs, to the use that A. and his heirs should receive thereout the said rent, and subject thereto and charged as aforesaid, to the usual uses to bar dower in favour of B., and, by the same deed, "for the considerations aforesaid," B. granted to A. and his heirs the above-mentioned rent and covenanted to pay the same rent. Part of the land having been recently recovered by title paramount, a question arose whether the rent charge ought to be apportioned or still continue to be payable in full.

HELD—that, a rent charge being reserved to A. in fee on the face of the deed in priority to B.'s estate in fee, no effect could be given to B.'s grant to A. in fee of the same rent. B. took nothing except subject to and charged with the rent.

HELD, therefore, according to the distinction drawn in Co. Litt, s. 222, p. 148 b, between the grant of a rent and the reservation of a rent in respect of apportionment—that the above-mentioned rent, being a rent reserved, was apportionable according to the value of the land and not according to acreage.

HARTLEY v. MADDOCKS, [1899] 2 Ch. 199; 68 [L. J. Ch. 496; 47 W. R. 573; 80 L. T. 755—Cozens-Hardy, J.

3. *Term to secure Rent Charge—Arrears raisable by Sale of the Inheritance*—A legal rent charge was by deed charged upon and payable out of land, and besides the usual powers of distress and entry, a term was limited by the deed to the use of trustees upon the usual trusts if the rent charge fell into arrear by mortgage or demise for all or part of the term, or by other reasonable means to raise the arrears.

HELD—that the limiting of the term negated the right to have arrears raised by a sale of the inheritance.

Hall v. Hurt ((1861) 2 Joh. & Hem. 76) followed.

BLACKBURN v. HOPE-EDWARDES, (1900) 48 [W R. 701; 83 L. T. 370; 1 Ch 419; 70 L. J. Ch. 99—Buckley, J.

**II. ANNUITIES**

And see INCOME TAX, 64—67.

4. *Charged on Money of Tenant in Common—Power to Distrain—Rents and Profits of Entirety less than Annuity.*—J. W. by will devised lands

**Annuities—Continued.**

and premises to his two granddaughters, A. and H., as tenants in common in tail. A. married H. A., and H. married the defendant. On her marriage H. by a deed of settlement disentailed her moiety and settled the same upon trust to pay the income to the defendant for life until he should be declared bankrupt; then, if no child (which happened), if she died in the defendant's lifetime (which happened), in default of appointment for her next of kin. The defendant's wife died in 1863, and in 1878 the defendant became bankrupt. After this A. A. became entitled to the whole of the rents and profits of the lands and premises.

In 1881 the defendant, who had obtained his discharge in bankruptcy, contemplated marrying again. Whereupon A. A. by a deed agreed to grant to the defendant the annual sum of £300 during his life, charged upon the moiety settled by the defendant's first wife. Under the deed, if the annuity became in arrear, the defendant had power to distrain all the premises charged. It was agreed that the defendant had power to distrain on the entirety of the lands, one undivided moiety of which was charged with the annuity. The rental value of the undivided moiety became less than £300 until the rents and profits of the entirety of the lands and premises produced only half that amount.

**HELD**—that the defendant was not entitled to distrain for the whole of the £300, which would exhaust all the rents and profits of the entire property; and was not entitled to distrain for more than one-half of the rents and profits of the whole.

ASHWIN v. BULLOCK, (1899) 81 L. T. 48—  
[Bucknill, J.]

**5. Covenant to pay Annuity—Evidence of Continuance of Life of Annuitant—R. S. C., Ord. 54A.**—The Court has no jurisdiction on an originating summons, under Ord. 54A, to declare what evidence a person, who has covenanted by deed to pay an annuity, is entitled to have produced as to the continuance of the life of the annuitant.

HUNT v. MAW, (1907) 52 Sol. Jo. 58—C. A.

**6. Duration of Annuity—Husband and Wife—Separation Deed—Covenant to pay Annuity—“So long as she shall continue to live separate and apart”—Death of Husband before Wife.**—A husband by a separation deed covenanted to pay to his wife an annuity during her life if she should so long continue to live separate and apart. The husband pre-deceased his wife.

**HELD**—that upon his death the annuity ceased, as she could no longer be said to be living separate and apart.

IN RE GILLING, PROCTOR v. WATKINS, (1905)  
[74 L. J. Ch. 335, 53 W. R. 427; 92 L. T.  
533—Kekewich, J.]

**7. Duration of Annuity—Terminable or Perpetual.**—By his marriage settlement, R. being entitled to certain lands held under a lease for

twenty-one years, customarily renewable, and also to certain other lands held under a lease for a term of sixty-one years, demised the former to the trustees of the settlement for the term of one hundred years, and the latter for a term of thirty years, upon trust, after the solemnisation of the intended marriage, for himself and his assigns, during the residue of the said terms of one hundred years and thirty years, if he should so long live, and from and after his death, during the continuance of the said terms, in trust to permit his wife, yearly during as many years of the said term as she should survive him, to have, receive, and take out of the said premises an annual sum or yearly rent-charge of £300, as and for her jointure, and also the said annuity or yearly rent-charge of £300 to be charged and chargeable on the said lands for ever in trust, ultimately for the issue of the marriage. The lands comprised in the first lease were subsequently conveyed to R. in fee simple.

**HELD**—that the annuity was terminable by the expiration of the terms vested in the trustees.

IN RE FINLAY'S ESTATE, [1907] 1 Ir. R. 24—  
[Wylie, J.]

**REPAIRS AND IMPROVEMENTS.**

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**REPLEVIN.**

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## RESTITUTION OF PROPERTY.

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## REVENUE.

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### I. EXCISE.

And see AUCTIONS, No 17, GAME,  
Nos. 3, 6.

#### (a) Carriage Duty.

1. *Dog Cart*—“Which is constructed or adapted for use, and is used, solely for the conveyance of any Goods”—*Customs and Inland Revenue Act, 1888* (51 & 52 Vict. c. 8), s. 4 (3).—By sect. 4 (3) of the Customs and Inland Revenue Act, 1888, no licence is required for “a waggon, cart, or other such vehicle which is constructed or adapted for use, and is used, solely for the conveyance of any goods or burden in the course of trade or husbandry,” provided it bears the owner's name, &c.

The word “adapted” must not be construed too narrowly, for even a brougham is capable of carrying some kinds of produce; it does not

follow, however, that a cart, primarily used for carrying produce, is not within the exemption, merely because it is capable, so far as construction goes, of use for carrying persons.

HELD—that a spring gig with cushioned seats, handrails, rubber floor-mats, stained and varnished sides, &c., was not within the exemption, although some market produce was in it on the day in question.

HANWORTH v. WILLIAMS, (1903) 67 J. P. 315; 19 T. L. R. 384—Div. Ct.

2. *Governess Cart*—“Constructed or adapted for Use and is used solely for the Conveyance of any Goods”—*Customs and Inland Revenue Act, 1888* (51 & 52 Vict. c. 8), s. 4, sub-s. 3.—By sect. 4, sub-sect. 3, of the Customs and Inland Revenue Act, 1888, the word “carriage,” for the purpose of carriage duty, is not to include “a waggon, cart, or other such vehicle which is constructed or adapted for use, and is used solely for the conveyance of any goods or burden in the course of trade or husbandry.”

HELD—that the word “solely” governs the words “constructed or adapted for use” as well as the words “and is used”; and that therefore a governess cart, though said to be only used for business purpose, was taxable.

Hanworth v. Williams (1903) 67 J. P. 315; 19 T. L. R. 384—Dictum of Lord Alverstone, C.J., *supra* not followed.

MOORE v. LEWIS, [1906] 1 K. B. 27; 75 L. J. [K. B. 89, 70 J. P. 26, 54 W. R. 194; 93 L. T. 812, 22 T. L. R. 51; 21 Cox, C. C. 60—Div. Ct.

3. *Governess Cart*—“Constructed or adapted for Use and used solely for the Conveyance of any Goods or Burden in the course of Trade or Husbandry”—*Customs and Inland Revenue Act, 1888* (51 & 52 Vict. c. 8), s. 4 (3).—The respondent, a travelling upholsterer, was possessed of a governess cart, which he used for the purposes of his trade and to collect debts and obtain orders.

HELD—that the carriage was neither “constructed or adapted solely” nor “used solely for the conveyance of goods or burden in the course of trade or husbandry,” and did not come within the exemption given by sect. 4 (3) of the Customs and Inland Revenue Act, 1888

WITHAM v. MORRIS, (1906) 70 J. P. 11; 93 [L. T. 813, 21 Cox, C. C. 64—Div. Ct.

4. *Motor Bicycle—Liability to Duty as a Carriage*—*Customs and Inland Revenue Act, 1888* (51 & 52 Vict. c. 8), s. 4.—The respondent was summoned for keeping a motor bicycle without a proper licence in contravention of the Customs and Inland Revenue Act, 1888.

HELD—that a motor bicycle was a carriage within the meaning of that Act and was liable to the excise duty claimed in respect of it.

O'DONOGHUE v. MOON, (1904) 68 J. P. 349; 90 [L. T. 843; 20 T. L. R. 495—Div. Ct.

**Excise—Continued.**

**5. Trams on Light Railway—Customs and Inland Revenue Act, 1888** (51 & 52 Vict. c. 8), s. 4.]—A light railway constructed under the Light Railways Act, 1896, is a railway within sect. 4 of the Customs and Inland Revenue Act, 1888, which exempts from the licence duty on carriages any carriage drawn or propelled upon a railway by steam, electricity or other mechanical power.

*Wakefield and District Light Ry. Co. v. Wakefield Corporation* (see **RATES**, No. 10) applied.

**ATTORNEY-GENERAL v. YORKSHIRE (WOOLLEN [DISTRICT] ELECTRIC TRAMWAYS, LD., [1907]** 2 K. B. 991, 71 J. P. 506, 97 L. T. 343, 23 T. L. R. 712, 5 L. G. R. 1098—Bray, J.

**6. Farm Cart—Exemptions—Revenue Act, 1869** (32 & 33 Vict. c. 14), s. 27—*Customs and Inland Revenue Act, 1888* (51 Vict. c. 8), s. 4 (3).]—A cart adapted for use and used solely for farm purposes is exempt from the carriage tax under sect. 4 (3) of the Customs and Inland Revenue Act, 1888, even though used occasionally by the owner for the purpose of driving his farm hands to and from their work.

**LATCHFORD v. KELSEY, (1907)** 71 J. P. 225; 96 [L. T. 620, 23 T. L. R. 416—Div. Ct.

**7. Conviction—Fine—First Offence—Second Offence—7 & 8 Geo. 4, c. 53, s. 78—42 & 43 Vict. c. 49, s. 4—32 & 33 Vict. c. 14, s. 27.]—Sect. 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), as far as reduction of fines is concerned applies only to first offences. Fines for second and subsequent offences are regulated by 7 & 8 Geo. 4, c. 53, s. 78, under which such fines cannot be reduced below one-fourth of their full amount as imposed by statute.**

To constitute a second offence under 32 & 33 Vict. c. 14, s. 27, it is not necessary to be convicted twice in the same year of keeping a carriage without having a licence for that year. A conviction in one year of keeping a carriage without a licence for that year following a conviction in a previous year for keeping a carriage without a licence for that year is a second conviction for the same offence.

**PHILLIPS v. STEPHENS, (1898)** 79 L. T. 280; 62 [J. P. 789; 19 Cox, C. C. 172—Div. Ct.

**(b) Dealer in Plate.**

**8. Coupon Competition instituted by Tea Merchants—Watches presented to Persons producing Coupons showing large Purchases of Tea—Inland Revenue Act, 1867** (30 & 31 Vict. c. 90), ss. 1, 3.]—A firm of tea merchants instituted a coupon competition, by which at stated periods persons producing the largest number of coupons taken from packets of tea purchased from the firm became entitled to prizes consisting of various articles, from a cottage to articles of common household use, amongst which were certain articles of "plate." Various persons received articles of plate under the terms of this competition,

**HELD**—that there was evidence of a "trading in" or of a "sale of" plate within the meaning of sect. 1 of the Inland Revenue Act, 1867, on which justices could convict under sect. 3 of that Act.

**SCOTT & Co., LD. v. SOLOMON, [1905]** 1 K. B. 577; 74 L. J. K. B. 262; 69 J. P. 137; 53 W. R. 459; 92 L. T. 325; 21 T. L. R. 230—Div. Ct.

**(c) Male Servants.**

**9. Apprentice in a Racing Stable—Customs and Inland Revenue Act, 1869** (32 & 33 Vict. c. 14), ss. 18, 19.]—The respondent, a trainer of racehorses, was summoned for keeping a male servant without the necessary licence. A lad had been bound to him by a contract of apprenticeship, by which the respondent undertook to find the apprentice clothing and wages and instruct him in riding. In the course of such instruction the apprentice carried out duties as a stableman, which would, if he were merely engaged otherwise than under the contract of apprenticeship, render a licence necessary for him as a male servant.

**HELD**—that the respondent was not liable to take out a licence in respect of such apprentice.

**HORAN v. HAYHOR, [1904]** 1 K. B. 288; 73 L. J. [K. B. 133; 68 J. P. 102; 52 W. R. 231; 90 L. T. 12; 20 T. L. R. 118—Div. Ct.

**10. Steward of Working Men's Club—Customs and Inland Revenue Act, 1869** (32 & 33 Vict. c. 14), ss. 18, 19.]—By sect. 18 of the Customs and Inland Revenue Act, 1869, there shall be paid for every male servant 15s.

By sub-sect. 3 of sect. 19 "the term 'male servant' means and includes any male servant employed either wholly or partially in any of the following capacities; that is to say . . . house steward . . . or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called."

The respondents, the committee of a working men's club, had power to discharge the steward, who had to be a member of the club, and was paid by the committee 38s. a week. He served at a bar at a window, but did not leave such bar to wait on the members, but passed what was ordered through the window.

Besides accounting for moneys he received, this was the only service rendered by him.

No licence had been taken out by the defendants in respect of such steward.

**HELD**—that such steward was a "male servant" within the Act, and that the respondents should have taken out a licence in respect of him.

**SOLOMON v. CROPPER, (1898)** 79 L. T. 301, 62 [J. P. 758—Div. Ct.

**11 "Under-gardener"—Labourer—Customs and Inland Revenue Act, 1869** (32 & 33 Vict. c. 14), ss. 18, 19 (3)—*Customs and Inland Revenue Act, 1876* (39 & 40 Vict. c. 16), s. 5.]—The respondent employed a number of men in his garden under a head-gardener in digging, watering, planting

**Excise—Continued.**

vegetables, weeding, mowing, sweeping, and cutting evergreens. The justices held they were labourers, and not under-gardeners, and that no licence was necessary to be taken out for them.

HELD—that the question whether the men were under-gardeners or not was a question of fact, but upon the evidence the justices were justified in finding that they were “labourers,” and not under-gardeners, and that the respondent was not liable to pay a licence duty in respect of them.

DILLON v. MARQUIS OF BATH, (1899) 63 J. P. [597; 81 L. T. 186; 15 T. L. R. 393—Div. Ct.

**(d) Publican's Licence Duty.**

12. *Inland Revenue Act, 1880* (43 & 44 Vict. c. 20), s. 43—*Duties of Excise on Licences to Retailers of Spirits (Publicans)*—K. owned and occupied a house of two storeys. The ground floor was his shop, the flat above was his dwelling-house. There was no internal communication between dwelling-house and shop. Access to dwelling-house was by an outside stair at rear of house. Commissioners of Inland Revenue assessed licence duty upon combined annual value of dwelling-house and shop.

HELD—that licence duty was chargeable on annual value of shop only.

KIRK v. LORD ADVOCATE, (1898) 62 J. P. 22—[Ct. of Exch. (Scot.).

13 *Public-house—Billiard Saloon on Floor Above—No Internal Access Thereto—Inland Revenue Act, 1880* (43 & 44 Vict. c. 20), s. 43.]—On the floor above a public-house was a room let to the publican and occupied by him as a billiard saloon; the only access was by means of an outside stair.

HELD—that for the purposes of the publican's licence duty the value of the saloon and of the hotel could not be aggregated.

PATERSON v. LORD ADVOCATE, (1906) 8 F. 880—[Ct. of Sess.

**(e) Saccharin.**

14. “*Manufacture*” of Saccharin—*Elimination of para Compounds from Saccharin.*—The chemical process of eliminating para saccharin from 330 saccharin and so producing 550 saccharin is not the “manufacture” of saccharin within the meaning of sect. 9 of the Finance Act, 1901 (1 Edw. 7, c. 7), and sect. 2 of the Revenue Act, 1903 (3 Edw. 7, c. 46), so that the persons carrying on that process need not take out an excise licence.

So held by Darling and Bray, JJ., Ridley, J., dissenting.

McNICHOL AND ANOTHER v. PINCH, [1906] 2 K. B. 352; 75 L. J. K. B. 741; 70 J. P. 438; 95 L. T. 530; 22 T. L. R. 654—Div. Ct.

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**(f) Spirit Dealers.**

And see INTOXICATING LIQUORS, 125, 126.

15. *Grogging—Spirit Casks—Penalties—Mitigation—Finance Act, 1898* (61 & 62 Vict. c. 10), s. 4.]—S. was a dealer in spirits. After twenty-nine casks had been emptied of spirits he put a quantity of water into each of them, with the result that the spirits which had been absorbed by the wood of the casks were extracted. There were also found on his premises thirty-three gallons of spirits which had been extracted from the wood of casks in a similar way. An information was laid against him, claiming a penalty in respect of each of the twenty-nine casks, and also a penalty in respect of the thirty-three gallons of spirits.

HELD—that S. was guilty of the contraventions charged and had incurred the penalties sued for, and that the Court had power to mitigate the penalties.

LORD ADVOCATE v. STEWART, (1899) 63 J. P. [311—Lord Stormonth-Darling, Ct. of Exch. (Scot.).

16. *Grogging—Spirit Casks—Water poured into Casks to keep them Sweet—Extraction of Spirits absorbed in Casks—Finance Act, 1898* (61 & 62 Vict. c. 10), s. 4.]—C. was a dealer in spirits. He had been in the habit as casks were emptied, or shortly thereafter, of causing to be poured therein either a small quantity of water or a small quantity of rinsings previously obtained from spirits casks. The quantity varied from about one quarter to three-quarters of a gallon, according to the size of the cask. This was alleged to be done for the purpose of keeping the wood what is technically termed “sweet,” and preventing the destruction of the casks, but an effect of the operation was proved to be the extraction of the spirits absorbed in the wood of the casks. An information under sect. 4 of the Finance Act, 1898, was laid against him, claiming a penalty in respect of each of twenty-two casks treated as described.

HELD—that C. was guilty of the contraventions charged, and had incurred the penalties sued for.

LORD ADVOCATE v. CARSE, (1899) 63 J. P. 472 [—Lord Stormonth-Darling, Ct. of Exch. (Scot.).

17. “*Grogging*”—*Having on Premises “any Spirits Extracted from the Wood of any Cask”—Spirits Evading Naturally from Wood of Cask—Finance Act, 1898* (61 & 62 Vict. c. 10), s. 4, sub-s. 1 (b).]—By sect. 4, sub-sect. 1 of the Finance Act, 1898, “a person shall not (a) subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof, or (b) have on his premises any cask which is being subjected to any such process, or any spirits extracted from the wood of any cask.”

HELD—that the word “extracted” meant extracted by some process which was applied for the purpose of extracting the spirit; and did not cover a case where an empty cask was placed aside merely to await removal, and spirit exuded from the wood without any process being applied

**Excise—Continued.**

or without any intention on the part of the defendant or his employees, to make the spirit exude.

ROBINSON BROS., BREWERS, LD. v. DIXON, [1903] 2 K. B. 701; 72 L. J. K. B. 717; 67 J. P. 386; 52 W. R. 8; 89 L. T. 132; 19 T. L. R. 600; 20 Cox C. C. 521—Div. Ct.

**18. Sale of Spirits—Ships' Store Merchant—Sale of Spirits out of Bond to Foreign Ship in Quantities not less than Two Gallons—Necessity for Excise Licence—Excise Act, 1825 (6 Geo 4, c. 81), s. 2—Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 104.]**—The appellant was a dealer in ships' stores, and supplied foreign ships from time to time with spirits. Such spirits were taken direct out of bond to such ships, all the due Customs House formalities having been complied with. On September 4th the appellant supplied in such manner a foreign ship with twelve bottles of spirits, amounting to two gallons.

**HELD**—that the appellant was a dealer in spirits within the meaning of the Inland Revenue Acts, and required to be the holder of a licence under 6 Geo. 4, c. 81, s. 2.

TINWELL v. MAYHOOK, [1904] 2 K. B. 790, 73 [L. J. K. B. 699; 68 J. P. 350; 53 W. R. 14; 91 L. T. 145; 20 T. L. R. 488—Div. Ct.

**(g) Tobacco.**

**19. Manufacture—Ground or Powdered Wood, Stained, Dyed, or Manufactured, to Imitate or Resemble Tobacco or Snuff—£200 Forfeit—Tobacco Act, 1842 (5 & 6 Vict. c. 93), s. 8.]**—W. and B. stained ground wood with permanganate of potash, and produced a material resembling tobacco or snuff. They sent samples of the product to several tobacco manufacturers, suggesting its use in the manufacture of cheap cigarettes, and quoting prices. A Revenue officer gave W. and B. an order which they agreed to execute. A quantity of the material was found in their custody or possession and seized. An information under sect. 8 of the Tobacco Act, 1842, was laid against them, claiming from each of them a penalty of £200.

**HELD**—that W. and B. were guilty of the contravention charged, and had each incurred the penalty sued for, and mitigation of penalty was refused as it was not in the power of the Court to mitigate; and that the question of mitigation must be left to the Commissioners of the Inland Revenue.

LORD ADVOCATE v. WILSON AND BAXTER, [1902] 66 J. P. 263—Lord Stormonth Darling, Ct. of Exch. (Scot.).

**II. IN GENERAL.**

**20 Appeal—Case Stated by Commissioners—Conclusiveness of Findings—Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59]**—The findings of fact in a case stated by the Commissioners for the General Purposes of the

Income Tax and Inhabited House Duty are conclusive.

COLE v. BISHOP BROS., (1903) 67 J. P. 128 [Ridley, J.

**21 Costs—Revenue Case—Costs of Settling Case—Case Stated by Commissioners of Income Tax—Allowed on Taxation—Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59—R. S. C., Ord. 65, r. 27 (29).]**—Under Ord. 65, r. 27 (29) r. 10 of 1902, the costs of preparing and settling a case to be stated by the Commissioners of Income Tax under sect. 59 of the Taxes Management Act, 1880, may properly be allowed on taxation to the successful party, whether Crown or subject.

MAYOR OF MANCHESTER v. SUGDEN, GRESHAM [LIFE ASSURANCE SOCIETY v. BISHOP, [1903] 2 K. B. 171, 72 L. J. K. B. 746; 67 J. P. 317; 51 W. R. 627, 88 L. T. 679; 19 T. L. R. 473—C. A.

**22. Customs—Excise—Practice—Costs under the Summary Jurisdiction Acts—Awarded to or against the Crown—Finance Act, 1898 (61 & 62 Vict. c. 10), s. 4—Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), s. 18, and 1879 (42 & 43 Vict. c. 49), s. 53.]**—In pursuance of sect. 53 of the Summary Jurisdiction Act, 1879, which provides that prosecutions under the excise laws are to be governed by the Summary Jurisdiction Acts, costs can now be awarded to and against the Crown in cases under those laws.

THOMAS v. PRITCHARD, [1903] 1 K. B. 209; [51 W. R. 58, 19 T. L. R. 10; 72 L. J. K. B. 23; 67 J. P. 71; 87 L. T. 688; 19 T. L. R. 10; 20 Cox C. C. 376—Div. Ct.

**23. Custom or Excise Duty—Duty imposed after Contract made—Right of Seller to Add New Duty to Price—Contract to take all Beer from Landlord at Fixed Prices—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 20—Finance Act, 1900 (63 & 64 Vict. c. 7), s. 8.]**—The defendant was lessee of a public-house, the plaintiffs being his landlords, and the lease, which was made on May 18th, 1899, provided that "the lessee shall and will from time to time, and at all times during this demise and as often as occasion shall require, purchase from the Newbridge Rhondda Brewery Company, Ltd., their successors and assigns, all the ale, beer, and porter, and other malt liquors (except spirits) that shall be drawn, sold, or disposed of on or upon the said demised premises . . . if the said company shall deal in and be willing to supply the same of a quality equal to that supplied by them to their customers and at the prices set forth in the schedule hereto." The company claimed that under sect. 20 of the Customs Consolidation Act, 1876, and sect. 8 of the Finance Act, 1900, they were entitled to throw the whole ls. a barrel, and therefore the 6d. which they claimed, on the defendant.

**HELD**—that there being the right on the part of the company to say that they would not supply at the prices in the schedule, it was impossible to say that that was a contract within sect. 20 of the Customs Consolidation Act, 1876, and

**In General—Continued.**

that the company could not recover the extra duty.

NEWBRIDGE RHONDDA BREWERY CO., LD. *v.*  
[EVANS, (1902) 86 L. T. 453, 18 T. L. R. 396  
—Div. Ct.]

**24 Custom House Officer—Obstruction of in the execution of his duty—Reasonableness of Search—Right of Magistrate to inquire into—Service of Notice of Appeal and Case—Respondent abroad—Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 12 (5)—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2.]** The respondent was summoned by the appellant, a Customs House officer, for obstructing him in the execution of his duty in searching the ship contrary to the Customs and Inland Revenue Act, 1881. The summons was dismissed by the magistrate on the ground that it was unreasonable for the officers to be searching under the circumstances of the case.

**HELD**—that the magistrate had no jurisdiction to inquire into the reasonableness or unreasonableness of the search, such duty being imposed by the Act on the Customs officer, and unless the magistrate found that the search was a mere pretence for the purpose of justifying an interference or annoyance by the Customs officer. The notice of appeal and the copy of the case stated by the magistrate could not be personally served on the respondent, as he had left the country on board his ship, but it was served on the solicitor who represented him before the magistrate, but who had ceased to represent him in the matter, and the respondent was not personally served till some months afterwards on his return to the United Kingdom.

**HELD**—that the service was sufficient under the Summary Jurisdiction Act, 1857, s. 2.

ANDERSON *v.* REID, (1902) 66 J. P. 564; 86 [L. T. 713; 18 T. L. R. 463—Div. Ct.]

**25. Plate—Assay—Marking—Gold and Silver Watch Cases—Imported Watches—Customs Act, 1842 (5 & 6 Vict. c. 47, s. 59).—**Gold and silver watch cases, forming part of finished watches imported from abroad, are gold and silver plate within the meaning of sect. 59 of the Customs Act, 1842, and must therefore be assayed, stamped and marked as required by that section before being sold or exposed for sale in the United Kingdom.

Decision of Channell, J. ([1905] 2 K. B. 586, 74 L. J. K. B. 822, 93 L. T. 515; 21 T. L. R. 654) reversed.

GOLDSMITHS CO. *v.* WYATT, [1907] 1 K. B. 95; [76 L. J. K. B. 166; 71 J. P. 79; 95 L. T. 855; 23 T. L. R. 107—C. A.]

**III. STAMP DUTIES.**

*And see under BILLS OF EXCHANGE*

**(a) Bond, Covenant, &c.**

*And see (f) Marketable Security.*

**26. Annuity payable Quarterly — “Bond, Covenant or Instrument” — Stamp Act, 1891,**

(54 & 55 Vict. c. 39), *Sched.*—By the Schedule to the Stamp Act, 1891, “Bond, covenant, or instrument of any kind whatsoever (1) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . . for the term of life or any other indefinite period For every £5 of the annuity or sum periodically payable 2s. 6d.”

By a deed of separation between a husband and wife, the husband agreed that so long as the wife observed the stipulations of the deed he would pay her every three months £625 by quarterly payments on September 29th, December 25th, March 25th, and June 24th in every year.

**HELD**—that this was an annuity of £2,500, and that *ad valorem* duty was payable on that sum, and not on £625.

LEWIS *v.* INLAND REVENUE COMMISSIONERS, [1898] 2 Q. B. 290; 67 L. J. Q. B. 694; 78 L. T. 745.—Div. Ct.]

**27. “Bond, Covenant or Instrument” — Will Charging Annuity on Real Property — Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1.**—A will is not a security for an annuity given and charged by a will on real property within the first schedule to the Stamp Act, 1891.

KENNEDY *v.* INLAND REVENUE COMMISSIONERS, [(1901) 65 J. P. 9—Div. Ct.]

**28. Separation Deed—Agreement to pay Wife £1 a Week for Life—Sum of Money at Stated Periods—Stamp Act, 1891 (54 & 55 Vict. c. 39), *Sched.***—An agreement in a separation deed by a husband to pay his wife £1 a week during her life, or until certain events should happen, is a security for £1 at stated periods (namely, one week) within the Stamp Act, 1891, and not security for an annuity of £52 a year within that Act.

*Clifford v. Inland Revenue Commissioners* ([1896] 2 Q. B. 187; 45 W. R. 14, 74 L. T. 699—Div. Ct) followed.

JACKSON *v.* INLAND REVENUE COMMISSIONERS, (1902) 66 J. P. 630; 50 W. R. 666; 87 L. T. 269; 18 T. L. R. 678—Phillimore, J.]

**29. Hire of use of Telephone for Annual Payments—“Bond, Covenant or Instrument of any kind whatsoever”—“Only a Principal or Primary Security”—“Indefinite Period”—Stamp Act, 1891 (54 & 55 Vict. c. 39), *Sched. I***—By an agreement in writing not under seal, R. agreed to pay a telephone company the sum of £12 per annum for the use of a telephone wire and apparatus which the company was to affix to his house. The rent was to be payable every year in advance, and either party might put an end to the agreement by giving the other three months' notice.

**HELD**—that this instrument was within the words “bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity” for an “indefinite period” in Sched. I. of the Stamp Act,

**Stamp Duties—Continued.**

1891, and chargeable with the *ad valorem* duty therein stated.

Decision of C. A. ([1899] 1 Q. B. 250; 68 L. J. Q. B. 222; 47 W. R. 247; 79 L. T. 514; 15 T. L. R. 98) affirmed.

NATIONAL TELEPHONE CO. v. INLAND REVENUE COMMISSIONERS, [1900] A. C. 1; 69 L. J. Q. B. 43; 64 J. P. 420; 48 W. R. 210; 81 L. T. 546; 16 T. L. R. 58—H. L. (E.).

**(b) Conveyance or Transfer on Sale.**

**30. Agreement for Sale—Lease of Licensed Premises—Goodwill—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59, sub-s. 1**—By sect. 59, sub-sect. 1, of the Stamp Act, 1891, any contract or agreement, under seal or under hand only, "for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, . . . or goods, wares, or merchandise, . . . shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

By an agreement under seal a vendor agreed to sell the goodwill of his business as hotel proprietor, the lease of the hotel premises, the household furniture, the stock in trade, and the book debts. The amount of the consideration was apportioned among these items, and £4,085 was attributed to the "lease and goodwill." It was also agreed that the vendor should show a good title to the lease and would assign the lease and goodwill to the purchasers; but in the event of the landlord refusing to consent to the assignment of the lease, the vendor was to execute a declaration of trust in favour of the purchasers.

The landlord having refused to consent, a declaration of trust was executed by the vendor in favour of the purchasers. A case was stated for the opinion of the Court whether the declaration of trust was liable to a fixed stamp duty of 10s. or an *ad valorem* duty under sect 59.

**HELD**—that the declaration of trust was liable in respect of the goodwill to the payment of an *ad valorem* duty.

Decision of Div Ct. ([1898] 1 Q. B. 226; 67 L. J. Q. B. 218, 77 L. T. 297, 14 T. L. R. 145) reversed.

WEST LONDON SYNDICATE, LD. v. INLAND REVENUE COMMISSIONERS, [1898] 2 Q. B. 507; 67 L. J. Q. B. 956, 79 L. T. 289; 14 T. L. R. 569, 47 W. R. 125—C. A.

**31. Agreement for Sale of Benefit of an Agreement—"Property"—Property locally situated out of the United Kingdom—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59, sub-s. 1**—By an agreement a syndicate agreed to sell to an English company the benefit of certain agreements and licences therein referred to, and in particular of an agreement of January 25th, 1899, and a licence granted by the Government of Roumania to one Vernescu of Bucharest, and

the company agreed to purchase the same, and to undertake all liabilities and engagements entered into by the syndicate in respect of the same. The consideration for the sale was to be the issue and allotment to the syndicate or to its nominees of 50,000 ordinary shares of £1 each in the capital of the company. The agreement of January 25th, 1899, was made between Vernescu and one Fraser (who under it had legally ceded his rights to the syndicate), whereby there was imposed on Vernescu a personal liability to do certain things for the benefit of the syndicate within a specified area in Roumania.

**HELD**—that the benefit of the contract of January 25th, 1899, was "property," and therefore came within the enacting part of sect. 59, sub-sect. 1, of the Stamp Act, 1891, and not within the exception therein, as being property locally situated out of the United Kingdom, and that the agreement was liable to *ad valorem* conveyance duty.

*Smelting Co. of Australia v. Inland Revenue Commissioners* ([1897] 1 Q. B. 175; 66 L. J. Q. B. 187; 61 J. P. 116; 45 W. R. 203; 75 L. T. 534—Div. Ct.) followed.

The judgment of Div. Ct. ([1899] 64 J. P. 441) reversed.

DANUBIAN SUGAR FACTORIES, LD. v. INLAND REVENUE COMMISSIONERS, [1901] 1 Q. B. 245; 70 L. J. Q. B. 211; 65 J. P. 212; 84 L. T. 101—C. A.

**32. Agreement for Sale of Foreign Business—"Agreement made in England"—"Property locally situated out of the United Kingdom"—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59, sub-s. 1.**—M., a merchant, had long carried on business in Germany under the style of M. & Co. N. and W. acquired from M. the right to purchase the said business, stock in trade, and assets thereof, and hold the same in trust for J. W.

N. and W. agreed to make over the said right to an English syndicate in consideration of debentures of the syndicate. The syndicate agreed to sell to the respondents (a company incorporated under the Companies Acts, 1862 to 1893) the said rights of purchase.

By the agreement, which was under seal, the goodwill of the said business, with the exclusive right to use the name of "M. & Co." as part of the name of the company, together with the factory and buildings in which the business was carried on, and all the plant, machinery, apparatus, rolling stock, and chattels employed in the business, except stock in trade and all pending contracts and orders, were agreed to be sold for a lump sum to the respondents. This agreement was executed at Amsterdam by M., N., and W., and in England by the syndicate and the company. The agreement contained a covenant on the part of M. not at any time thereafter to be engaged in any similar trade within fifty miles of the said freehold premises. The customers were all resident abroad.

**HELD**—that the agreement was made in England; and (Halsbury, L.C., dissenting) that

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the goodwill was "property locally situate out of the United Kingdom" within sect. 59, sub-sect. 1, of the Stamp Act, 1891, and consequently the agreement was chargeable with *ad valorem* duty.

*Smelting Company of Australia, Ltd v. Inland Revenue Commissioners* ([1897] 1 Q. B. 175; 66 L. J. Q. B. 137; 61 J. P. 116; 45 W. R. 203; 75 L. T. 534) commented on

Decision of C. A. ([1900] 1 Q. B. 310; 69 L. J. Q. B. 291; 81 L. T. 667, 16 T. L. R. 72) affirmed.

**INLAND REVENUE COMMISSIONERS v. MÜLLER & Co's MARGARINE, LD.**, [1901] A. C. 217; 70 L. J. K. B. 677; 49 W. R. 603; 84 L. T. 729; 17 T. L. R. 53—H. L. (E.).

**33. Agreement made in England for Sale of equitable Interest in property Locally situate out of United Kingdom—Stamp Duty on Agreement—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59, sub-s. 1—Trust Property Act of 1862, New South Wales (26 Vict. No. 12), s. 25.]**—Sect. 25 of the Trust Property Act, 1862 of New South Wales provided that mortgages of real and personal estate should be deemed at law, as now in equity, pledges only of the property mortgaged, and that the title of the mortgagor should be "deemed a good title at law subject to such pledge as against all persons other than the mortgagee and those claiming under him," and sect. 59, sub-sect. 1, of the Stamp Act, 1891, provided that "any agreement made in England for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, . . . or property locally situate out of the United Kingdom," shall be charged with the same *ad valorem* duty as if it were an actual conveyance on sale.

The owner of a mortgaged freehold property situate in New South Wales made and executed in England an agreement for the sale of the mortgaged property.

**HELD**—(1) that the above section of the colonial statute had not the effect of giving a legal title or interest to the mortgagor, whose interest therefore was equitable only; and (2) that the exception in sect. 59, sub-s. 1, of the Stamp Act, 1891, in favour of "lands or property locally situate out of the United Kingdom," applied only to the second branch of that sub-section, and did not apply to the first part of the sub-section having reference to the sale of an equitable estate or interest in any property.

**HELD**, therefore, that the agreement was an agreement for the sale of an equitable estate or interest in property within the meaning of sect. 59, sub-sect. 1, and did not come within the exception in that sub-section, and was therefore chargeable with the same *ad valorem* duty as an actual conveyance on sale of the property.

**FARMER & Co, LD. v. INLAND REVENUE COMMISSIONERS**, [1898] 2 Q. B. 141; 67 L. J. Q. B. 775; 79 L. T. 32; 14 T. L. R. 408—Div. Ct.

**34. Assignment of Leaseholds—Consideration—Apportionment of Rent—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 57, Sched. I.]**—The lessee of land with three houses thereon conveyed, in consideration of a sum of money, two of the houses for the residue of the term subject to a duly apportioned part of the rent reserved by the original lease. The assignee covenanted to pay the rent, and to observe and perform the covenants contained in the original lease.

**HELD**—that the rent payable by the assignee was not part of the consideration in respect whereof the conveyance was chargeable with *ad valorem* duty under sect. 57 of the Stamp Act, 1891.

Judgment of the Div. Ct. ([1899] 1 Q. B. 335, 68 L. J. Q. B. 234; 47 W. R. 300; 63 J. P. 228; 80 L. T. 56; 15 T. L. R. 133) affirmed.

**SWAYNE v. INLAND REVENUE COMMISSIONERS**, [1900] 1 Q. B. 172; 69 L. J. Q. B. 63, 81 L. T. 623; 48 W. R. 197; 16 T. L. R. 67—C. A.

**35. Contingent and Uncertain Consideration—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss 56 (2), 57.]**—A company agreed to sell its business to a new company in consideration of a certain sum in cash and a certain number of shares. The agreement provided that the profits of the new company in respect of each year should be applied in paying a dividend of 5 per cent. on its paid-up share issue and (subject to the payment of such dividend) in paying to the old company "as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. . . ."

**HELD**—that this sum, though payable contingently, was "money payable periodically in perpetuity" within the meaning of sect. 56 (2) of the Stamp Act, 1891, and that the agreement was chargeable with *ad valorem* duty in respect of it.

Decision of C. A. ([1905] 1 K. B. 174; 74 L. J. K. B. 200; 53 W. R. 325, 92 L. T. 6; 21 T. L. R. 109), affirmed.

**UNDERGROUND ELECTRIC RYS. CO. OF LONDON, LD. v. COMMISSIONERS OF INLAND REVENUE**, [1906] A. C. 21; 75 L. J. K. B. 117; 54 W. R. 381; 93 L. T. 819; 22 T. L. R. 160—H. L. (E.).

**36 Conveyance Executed Abroad—Transfer Abroad to New Company—Payment by Issue in England of Shares in Company—Company Registered in England—"Property Situate"—"Thing done or to be done" in United Kingdom—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1; s 14, sub-s. 4; s 54; Sch., "Conveyance on Sale."]**—A company, which was registered in England, and which had a branch business in France, by an instrument in writing executed in France and drawn up in French transferred to a new company, also registered in England, all its business and assets in France, and in consideration thereof the new company issued and allotted to the old company in England certain shares in the new company.

**HELD**—that the instrument was a "conveyance on sale" within the meaning of sect. 54 of

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the Stamp Act, 1891, and required to be stamped accordingly. "Conveyance on sale" is not limited to a conveyance executed in the United Kingdom. It must, however, if executed abroad, relate to property situate in the United Kingdom, or to any matter or thing to be done in some part of the United Kingdom, as prescribed in sect. 14, sub-sect. 4. The instrument in question related to the appropriation of the capital of the new company, which was registered in England, and therefore related to property situate in the United Kingdom. It also related to a matter or thing to be done in the United Kingdom.

Sect. 15 (2) of the Stamp Act, 1891, only imposes a fine if the instrument is stamped after the prescribed period.

Decision of C. A. ([1906] 2 K. B. 834; 22 T. L. R. 829) reversed.

INLAND REVENUE COMMISSIONERS v. MAPLE & CO. (PARIS), LD.. [1907] 24 T. L. R. 140—H. L. (E.).

**37. Conveyance in consideration of Debt—Bad Debt—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 57.]**—The North British Railway Company acquired by purchase the undertaking of the BoNESS Harbour Commissioners.

The Inland Revenue authorities claimed stamp duty on the £303,376 19s. of arrears of interest due by the Harbour Commissioners to the North British Railway Company in respect of the company having paid that interest to the creditors in the harbour debt under a guarantee given by the company to those creditors. This debt formed part of the consideration for the sale.

**HELD**—that the circumstance that the debt was a bad debt did not make any difference: and there was no reason to suppose that the Harbour Commissioners would have agreed to the transfer of the harbour undertaking unless they had been relieved of this debt, as well as their other obligations; and the liability was none the less a debt because the debtors might be unable to pay it in whole or in part, and that *ad valorem* conveyance duty was chargeable.

INLAND REVENUE COMMISSIONERS v. NORTH [BRITISH RY. CO., [1902] 4 F. 27—Ct. of Sess., 1st Div.

**38. Decree under Heritable Securities Act, 1894.]**—A decree under the Scotch Heritable Securities Act, 1894 (57 & 58 Vict. c. 44), is a "conveyance on sale" within sect. 54 of the Stamp Act, 1891, and chargeable with an *ad valorem* duty under that Act.

Decision of Ct. of Sess. reversed.

COMMISSIONERS OF INLAND REVENUE v. TOD, [1898] A. C. 399; 67 L. P. (P. C.) 42; 78 L. T. 571, 14 T. L. R. 400—H. L. (Sc.)

**39 Devise of Realty—Executor's Assent in Writing—Whether a Conveyance or Transfer—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 62, Sched. I.—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3.]**—In accordance with sect. 3 (1) of

the Land Transfer Act, 1897, an executor assented to a devise of land. The assent was given in writing, but not under seal.

**HELD**—that the assent was not liable to duty as a conveyance or transfer, not being "an instrument . . . whereby any property on any occasion, except a sale or mortgage, is transferred to, or vested in any person."

KEMP v. COMMISSIONERS OF INLAND REVENUE, [1905] 1 K. B. 581; 74 L. J. K. B. 112; 53 W. R. 479; 92 L. T. 92; 21 T. L. R. 168—Phillimore, J.

**40. Dissolution of Old Company—Vesting of Property in New Company—Statutory Transfer—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 6, Sched.—Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12.]**—A private Act provided that a gas company could be dissolved and reincorporated with further powers; that its property should vest in the new company, who should assume all its liabilities; and that the stockholders should receive the same amount of stock in the new company.

**HELD**—that the copy of the Act was chargeable with *ad valorem* duty, as a "conveyance on sale," on the amount of the liabilities assumed by the new company and the value of the stock issued by it to stockholders in the old company, such value to be ascertained as on the day of the passing of the Act.

ATTORNEY-GENERAL v. FELIXSTOWE GAS LIGHT [Co., [1907] 2 K. B. 984; 76 L. J. K. B. 1107; 97 L. T. 340—Bray, J.

**41. Family Arrangement—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 54, 57.]**—A was entitled to (1) freehold and copyhold property, subject to a mortgage debt of £62,000, (2) certain chattels, and was indebted to B. in the sum of £123,800. A. conveyed the property and chattels to B. B. released A. from the debt of £123,800, agreed to indemnify him against the £62,000, and entered into an agreement whereby A. got an annuity. The transaction was carried out by three deeds.

**HELD**—that (although called a family arrangement) two of these deeds were conveyances on sale, and that *ad valorem* stamp duty must be paid on £123,800 and £62,000 at least.

BRISTOL (MARQUIS OF) v. INLAND REVENUE [COMMISSIONERS, [1901] 2 K. B. 336; 70 L. J. K. B. 759; 65 J. P. 360; 49 W. R. 718; 84 L. T. 659, 17 T. L. R. 488—Div. Ct.

**42 Foreclosure Order before 1898—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 54, 57—Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6.]**—A foreclosure order made between 1891 and 1898 foreclosing a legal mortgage is not properly stamped unless stamped as a "conveyance on sale."

*Semble*, apart from the declaratory enactment in sect. 6 of the Finance Act, 1898, such an order would be within sect. 54 of the Stamp Act, 1891; in any event sect. 6 declares it to be



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within sect. 54, and, being declaratory, sect. 6 is retrospective.

*Attorney-General v. Theobald* ((1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527—Div. Ct.) followed.

*Harding v. Queensland Stamp Commissioners* ([1898] A. C. 769; 67 L. J. P. C. 144; 79 L. T. 42—P. C. See DEPENDENCIES AND COLONIES, No. 44) distinguished.

IN RE LOVELL AND COLLARD'S CONTRACT, [1907] 1 Ch. 249; 76 L. J. Ch. 246; 96 L. T. 382—Eady, J.

**43. Land sold for Lump Sum and Annual Payment by Purchaser to Vendor—Annual Payment made by Purchaser in consideration of Vendor paying Tithe—Whether Annual Payment is "part of the consideration for conveyance on sale"**—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 56, sub-s. 2, Sched. I.—The owners in fee simple of a certain piece of land offered the land for sale in lots as a building estate, and by an indenture which recited that the vendors had agreed with the purchaser for the sale to him of a certain lot or piece of the land for the sum of £50: the vendors granted the lot to the purchaser in fee simple in consideration of the sum of £50 then paid by the purchaser (amongst other conditions), subject to and charged with the payment to the vendors and their assigns of the annual sum of 1s., in accordance with a stipulation providing that the piece of land thereby conveyed was, in consideration of the vendors paying the whole of the tithe in respect of the land of which the plot formed part, subjected to and charged with the payment to the vendors of the perpetual sum of 1s. per annum; and the purchaser for himself and his assigns covenanted to make this annual payment of 1s. to the vendors and to perform the other stipulations of the agreement. The payment of the 1s. was in consideration of the vendors paying the whole of the tithe. In assessing the stamp duty upon the indenture.—

HELD (affirming the decision of the commissioners)—that the annual payment of 1s. per annum was part of the consideration for the sale; that the consideration for the sale was therefore the £50 plus the annual sum of 1s., and that having regard to sect. 56, sub-sect. 2 of the Stamp Act, 1891, the whole consideration for the sale was £50 plus 1s., multiplied by twenty, namely, £51, and that the indenture was to be stamped as a conveyance on sale for a consideration of £51, namely, with a stamp of 7s. 6d.; but that even if the annual payment was not part of the consideration, the stipulation to pay it would be a separate collateral covenant which would require to be stamped as such.

MARTIN v. COMMISSIONERS OF INLAND [REVENUE, (1904) 91 L. T. 453—Channell, J.

**44. Legacy—Legatee accepting Stock in Payment—Stamp on Transfer—Ad valorem Duty**—Stamp Act, 1891 (54 & 55 Vict. c. 39).—A legatee agreed with the executor of his testator's will to take payment of his legacy in stock.

HELD—that the transfer deed was chargeable with *ad valorem* duty as being a "conveyance or transfer on sale."

DAWSON v. COMMISSIONERS OF INLAND [REVENUE [1905] 2 Ir. R. 69—K. B. D.

**45. Partnership Dissolution — Record of Transfer of Property—"Release or Renunciation"**—Stamp Act 1891 (54 & 55 Vict. c. 39), Sched. I.]—J. F. and his brother, J. W., carried on business in partnership. J. F., in pursuance of the power for that purpose contained in the articles of partnership, gave J. W. notice to determine it, and J. W. gave J. F. notice of taking over his share in the partnership upon the terms prescribed by the articles. Two instruments were executed to give effect to the dissolution of the partnership, the first a conveyance, whereby the share and interest of J. F. in the real estate of the partnership was released and transferred to J. W. This deed was duly stamped with an *ad valorem* duty. The other instrument, of even date, after reciting that accounts of the partnership had been made up, and that the amount standing to the credit of J. F. was £41,752 4s. 7d., and that by the above-mentioned deed of even date, the real estate had been conveyed to J. W., and that the chattel property of the partnership was then in the exclusive possession of J. W., and that the said J. W. had given his promissory note bearing even date therewith for the above said sum, witnessed that J. F. and J. W. declared that the partnership between them should be considered as determined, and J. F. declared that he accepted the said promissory note in full satisfaction of all claims against J. W. in respect of his share and interest in the said partnership, and the assets and properties thereof. The commissioners claimed that this last-mentioned instrument was chargeable with an *ad valorem* conveyance duty.

HELD—that the instrument was chargeable in accordance with the assessment of the commissioners.

GARNETT v. COMMISSIONERS OF INLAND [REVENUE, (1900) 48 W. R. 303, 81 L. T. 633—Div. Ct.

**46. Purchase of Property under Statutory Powers—Conveyance of Chattels—Finance Act, 1895 (58 Vict. c. 16), s. 12.]**—Where lands and chattels are purchased under statutory powers, the party making the purchase is bound to produce to the Commissioners of Inland Revenue an instrument of conveyance duly stamped with the *ad valorem* duty payable upon a conveyance calculated on the value of the whole property passed, including chattels.

The decision of C. A. ([1902] 1 K. B. 403, 71 L. J. K. B. 181; 66 J. P. 36; 50 W. R. 161, 85 L. T. 745; 18 T. L. R. 122) affirmed.

EASTBOURNE CORPORATION v. ATTORNEY-GENERAL, [1904] A. C. 155; 73 L. J. K. B. 259; 68 J. P. 393, 52 W. R. 577; 90 L. T. 99, 20 T. L. R. 252, 2 L. G. R. 789—H. L. (E.).

**47. Reconstruction—Agreement between Old and New Company as to Exchange of Shares—Declaration of Trust—Stamp Act, 1891 (54 & 55**

**Stamp Duties—Continued.**

*Vict. c. 39*, ss. 54, 59, *Sched. I.*—By an agreement under seal, made between all the shareholders in an unlimited company (which was in course of being voluntarily wound up) and a new limited company, it was agreed that the shareholders in the old company should "exchange" their shares in that company for certain numbers and amounts of stock and shares in the new company, and that the new company should also pay certain sums of cash to the shareholders. The agreement also provided that, upon the allotment to the shareholders of the old company of the shares and stock in the new company, the shareholders should "hold their respective shares in the old company in trust for the new company."

**HELD**—that the agreement, which amounted to a declaration of trust, was a "conveyance on sale" of the shares in the old company within the meaning of sect. 54 of the Stamp Act, 1891, or a "contract for the sale of an equitable interest" in those shares within sect. 59 (1) of that Act, and was chargeable with *ad valorem* duty on the cash paid and the shares and stock allotted.

Dictum of Channell, J., in *West London Syndicate v. Inland Revenue Commissioners* [1898] 1 Q. B. 226; 67 L. J. Q. B. 218; 77 L. T. 797, see No. 30, *supra* approved.

**CHESTERFIELD BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS**, [1899] 2 Q. B. 7; 68 L. J. Q. B. 204; 47 W. R. 320; 79 L. T. 559; 15 T. L. R. 123—Div. Ct.

48. "*Right not before in Existence*"—"Property"—"*Estate or Interest in any Property*"—"Right of Colliery Company to work Coal under Railway"—*Right of Railway Company to Stop such Working and to pay Compensation therefor*—*Document under Seal containing Receipt for Compensation Money and Undertaking not to work Coal*—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 54, 60, *Sched. I.*—*Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 20), ss. 78, 79.—The plaintiff company purchased lands necessary for the construction of one of its branch lines of railway, the surface, as also the coal under the said lands, then being, so far as material, the property of a colliery company. Some time afterwards, the colliery company, pursuant to sect. 78 of the Railways Clauses Consolidation Act, 1845, gave notice to the railway company that it was desirous of working the coal (which was still its property) in three acres. The railway company thereupon gave notice to the colliery company, pursuant to sect. 78, that the working of the coal in the three acres would be likely to cause damage to the works of the railway company, and the notice required the colliery company to refrain from working the coal under the three acres, and stated that the railway company would make compensation to the colliery company for so much of the seam of coal as was within the three acres. The amount of compensation was assessed by an arbitrator and paid by the railway

company, and the colliery company executed a document, under seal, by which they acknowledged the receipt of the compensation money and thereby undertook to leave entirely unworked the whole of the said coal and to do and execute all deeds, matters and things necessary for vesting the same in the railway company, and declared the sum paid to them included satisfaction and compensation for all claims, which, but for those presents, they might have had against the railway company in respect of the said coal.

**HELD**—that the said document was not covered by sect. 60 of the Stamp Act, 1891, and thereby made liable to an *ad valorem* stamp duty, and it required only a 10s. stamp.

**HELD**, also (by A. L. Smith, M.R., Collins and Stirling, L.JJ.), that the right of the railway company to stop the further working for ever of the minerals, and the right of the mineral owner to be then paid for his minerals came into existence before the date of the document sought to be charged with stamp duty, and therefore did not satisfy the requisites of sect. 60 as a "right not before in existence."

**HELD**, also (by Collins and Stirling, L.JJ.), that there was in point of fact no sale at all, and no "property" and no "estate or interest in any property" was transferred to or vested in a purchaser.

Appeal from the judgment of the Div. Ct. ([1899] 2 Q. B. 652; 68 L. J. Q. B. 978; 64 J. P. 21; 48 W. R. 170; 81 L. T. 385; 15 T. L. R. 504) dismissed.

**GREAT NORTHERN RY. CO. v. INLAND REVENUE COMMISSIONERS**, [1901] 1 K. B. 416, 70 L. J. K. B. 336, 65 J. P. 275; 49 W. R. 261; 84 L. T. 183—C. A.

49. *Sale of Book Debts*—"Property"—*Ad valorem Duty*—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59 (1).—A limited company sold its goodwill and entire undertaking, including book debts, to another limited company. The value of the book debts existing on December 31st, 1898, for the purpose of apportioning the price between them was £30,030 2s. 5d. At the date of the agreement for sale, May 6th, 1899, there remained outstanding of these book debts only debts to the value of £700. The business had been carried on and the book debts collected in the ordinary way by the old company from a period anterior to December 31st, 1898, down to the date of the agreement for sale on behalf of the new company. The Commissioners of Inland Revenue in assessing the *ad valorem* conveyance duty declined to deduct the sum of £29,330 2s. 5d., being the £30,030 2s. 5d. less the £700, from the consideration for the sale.

**HELD**—that the Commissioners were right, as the book debts were property within sect. 59 (1) of the Stamp Act, 1891, and did not fall within any of the exceptions in that section.

**MEASURES BROS., LD v. INLAND REVENUE COMMISSIONERS**, (1900) 82 L. T. 689—Div. Ct.

**Stamp Duties—Continued.****(c) Capital of Companies.**

**50 Increase of Capital—Consolidation of Capital**—Increase of "Amount of Nominal Share Capital"—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 113—*Gas Light and Coke Company's (Capital Consolidation) Act*, 1898 (61 & 62 Vict. c. clxxxii.), ss. 4, 5, 6 ]—By the defendants' private Act certain existing stock was consolidated, and converted into one stock of an increased nominal value; and by sect. 6 (2) thereof power was given to create stock to the value of £437,500 in lieu of stock to the value of £175,000 already authorised; the sub-section provided that "except to the extent of the increase in this sub-section provided for, nothing in this Act shall be construed as authorising any increase of the nominal share capital of the company"

HELD—that, notwithstanding the proviso, there had been an increase of the nominal share capital within sect. 113 of the Stamp Act, 1891, and that stamp duty was payable thereon.

Decision of Ridley, J. ((1902) 18 T. L. R. 517) affirmed.

*Midland Ry. Co. v. Attorney-General* ([1902] A. C. 171; 71 L. J. K. B. 315; 50 W. R. 433, 86 L. T. 206; 18 T. L. R. 352—H. L., No. 54, *infra*) followed.

ATTORNEY-GENERAL *v.* GAS LIGHT AND COKE [Co., (1903) 19 T. L. R. 12—C. A.

**51. Issue of Loan Capital by Corporation—Meaning of "Issue"**—When Scrip Certificates Issued, then Loan Capital is Issued—*Finance Act*, 1899 (62 & 63 Vict. c. 9), s. 8.]—By sect. 8 of the Finance Act, 1899, which came into operation on June 20th, 1899, where a corporation proposes to issue any loan capital—which means any corporation stock—they should, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue, charged with an *ad valorem* stamp duty.

The defendant corporation having under statutory powers resolved to create stock, the Bank of England issued a prospectus on April 8th, 1899, inviting tenders for the stock to an amount of £1,000,000. The payments on account of the loan were to be by instalments; the last of such instalments was payable on June 21st, 1899. In respect of stock to the amount of £209,400 the final instalments were paid in full prior to June 20th, 1899. All the scrip certificates were issued before June 20th, 1899. The question arose whether this loan capital was issued after June 20th, 1899.

HELD—that the stamped statement must be delivered to the Commissioners before the corporation issue the certificate which is called the scrip certificate; that the whole of the issue of the loan capital, not merely the £209,400, was therefore made before June 20th, 1899; and therefore the corporation could not, and were

under no obligation to, comply with sect. 8, and were not taxable.

ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION, [1902] 1 K. B. 411; 71 L. J. K. B. 195; 66 L. J. 391; 50 W. R. 328; 86 L. T. 300—Phillimore, J.

**52 Issue of Loan Capital—Existing Debenture Stock—Amalgamation—Rights of Holders of Existing Stock Modified and Altered—Liability of Issue of New Stock to Duty**—*Finance Act*, 1899 (62 & 63 Vict. c. 9), s. 8.]—A company, incorporated by special Act, had from time to time issued certain debenture stock, bearing interest at 4 per cent. By an Amalgamation Act it was provided that on and from the date of the amalgamation with another company the then existing debenture stock was to be divided into A. and B. debenture stock, each bearing interest at 3 per cent, and the amount of the A. and B. stock was to be 61 per cent. and 39 per cent. respectively of the total amount of the existing stock. The rights of each holder of existing debenture stock were to be modified so that his holding was to consist of 61 per cent of A. stock and 39 per cent. of B. stock, bearing interest at 3 per cent, and each holder was to be entitled to a further amount of B. stock equal to one-third of the amount of existing debenture stock held by him. There was no provision in the Act that the existing debenture stock was to be cancelled or extinguished; but each holder of existing stock was to deliver up the certificates of the stock held by him and was to receive proper certificates in exchange, and he was to be no longer entitled to register the existing stock. The operation carried out under the Act did not involve the raising or obtaining from the public any additional capital.

The Crown claimed that the company were bound under sect. 8 of the Finance Act, 1899, to deliver a duly stamped statement of the aggregate amount of the A. and B. debenture stock.

HELD—that, under the operation carried out by the Amalgamation Act, the issue of the A. and B. debenture stock was an "issue of loan capital" within the meaning of sect. 8, sub-sect. 1, of the Finance Act, 1899, and that the company were bound, under sub-sect. 2, to deliver a duly stamped statement of the total aggregate of such A. and B. debenture stock.

*Attorney-General v. Regent's Canal and Dock Co.* ([1904] 1 K. B. 263; 73 L. J. K. B. 50; 68 J. P. 105, 52 W. R. 211, 89 L. T. 599; 20 T. L. R. 92—C. A., No. 53, *infra*) followed.

ATTORNEY-GENERAL *v.* LONDON AND INDIA [DOCKS Co., (1906) 95 L. T. 536—Walton, J.

**53. Proposal to "Issue any Loan Capital"**—*Special Act Consolidating Debenture Stock—Finance Act*, 1899 (62 & 63 Vict. c. 9), s. 8.]—A company had, under the powers conferred upon it by various special Acts, issued three classes of debenture stock, paying respectively 3, 4, and 4½ per cent., and in 1900 the total amount of all classes issued to date was £411,852. In that year another special Act was obtained to consolidate the existing stocks into a new

**Stamp Duties—Continued.**

stock paying 3 per cent.; the existing stock was extinguished, and the holders of the old stock received such an amount of the new stock as would at 3 per cent. produce the same income as their existing stock. The amount of new stock required to carry out this scheme was £529,136.

**HELD**—that the new debenture stock was "loan capital," which the company proposed to "issue" within the meaning of sect. 8 of the Finance Act, 1899; and that the company were liable for stamp duty under that section.

Decision of Ridley, J. ([1903] 2 K. B. 86; 72 L. J. K. B. 511; 67 J. P. 211, 88 L. T. 740), reversed.

**ATTORNEY-GENERAL v. REGENT'S CANAL AND DOCK CO.**, [1904] 1 K. B. 263, 73 L. J. K. B. 50; 68 J. P. 105; 52 W. R. 211; 89 L. T. 599; 20 T. L. R. 92—C. A.

**54. Railway Company—“Re-arrangement and Consolidation” of “Shares—“Increase of the Amount of the Nominal Share Capital”**—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 113.]—Prior to the Midland Railway Act, 1897, the nominal share capital of the company was, roughly speaking, seventy-four millions odd. The result of what was done by the authority of that Act, viz., the re-arrangement and consolidation of the several classes and denominations of the shares and stocks in the capital of the company, was that it became 134 millions odd.

**HELD**—that the working capital had not been increased by one penny, but the amount of the nominal share capital had been just doubled; that there was an "increase of the amount of nominal share capital" of the Midland Railway Company authorised by the Midland Railway Act, 1897; and that the case clearly fell within the 113th section of the Stamp Act, 1891.

Decision of C. A. ([1901] 1 K. B. 220; 70 L. J. Q. B. 254; 65 J. P. 68; 49 W. R. 243; 84 L. T. 15; 17 T. L. R. 142) affirmed.

**MIDLAND RY. CO. v. ATTORNEY-GENERAL**, [1902] A. C. 171; 71 L. J. K. B. 315; 50 W. R. 433; 86 L. T. 206; 18 T. L. R. 352—H. L. (E.)

**(d) Highway Agreements.**

**55. Agreement between the County Council and Urban Council—Repair and Improvement of Roads—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11—Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule.]**—On November 26th, 1897, an agreement was made between the appellants and the Urban District Council of Fitzington, whereby the payment for the year ending March, 1898, in pursuance of the Local Government Act, 1888, towards the cost of maintenance, and repair and reasonable improvement connected with the maintenance and repair of all main roads within the district of the urban council was fixed at a certain sum.

The money was to be paid in four instalments, and there was a proviso that nothing, except as expressly declared, should alter the rights and liabilities of the parties thereto

**HELD**—that this was not an agreement made pursuant to the Highways Acts for or relating to the making, maintaining, and repairing of highways, which would only require a 6d. stamp, but that it was made under the Local Government Act, and came under the heading "deed of any kind whatsoever not described in the schedule" of the Stamp Act, and so required a 10s. stamp.

**CUMBERLAND COUNTY COUNCIL v. COMMISSIONERS OF INLAND REVENUE**, (1898) 78 L. T. 679; 14 T. L. R. 408; 47 W. R. 407—Div. Ct.

**56. Agreement between County Council and Rural District Council for Repair of Roads—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.]**—An agreement under seal between a county council and a rural district council for the repair of roads requires a 10s. stamp.

**SOUTHAMPTON COUNTY COUNCIL v. COMMISSIONERS OF INLAND REVENUE**, (1905) 69 J. P. 105; 92 L. T. 364; 21 T. L. R. 199; 3 L. G. R. 1060—Phillimore, J.

**(e) Insurance Policies.**

**57. Accident or Life—Insurance against Accident and Illness—Stipulation for Return of Premiums on Death or Attainment of Certain Age.]**—A policy of insurance stated that in consideration of the payment by the insured of 2s. 6d. per month the company would pay to him or to his representatives a monthly allowance of £4 in the event of illness or accident, and £100 in the event of death, or loss of limbs or sight by accident. Provision was made for the return to the assured or his representatives of half of all the premiums paid under the policy, as soon as the assured reached the age of sixty-five, or in the event of his previous death, if the policy remained in force.

**HELD**—that the instrument was primarily a policy of insurance against accident, and that the stipulation for the return of half the premiums was merely incidental, and that, therefore, the instrument should be assessed as an accident insurance policy.

**GENERAL ACCIDENT ASSURANCE CORPORATION v. INLAND REVENUE COMMISSIONERS**, (1906) 8 F. 477—Ct of Sess.

**58. Policy against Accidents—Policy against paying Compensation for Accidents to Workmen—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 98, and Sched. I.]**—A policy of insurance whereby the insurance company covenanted to pay to an employer such sums as he should become liable to pay under the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or at common law in respect of personal injuries to any workmen in his employ, is not "a policy of insurance against accident" within the meaning of sect. 98 and Sched. I. of the Stamp Act, 1891, inasmuch as the condition for payment of the sum insured is not the happening of the accident, but the liability of the employer to compensate for it.

The policy should, therefore, be stamped, not

**Stamp Duties—Continued.**

with a 1d stamp only, but if under seal with a 10s stamp, and if under hand only with a 6d. stamp as an agreement.

LANCASHIRE INSURANCE CO. v. INLAND REVENUE COMMISSIONERS, [1899] 1 Q. B. 353; 68 L. J. Q. B. 143; 63 J. P. 21; 47 W. R. 396; 79 L. T. 731; 15 T. L. R. 119—Div. Ct.

59. "*Policy of Life Assurance*"—*Old Age Endowment with Life Assurance—Agreement to pay fixed sum on Assured attaining Sixty-five, or smaller sum if he should die before attaining that Age—Mortgage, Bond, Debenture, Covenant*"—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 91, 98.]—By an instrument, headed "Old age endowment with life assurance from entry to sixty-five years," an insurance company agreed, in consideration of a weekly premium, to pay a fixed sum if the assured attained the age of sixty-five, or in the alternative a smaller sum should the assured die before attaining that age.

HELD—that the instrument was a "policy of life insurance" within the meaning of sect. 98, sub-sect. 1 of the Stamp Act, 1891, and should be stamped as such, and not under the heading "mortgage, bond, debenture, covenant."

THE PRUDENTIAL ASSURANCE CO., LD. v. THE COMMISSIONERS OF INLAND REVENUE, [1904] 2 K. B. 658; 20 T. L. R. 621; 53 W. R. 108; 91 L. T. 520—Channell, J.

**(f) Marketable Security.**

60. *Bond of Foreign Railway Company—Issued in the United Kingdom*—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 82.]—The bonds of an American railway company, payable to bearer, contained a clause that they should not be valid for any purpose unless authenticated by a certificate indorsed on them in accordance with the provisions of a trust deed.

Bonds were prepared in America, and delivered to the trustee under the deed, and were sent to London unauthenticated by the certificate, which was afterwards indorsed on them in London, where they were delivered to the persons entitled to them.

HELD—that they were "marketable securities made and issued in the United Kingdom" within sect. 82 of the Stamp Act, 1891, and were liable to stamp duty.

Decision of C. A. (*sub nom.* *Baring v. Inland Revenue Commissioners*, [1898] 1 Q. B. 78; 61 J. P. 822; 67 L. J. Q. B. 44; 77 L. T. 353; 46 W. R. 98) affirmed.

REVELSTOKE (LORD) v. INLAND REVENUE COMMISSIONERS, [1898] A. C. 565; 62 J. P. 740; 67 L. J. Q. B. 855; 79 L. T. 227; 14 T. L. R. 525—H. L. (E.).

61. *Bonds—Issue in United Kingdom—Offered for Subscription in United Kingdom*—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 82, sub-s. 1 (b) (i.), (ii.).]—In these cases there arose the following two points (1) whether certain

bonds of two American railway companies were issued by those companies in America; (2) if issued in America, were they afterwards "offered for subscription" in this country.

HELD—that the facts showed an issuing of the bonds in America, but did not show when or where the bonds were "offered for subscription" in this country within the meaning of sect. 82 (1) (b) (i.) and (ii.) of the Stamp Act, 1891.

Decision of Div. Ct. ((1900) 16 T. L. R. 94) reversed.

BROWN v. INLAND REVENUE COMMISSIONERS; [GORDON v. INLAND REVENUE COMMISSIONERS, (1901) 84 L. T. 71; 17 T. L. R. 177—C. A.]

62. *Certificate for Debenture Stock in Foreign Railway—Form of Transfer indorsed thereon—Finance Act, 1899 (62 & 63 Vict. c. 9), ss. 4, 6.*]—The Crown has a right where an instrument comes under two headings to charge the higher rate of duty.

A certificate for 4 per cent. debenture stock of the Chicago Great Western Railway Company which had indorsed on it a form of transfer signed by the holder, the name of the transferee being left blank, and which was transferred in the United Kingdom, was

HELD—to be chargeable with duty as a "marketable security," within sect. 4, sub-sect. 1, of the Finance Act, 1899.

NOAKES v. INLAND REVENUE COMMISSIONERS, [(1901) 83 L. T. 714; 17 T. L. R. 99—Div. Ct.]

63. *Debenture—Option to Redeem on Paying Premium—"Money thereby Secured"*—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.]—A limited company issued a series of debentures of £100 each, each debenture stating that the company would, as and when the principal moneys thereby secured became payable, pay the registered holder the sum of £100. By one of the conditions indorsed thereon, a certain number of debentures were to be redeemed by annual drawings on July 1st, 1902, and on July 1st in each succeeding year up to July 1st, 1917, when the balance outstanding was to be redeemed. By another condition the company might at any time after July 1st, 1900, redeem the debentures at £103 on giving six months' previous notice in writing, and upon the expiration of such notice the sum of £103 was to become payable as if the same was the amount of the principal moneys secured. The debentures were "marketable securities" not transferable by delivery within the meaning of Sched. I. to the Stamp Act, 1891.

HELD—that each debenture was a security for £100 only, and was, therefore, liable to *ad valorem* duty upon that amount, as "money thereby secured," and not upon £103.

Judgment of Div. Ct. ([1899] 1 Q. B. 345; 68 L. J. Q. B. 125; 47 W. R. 415; 79 L. T. 704; 15 T. L. R. 121) reversed.

KNIGHT'S DEEP, LD. v. INLAND REVENUE COMMISSIONERS, [1900] 1 Q. B. 217; 69 L. J. Q. B. 66; 48 W. R. 198; 81 L. T. 625; 16 T. L. R. 68—C. A.

## Stamp Duties—Continued.

**64. Debenture**—"Given in Substitution for a like Security"—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.]—Two companies, one registered in England and having a debenture issue, sold their assets and liabilities to a new company incorporated under the laws of Victoria. The holders of the debentures accepted in lieu thereof debentures of the same value from the new company.

**HELD**—that such debentures were not "given in substitution for a like security" within sub-head 4 of "marketable securities" in Sched. I. of the Stamp Act, 1891, and were liable to the full duty.

Decision of Channell, J. ([1904] 1 K. B. 757; 73 L. J. K. B. 371; 90 L. T. 579; 20 T. L. R. 355) affirmed.

**MOUNT LYELL MINING & Ry. Co. v. COMMISSIONERS OF INLAND REVENUE**, [1905] 1 K. B. 161; 74 L. J. K. B. 4; 53 W. R. 225; 92 L. T. 134; 21 T. L. R. 112—C. A.

**65 Mortgage to Secure Debentures**—"Substituted Security"—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (11), Sched. I.]—By clauses in a trust deed made between a company and trustees for debenture-holders certain freeholds and leaseholds were assured to the trustees to secure the payment of principal and interest, and the company had power to withdraw any of the freeholds and leaseholds and substitute others. By a subsequent deed a small part of the leaseholds was withdrawn and other leaseholds were substituted and conveyed to the trustees for the purposes declared and mentioned in the trust deed.

**HELD**—that the subsequent deed was a "substituted security," within Sched. I. of the Stamp Act, 1891, and liable to be taxed at the rate of 6d. per cent.

**GARTSIDES (BROOKSIDE BREWERY), LD. v. INLAND REVENUE COMMISSIONERS**, (1900) 82 L. T. 686; 16 T. L. R. 378—Div. Ct.

**66. "Promissory Note"**—"Debenture"—Treasury Note of Foreign Government—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 33, 82 (1) (b), 122; Sched. I.]—An instrument, called a Four-and-a-Half per cent. Gold Coupon Treasury Note, issued by the United States of Mexico, contained a promise by the States to pay to the bearer at a certain date \$1,000 in gold, and also interest in gold at the rate of  $4\frac{1}{2}$  per cent. per annum upon surrender of the annexed coupons; and the note was redeemable at par at the option of the United States at any time before maturity on 60 days' notice.

**HELD**—that the instrument, though a "promissory note," was a "marketable security" within the meaning of sects. 89, 122, of the Stamp Act, 1891, and must be stamped as such.

Decision of Walton, J. ([1906] 1 K. B. 318; 75 L. J. K. B. 132; 93 L. T. 839; 22 T. L. R. 171) reversed.

**SPEYER BROTHERS v. COMMISSIONERS OF INLAND REVENUE**, [1907] 1 K. B. 246; 76 L. J. K. B. 186; 96 L. T. 70; 23 T. L. R. 145—C. A.

## (g) Mortgage.

**67. "Auxiliary Security"**—"By way of further Assurance"—Debenture Trust Deed—Subsequent Conveyance to Trustees in Accordance with Deed—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (1), Sched. I., "Mortgage," §c. (2).]—An amalgamating company, wishing to issue debentures, executed a trust deed creating a floating charge on general assets in favour of trustees, and also binding the company to convey to them the various properties to be acquired in the course of the amalgamation, and at that time actually contracted to be sold to the company. This trust deed was stamped as a "mortgage"—2s. 6d. per £100—and the company did not object. Subsequently, a conveyance of the properties was executed "upon and for the trusts and purposes, and subject to the provisions of the Trust Deed."

**HELD**—that this document was liable to an *ad valorem* duty of 6d. per cent. on the amount of the debenture stock secured, as "being an auxiliary security or by way of further assurance" for the repayment of money, "where the principal or primary security is duly stamped."

Decision of Phillimore, J. (66 J. P. 438) affirmed.

**BRITISH OIL AND CAKE MILLS, LD. v. COMMISSIONERS OF INLAND REVENUE**, [1903] 1 K. B. 689; 72 L. J. K. B. 312; 67 J. P. 145; 51 W. R. 388; 88 L. T. 526; 19 T. L. R. 262—C. A.

**68. Debenture Stock for Purpose of paying off existing Debenture Stock**—"Security by Way of Mortgage for the Repayment of Money to be thereafter paid"—"Additional or substituted Security"—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86, sub-s. 1; s. 87, sub-s. 3; s. 88, sub-s. 1; Sched. I., title "Mortgage," §c.]—A trust deed of 1897, for securing irredeemable  $3\frac{1}{2}$  per cent. debenture stock of a company, provided as follows:—That the issue of the stock should in the first instance be limited to £300,000; that a further issue might be made of £540,000, making altogether £840,000; that such further issue should only be made for the purpose of redeeming or paying off an already existing 4 per cent. debenture stock secured by a trust deed of 1892; and that the 4 per cent. debenture stock to be redeemed or paid off should be transferred to the trustee of the deed of 1897.

**HELD**—first, that the deed of 1897 was a security by way of mortgage for the repayment of money to be thereafter paid within the meaning of sect. 86, sub-sect. 1, of the Stamp Act, 1891, and that by virtue of sect. 88, sub-sect. 1, it was chargeable with duty on the total amount of £840,000; secondly, that it was chargeable (under the heading "Mortgage, Bond, Debenture, Covenant") with *ad valorem* duty at the rate of 2s. 6d. per cent., as being a principal or primary security, and not merely with *ad valorem* duty at the rate of 6d. per cent., as being an "additional or substituted security."

**CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS**, [1899] 1 Q. B. 121; 68 L. J. Q. B. 62; 47 W. R. 216; 79 L. T. 648; 15 T. L. R. 49—Div. Ct.

**Stamp Duties—Continued.**

**69. Covenant—Agreement under Seal to execute Mortgage when required—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86, Sched. I.]**—By an instrument under seal a company agreed, in consideration of a sum of money then advanced to them by a building society, to execute, whenever called upon by the society, a mortgage or charge of the company's interest in certain lands in such form as the society should request, to secure the repayment of the sum so advanced and interest; and, by the same instrument, the company agreed to pay interest on the sum advanced until repayment, and appointed a person receiver of the rents and profits of the lands so long as any money remained due to the society, such receiver not to take possession until default had been made in payment after demand of the principal and interest.

**HELD**—that the instrument was a "mortgage" or a "covenant" within the meaning of the Stamp Act, 1891, and was chargeable with *ad valorem* duty under the head "Mortgage, Bond, Debenture, Covenant," in the first schedule to that Act.

**UNITED REALIZATION CO. v. INLAND REVENUE COMMISSIONERS, [1899] 1 Q. B. 361; 68 L. J. Q. B. 218; 47 W. R. 381; 79 L. T. 556—Div. Ct.**

**70. Reconveyance—Building Society—Exemption.]**—By the Building Societies Act, 1874, sect. 41, certain documents, including transfers and receipts, are not to "be subject or liable to be charged with any stamp duty or duties whatsoever, provided that the exemption shall not extend to any mortgage." And by sect. 42, where moneys secured by any mortgage or further charge are paid, a receipt in the form in the schedule to the Act indorsed on the deed is sufficient release. A deed was executed by the society, its trustees and the mortgagor, reconveying the mortgaged property as all the money due under the mortgage had been duly paid.

**HELD**—that the deed was exempt from duty.

**OLD BATTERSEA AND DISTRICT BUILDING SOCIETY v. INLAND REVENUE COMMISSIONERS, [1898] 2 Q. B. 294; 67 L. J. Q. B. 696; 78 L. T. 746—Div. Ct.**

**71. Transfer of Balance due on a Mortgage—Release—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched.]**—Certain hereditaments were mortgaged by an indenture to secure £1,100 lent by the mortgagees. A deed of transfer recited the mortgage and the payment off by the mortgagor of £100, part of the £1,100, and transferred the balance to the transferees in consideration of the sum of £1,000 paid by them to the mortgagees. The Inland Revenue Commissioner, assessed the stamp duty as on £1,000 transferred and £1,100 released.

**HELD**—that the deed was liable to be stamped only as a transfer, and not liable to be stamped as a release.

**HUMPHREYS v. INLAND REVENUE COMMISSIONERS, (1899) 81 L. T. 199—Div. Ct.**

**(h) Proprietary Medicines.**

**72. Medicinal Preparations — "Held out or Recommended . . . as a Specific" — Gum Pastilles—Influenza—Label on Box—52 Geo. 3, c. 150, s. 2, and Sched.]**—The respondent, a chemist, was summoned under sect. 2 of 52 Geo. 3, c. 150, for selling gum pastilles in a box which had a label containing the words "Pure Gum Pastilles: Influenza. Delightfully soothing to singers and public speakers," without a paper cover, wrapper, and label provided by the Commissioners of Inland Revenue, and without being duly stamped. The justices dismissed the summons on the ground that in their opinion these words did not in fact hold out or recommend the pastilles to the public as a nostrum, proprietary medicine or as a specific, or beneficial, for the prevention, cure or relief, of any distemper within the meaning of the said Act.

**HELD**—that the words were capable of only one meaning, namely, as amounting to a distinct statement that these pastilles were beneficial to a complaint affecting the human body, and that the justices ought to have convicted.

**RANSOM v. SANGUINETTI, (1903) 67 J. P. 219—[Div. Ct.]**

**73. Medicinal Preparations — "Owner, Proprietor, Maker, Compounder, Original or first Vendor thereof"—"Held out or Recommended to the Public"—Retail Chemist Buying from Maker, and Affixing Recommendation—Liability for Duty—Medicines Stamp Act, 1812 (52 Geo. 3, c. 150, Sched.)]**—The whole scheme of the Acts which impose a duty on medicinal preparations is to tax medicines imported from abroad, and medicines which particular persons can make to the exclusion of others.

A retail chemist purchased a quantity of ammoniated tincture of quinine from wholesale chemists who compounded it, and sold it without any label, or "recommendation to the public"; he then put it into bottles, to which he affixed labels describing it as "a well-known and highly recommended remedy for influenza and colds." An information was thereupon laid against him for selling such bottles without a label bearing an Inland Revenue stamp.

It was admitted that the case fell within the exemptions contained in the Schedule to 52 Geo. 3, c. 150, unless upon the above facts the drug had been "held out or recommended to the public by the owners, proprietors, makers, compounders, original or first vendors thereof."

**HELD**—that the retail chemist was not liable, on the ground that he was not "an owner, proprietor . . . or original, or first vendor" within the meaning of the Schedule.

If a preparation at the time of its purchase by such a retailer is exempt from stamp duty, the retailer does not become liable to pay duty by reason of his affixing a label of recommendation.

**FARMER v. GLYN-JONES, [1903] 2 K. B. 6; 72 L. J. K. B. 523; 67 J. P. 240; 51 W. R. 524; 89 L. T. 64; 19 T. L. R. 423—Div. Ct.**

## Stamp Duties—Continued.

## (i) Receipts.

74. *Counsel's Fees — Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 101 — Sched. I.]*—An acknowledgment given by counsel on a brief or at foot of a "list of fees" upon payment of fees amounting to £2 or upwards must be stamped as a receipt.

BAR GENERAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE, [1907] 1 K. B. 462; 76 L. J. K. B. 212; 71 J. P. 117; 96 L. T. 267; 23 T. L. R. 192—Bray, J.

75. "*Discharge*" — *Debenture Trust Deed—Indorsement of Redemption and Satisfaction—Stamp Act, 1891 (54 & 55 Vict. c. 39)]*—Upon the redemption of certain debenture stock, the trust deed was indorsed with a statement by the trustees to the effect that the stock secured by it and all interest thereon had been redeemed, paid off, and satisfied.

HELD—not to be a "discharge" and therefore not liable to *ad valorem* duty under the heading "Mortgage," sub-heading 5, in the Schedule to the Stamp Act, 1891, but merely a "receipt," and therefore exempt under "Receipt," 11th exemption.

FIRTH & SONS, LD. v. COMMISSIONERS OF INLAND REVENUE, [1904] 2 K. B. 205; 73 L. J. K. B. 632; 52 W. R. 622; 91 L. T. 138; 20 T. L. R. 447—Channell, J.

76. *Entry in a Book of Sum received by Officer of Bank — This Entry initialed by another Officer with the Word "Entered" or "Received" — Stamp Act 1891 (51 & 55 Vict. c. 39), ss. 101, 103.]*—A bank which was a limited company carrying on a money-lending business engaged a solicitor, under an agreement which made him an officer of the bank, for the purpose of carrying on the legal business of the bank and collecting debts due from customers. When the solicitor recovered sums of money for the bank he wrote down the amount in a book kept by him for that purpose, and he then took the money, with the book, to the bank and handed the amount over to one of the officers of the bank, who, in the margin opposite the amount paid, generally wrote the word "Received," with the amount and the date, and sometimes simply put his initials with the date, and in one case wrote the word "Entered," with the amount and initials.

HELD—that these entries were all receipts within the meaning of sect. 101 of the Stamp Act, 1891; that there was no distinction in the form of the receipts, and that all the entries in respect of £2 or upwards required to be stamped as receipts, and that the bank were liable in penalties, under sect. 103 for the act of its officers in not stamping them.

ATTORNEY-GENERAL v. CARLTON BANK, [1899] 2 Q. B. 158, 68 L. J. Q. B. 788; 63 J. P. 629; 47 W. R. 650; 81 L. T. 115; 15 T. L. R. 380—Lord Russell of Killowen, C.J.

77. *Scrip Certificate—Receipts for Instalments of "Consideration Money therein Expressed"—Stamp Act, 1891 (54 & 55 Vict. c. 39)—Schedule "Receipt," Exemption 11.]*—A duly stamped scrip certificate for £100 stock was issued upon payment of the allotment money, the balance being payable by two instalments of £40 each at fixed future dates. Payment in full might be made at any time subject to discount, and upon default in payment of the amounts at their due dates the previous payments were liable to forfeiture. At the foot of the certificate two blank forms of receipt for payment of the two instalments respectively were printed. The instalments were duly paid and the receipts filled in.

HELD—that the receipts were exempt from stamp duty within exemption 11 under the heading "Receipt" in Sched. I. to the Stamp Act, 1891, as they were written upon the duly stamped certificate, and acknowledged the receipt of the consideration money therein expressed.

Judgment of Div. Ct. (68 L. J. Q. B. 787; 63 J. P. 629) affirmed.

LONDON AND WESTMINSTER BANK v. INLAND REVENUE COMMISSIONERS, [1900] 1 Q. B. 166; 69 L. J. Q. B. 102; 48 W. R. 195; 81 L. T. 630; 16 T. L. R. 106—C. A.

## (k) Settlement.

78. *Appointment of New Trustee of Settlement—Sale of Lands Included in Settlement—Reinvestment of Proceeds in Stock—Ad valorem Duty of a Settlement—Stamp Act, 1891 (54 & 55 Vict. c. 39).]*—A portion of certain lands, subject to the trusts of a marriage settlement executed in 1870, was, in exercise of a power contained in the settlement, sold, and the proceeds invested in the purchase of stock.

HELD—that a deed appointing a new trustee of the settlement, and vesting in the new and continuing trustee the property, subject to the trusts of the settlement, including therein the stock above mentioned, is not a settlement within the meaning of the definition of the word "settlement" in the schedule to the Stamp Act, 1891.

MASSEREENE v. COMMISSIONERS OF INLAND REVENUE, [1900] 2 Ir. R. 188—Q. B. Div.

79. "*Settlements*" — *Several Instruments—Instrument of Appointment—Revocation and Declaration of New Trusts—Exception—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 106, Sched. I.]*—By a deed of settlement of June 25th, 1895, the settlor granted to trustees certain funds, and by a deed dated December 12th, 1896, certain other funds, upon trust for his five children, but so nevertheless that the share of each child should be held by the trustees upon trust to pay the income thereof to such child during his or her life, and after his or her death upon trust for such one or more of the others as such child should by will appoint. It was further provided that the trustees should have power, on or subsequent to the marriage of any of the children, to revoke the trusts of the settlement and to declare, as they thought fit, new trusts by way of resettlement for the



**Stamp Duties—Continued.**

benefit of such child, or any wife or husband of such child, or such child's children or remoter issue, or the next of kin of such child, and to transfer the funds to the trustees of such settlement. The deeds were stamped with *ad valorem* duty as settlements.

By two deeds, both dated April 10th, 1899, the trustees of the settlements of June 26th, 1895, and December 12th, 1896, revoked the trusts of those settlements so far as they concerned the share of C. E. H.-R. one of the children, who was then about to be married, and declared that such share should, from and after the solemnisation of the intended marriage, be held upon trust to pay the income thereof to C. E. H.-R. during his life, and after his decease to transfer such share to the trustees of the marriage settlement of C. E. H.-R., to be held by them upon the trusts declared in the marriage settlement. The deeds were each stamped with a duty of ten shillings.

By the marriage settlement, a deed of even date with the two last-mentioned deeds, it was provided that after the death of C. E. H.-R. the trustees of the settlement should stand possessed of his share of the funds comprised in the settlement of June 26th, 1895, and December 12th, 1896, upon the trusts of the settlement, which were, as regards the husband's fund after the death of the husband, to pay the income to the intended wife during her life, and after her death upon trust for the children or remoter issue of the intended marriage as the intending husband and wife jointly or the survivor of them should appoint, and in default of appointment in trust for the children in equal shares.

**HELD**—that the instrument dated April 10th, 1899, referred to as the marriage settlement, was *prima facie* chargeable with duty as being a "settlement" within the meaning of the word "settlement" as used in schedule to the Stamp Act, 1891; that as the donors of the power of appointment were not parties to it the instrument did not come within the exception in favour of "an instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment", that if the revocation of the trusts of the original settlement, and the declaration of the new trusts had been effected by the same deed, that deed might have been within the exception; and that the case did not fall within the terms of sect. 106 of the Stamp Act, 1891, as that section contemplates one transaction by way of settlement of property effected at the same time by several documents, not a series of documents effecting at different stages different dispositions with regard to settled property.

Decision of Div. Ct. ([1901] 2 K. B. 342; 70 L. J. K. B. 715, 65 J. P. 374; 49 W. R. 569, 84 L. T. 716) affirmed.

**RUSSELL (HAMILTON) v. INLAND REVENUE COMMISSIONERS**, [1902] 1 K. B. 142; 71 L. J. K. B. 201; 66 J. P. 228; 50 W. R. 193; 85 L. T. 738; 18 T. L. R. 126—C.A.

**(1) Miscellaneous.**

**80. Cancellation of Adhesive Stamp—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 8.**—It is not necessary now that a person cancelling a stamp should write his name and the date across it. The new sect. 8 of the Stamp Act, 1891, differs materially from sect. 24 of the Stamp Act, 1870, and was passed for the very purpose of altering the rule and allowing cancellation by other means.

**McMULLEN v. SIR ALFRED HICKMAN STEAM-SHIP CO., LD.**, (1902) 71 L. J. Ch. 766; 18 T. L. R. 650—Joyce, J.

**81. Instrument used for the Purpose of Assigning or Transferring Stock—Finance Act, 1899 (62 & 63 Vict. c. 9), s. 4 (2).**—In order to facilitate the reconstruction of a company, certificates for shares in the new company were given to some London agents, who transferred them to the persons beneficially entitled when called upon.

**HELD**—that by the assignment of the legal title and appropriation of the shares to the several beneficial owners, these certificates were assigned or transferred within the meaning of sect. 4 of the Finance Act, 1899.

**SPEYER BROS. v. INLAND REVENUE COMMISSIONERS**, (1902) 66 J. P. 551—Phillimore, J.

**82. Promissory Note—Document containing a Promise to Pay—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 33 (1).**—The plaintiff sold his public-house to the defendant. The defendant being unable to get a transfer of the licence, by arrangement the plaintiff agreed to carry on the business until the next licensing sessions for a consideration. Subsequently the defendant gave the plaintiff the following document, which was sued on:—

April 4th, 1899—*Re* "The Mitre Hotel," Tooting Graveney, S.W.—On the day of the transfer of the licence I agree to pay you the sum of twenty-five pounds.—To Mr. G. W. Smith—Witness, T. M. Wales, 174, Victoria Street, S.W.

**HELD**—that this document ought to be stamped as a promissory note within sect. 33 (1) of the Stamp Act, 1891. The document only could be looked at and not the circumstances connected with the matter.

**SMITH v. DEAN**, (1900) 69 L. J. Q. B. 331; 81 L. T. 755—Div. Ct.

**83. "Lease or Tack"—Lease of Tramways—Consideration—"Covenant relating to the Matter of the Lease"—Demise of Tramways—Annual Sum in Lieu of Repairing Roads—Annual Sum for Electrical Energy—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 4, 77, sub-s. 2.**—A corporation of a borough by an indenture demised to an electric traction company the right to use certain tramways at a certain yearly rent, and the indenture also provided that the company should in addition pay to the corporation, as from the date of the Board of Trade certificate authorising electric traction, £100 per mile per annum, making in all not less than the sum of

**Stamp Duties—Continued.**

£900 per annum in lieu of repairing and maintaining the roads, and should purchase all electrical energy required from the corporation, paying therefor, as from the said date, 2*d.* per unit, the minimum sum payable in any one year being £4,000. The question was, what stamp duty was payable under the indenture.

**HELD**—that as to the £900 it was to be treated as rent and as such swelling the *ad valorem* duty payable under sect. 4 of the Stamp Act, 1891, that as to the £4,000 it could not be described as rent, it was really ancillary to the main provision and a security for its performance, and it came within sect. 77, sub-sect. 2, of the Stamp Act, 1891, excepting a lease chargeable with *ad valorem* duty from paying a duty in respect of the further consideration of a "covenant relating to the matter of the lease."

Judgment of Div Ct. ([1901] 64 J. P. 805; 84 L. T. 84; 17 T. L. R. 92) reversed in part.

**BRITISH ELECTRIC TRACTION CO. v. INLAND [REVENUE COMMISSIONERS, [1902] 1 K. B. 441; 71 L. J. K. B. 92, 66 J. P. 83; 50 W. R. 280; 85 L. T. 663, 18 T. L. R. 105—C. A.]**

**84. Statutory Declaration—One Instrument containing Distinct Matters—Two Instruments on one Piece of Paper—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 3 (2), 4 (a).]**—A statutory declaration for the purpose of carrying through a transaction was sworn to, as to the whole of it by one person, and as to part of it by another person.

**HELD**—that the document constituted only one declaration, that it was not a declaration as to two distinct matters with sect. 4 (a) of the Stamp Act, 1891, and that it was therefore chargeable with only one stamp duty of 2*s.* 6*d.* in accordance with the heading "Affidavit and Statutory Declaration" in Sched. I. to the Act.

**REVERSIONARY INTEREST SOCIETY v. COMMISSIONERS OF INLAND REVENUE, (1906) 22 T. L. R. 740—Walton, J.**

**REVERSIONS AND REMAINDERS.**

*See* **REAL PROPERTY AND CHATELS REAL; PERSONAL PROPERTY.**

**REVERSIONS, ASSIGNMENT OF.**

*See* **PERSONAL PROPERTY, 1, 2.**

**REVISING BARRISTER.**

*See* **ELECTIONS.**

**REVOCATION.**

*See* **WILLS.**

**REWARD.**

*See* **CONTRACTS; CRIMINAL LAW.**

**RIGHT OF WAY, &c.**

*See* **EASEMENTS; HIGHWAYS.**

**RIOT.**

*See* **CRIMINAL LAW AND PROCEDURE; DAMAGES.**

**RIPARIAN OWNERS AND RIGHTS.**

*See* **FISHERIES; WATERS AND WATERCOURSES.**

**RIVERS.**

*See* **WATERS AND WATERCOURSES.**

**ROADS.**

*See* **HIGHWAYS, STREETS AND BRIDGES.**

**ROBBERY.**

*See* **CRIMINAL LAW AND PROCEDURE.**

**ROYAL FORCES.**

For **SOLDIERS' AND SAILORS' WILLS**, *see* title **WILLS, 24—31.**

*And see* **COURTS, 10, 11, 23; DEPENDENCIES AND COLONIES, 26; ELECTIONS; PUBLIC AUTHORITIES, 15; RATES, 15, 103.**

**1. Army—Arrest of Soldier on Active Service—Suspicion of Cowardice—Under Arrest for Six Months—No Charge Preferred—Right of Action—Time for taking Proceedings—Army Act, 1881 (44 & 45 Vict. c. 58), ss. 21, 43, 45, 170, 183.]**  
—A non-commissioned officer on active service

in the South African War was arrested on suspicion of cowardice. A court of inquiry was held, but dispersed without reporting; and he was kept under arrest for six months, although he asked that he might have a definite charge preferred against him, and be tried by court-martial.

Ultimately he brought an action for wrongful arrest and imprisonment against his superior officers.

**HELD**—that his action failed because

(1) it was not brought within six months as required by sect. 170 of the Army Act;

(2) if he was arrested under the Army Act his only remedy was the one provided by the Act, and

(3) on the broader ground that it is contrary to public policy that the acts of persons in authority done *flagrante bello* should be brought before a court of justice even after the close of the war.

*Dawkins v. Lord Paulet* ((1871) L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 21 L. T. 584) followed.

*EDMONDSON v. RUNDLE AND OTHERS*, (1903) [19 T. L. R. 356—Lawrance, J]

**2. Army—Unlawful Possession of Regimental Necessaries—Personal Knowledge—Proof—Army Act, 1881 (44 & 45 Vict. c. 58), s. 156 (2).**—In order to justify a conviction under sect. 156 (2) of the Army Act, 1881, it is not necessary to prove personal knowledge on the part of the accused that the articles, the subject-matter of the charge, were in his possession.

Regimental necessaries were found in one of three shops belonging to a pawnbroker.

**HELD**—that this fact alone cast upon him the burden of proving that his possession was lawful.

*O'BRIEN v. MACGREGOR*, [1904] 5 F. (J. C.) 74 [—Ct. of Justy.]

**3. Navy—Naval—"Naval Service"—"Royal Naval Reserve"—Enlistment—False Statement—Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), s. 16—Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 17—Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), ss. 15, 16**—The respondent applied to the appellant to be enrolled in the Royal Naval Reserve and signed a printed form which contained two statements, both of which were false.

**HELD**—that sect. 16 of the Naval Enlistment Act, 1853, which makes it an offence for a person upon entering the naval service to make any false statement with intent to deceive, does not apply to a person entering, or offering to enter, the Royal Naval Reserve, and that the respondent could not be convicted of an offence under that section.

*WESTHORPE v. POWLEY*, [1905] 1 K. B. 286; [74 L. J. K. B. 150; 69 J. P. 77, 53 W. R. 366, 92 L. T. 57; 21 T. L. R. 152; 20 Cox, C. C. 747—Div. Ct]

**4. Volunteers—Contract by Commanding Officer—Uniforms and Goods supplied for use**

B.D.—VOL. III.

*of Corps—Personal Liability—Regulations as to Volunteers 407—Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 25.*—Where uniforms or other goods are ordered by or on the authority of the commanding officer of a volunteer corps, he is, by virtue of sect. 25 of the Volunteer Act, 1863, and Regulation 407 of the regulations made under the Act, personally liable for the price of the uniforms and goods supplied under those orders; and if he dies before they have been paid for, his personal representatives are liable, although the property in the goods has passed to his successors in command.

*SAMUEL BROS., LD. v. WHETHERLY*, [1907] [1 K. B. 709; 76 L. J. K. B. 357; 96 L. T. 552; 23 T. L. R. 280—Walton, J.]

Affirmed, [1908] 1 K. B. 184, 98 L. T. 169; 77 L. J. K. B. 69; 24 T. L. R. 160—C. A.

**5. Volunteers—"Subject to Military Law"—Trained or Exercised with the Regular Forces—Return Home from Training—Arrest by Order of Adjutant—False Imprisonment—Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21—Army Act, 1881 (44 & 45 Vict. c. 58), ss. 41, 43, 45, 158, and 176.**—The plaintiff was a member of a volunteer corps, which under an order of the War Office went into military training with a portion of the regular forces at Shorncliffe Camp. On the morning of the day when the camp was being broken up he was accused by some of his comrades of larceny. Thereupon the adjutant ordered him to be arrested, taken to the guard tent, and from there taken with the baggage guard to the railway station and then to be carried in the special military train which took the corps home, to Boxmoor, from which place he was to be taken and handed over to the police authorities. These orders were carried out, and the plaintiff, in charge of three members of his corps, was taken from Shorncliffe Camp to Boxmoor and from thence to Hemel Hempstead, where he was handed over on the same day to the police. He was subsequently tried for larceny and acquitted. He then brought an action for assault and false imprisonment against the three members of his corps who had taken him from Shorncliffe and handed him over to the police.

**HELD**—that under sect. 176, sub-sect. 8, of the Army Act, 1881, the plaintiff was subject to military law during the happening of the acts complained of, being a volunteer "trained or exercised with a portion of the regular forces."

**HELD**, also, that the condition precedent at the beginning of sect. 158 of the Army Act, 1881, "where an offence under this Act has been committed" should be read as "where an offence under this Act has been alleged to have been committed."

**HELD**, therefore, that the action failed.

Judgment of Kennedy, J. ([1898] 1 Q. B. 396; 67 L. J. Q. B. 284; 78 L. T. 77; 18 Cox, C. C. 711; 46 W. R. 249; 14 T. L. R. 181) reversed.

*MARKS v. FROGLEY*, [1898] 1 Q. B. 888; 67 [L. J. Q. B. 605; 78 L. T. 607; 14 T. L. R. 393; 46 W. R. 548; 19 Cox, C. C. 91—C. A.]

6. *Volunteer Corps—Action against—Personal Injuries due to Commanding Officer's Negligence—Not Maintainable*—An action was commenced against a volunteer corps and its commanding officer as representing it in respect of a street accident alleged to be due to the negligent selection of horse and drivers for an ammunition waggon.

HELD—that the action would not lie, the funds of the corps belonging to the Crown, and the Crown not being liable for damages caused by its officers' negligence.

WILSON v. MACKAY AND OTHERS, [1905] 7 F. [168—Ct. of Sess.]

For MILITARY LANDS, see COMPULSORY PURCHASE, Nos. 5, 15, 21, 24, 51.

## SALE OF GOODS AND PERSONAL PROPERTY.

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And see AGENCY, Nos. 7, 16, 17, 18, 20; AUCTIONS.

### I. ACCEPTANCE.

1. "*Act in relation to the Goods which recognises a pre-existing Contract of Sale*"—*Absence of Memorandum—Passing of Property—Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 4, sub-ss. 1, 3.]—A firm sold to S. a quantity of barley "on rail" at a station on the defendants railway, and gave him an invoice containing the terms of the contract. There was no memorandum in writing in the contract signed by S. The defendants, on a written order of the vendors, sent S. an advice note informing him that the barley was at the station awaiting his order. After receiving the advice note S. tried to resell the barley, using for the purpose a sample obtained from the vendors, but he did not succeed in finding a purchaser. He never inspected the bulk. He was afterwards adjudicated a bankrupt, and the plaintiff was appointed trustee. S. had paid no part of the price. The

vendors claimed to stop the goods *in transitu*. The plaintiff claimed as trustee in bankruptcy.

HELD—that S. had accepted the goods; that the attempt to sell by S. was an act recognising a pre-existing contract within sect. 4, sub-sect. 3, of the Sale of Goods Act, 1893, and that the plaintiff was entitled to judgment.

*Semble*, that the absence of a memorandum in writing, and of the other conditions mentioned in sect. 4, sub-sect. 1, of the Sale of Goods Act, 1893, does not make a contract void or even voidable. The only effect of the non-fulfilment of the statutory condition is that the contract is unenforceable; the contract being good, all the other legal consequences of a contract follow, and the property in the goods passes to the buyer.

*Nicholson v. Bower* ((1858) 1 E. & E. 172; 28 L. J. Q. B. 97; 5 Jur. (N.S.) 246) discussed.

TAYLOR v. GREAT EASTERN RY. CO., [1901] [1 K. B. 774; 70 L. J. K. B. 499; 49 W. R. 431; 84 L. T. 770; 17 T. L. R. 394; 6 Com. Cas. 121—Bigham, J.]

2. "*Approved Acceptance*"—*Meaning of*.—An "approved acceptance" in a mercantile contract means an acceptance to which no reasonable objection can be taken, and not one to which no objection has in fact been taken.

REID v. SNOWBALL CO., LD., (1905) 7 F. 35—[Ct. of Sess.]

### II. CONDITIONS.

3. *Condition as to Price on Re-sale—Sale to Wholesale Trader—Re-sale to Retailer—Retailer having Notice of Condition—Whether binding on him.*—T. & Co., a firm of manufacturers, sold tobacco to wholesale dealers subject to conditions, which provided that the goods should not be resold at less than a specified price, and that "acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & Co."

In an action by T. & Co. against a retailer, who had bought with notice of these conditions from a wholesale dealer, and was nevertheless reselling below the specified price:—

HELD—(1) that such conditions could not be attached to goods so as to bind purchasers with notice; and

(2) that there was no contract between T. & Co. and the retailer, for the wholesale dealer was not in fact the former's agent, but an independent vendor.

TADDY & CO. v. STERIOUS & CO., [1904] 1 Ch. [354; 73 L. J. Ch. 191; 52 W. R. 152; 89 L. T. 628; 20 T. L. R. 102—Eady, J.]

4. *Conditions as to Price on Re-sale—Manufacturers—Wholesale Dealers—Minimum Retail Prices—Successive Purchasers—Privity of Contract.*—Conditions cannot be imposed on a sale of goods so as to run with the goods and

**Conditions—Continued.**

be enforceable against subsequent purchasers by the original vendor, even though the subsequent purchasers had notice of them at the time of their purchase.

The plaintiffs, who were manufacturers of rubber heel pads, sold them in boxes inside the lids of which were fixed certain printed conditions providing that the pads were not to be retailed at less than certain minimum prices, or resold except subject to the conditions as a term of the sale; and that the acceptance of the goods by any purchaser would be deemed to be an acknowledgment that they were sold to him on those conditions, and that he agreed with the vendors as agents of the plaintiffs in that respect to be bound by them. The defendant bought some of these pads from H., one of the plaintiffs' factors, and was reselling them, as the plaintiffs alleged, at less than the minimum prices.

**HELD**—that the defendant had entered into no contract with the plaintiffs, and the plaintiffs had no cause of action against him.

*Taddy & Co. v. Sterious & Co. (supra)* approved.

*McGRUTHER v. PITCHER*, [1904] 2 Ch. 306, 73 [L. J. Ch. 653; 20 T. L. R. 652; 53 W. R. 138; 91 L. T. 678—C. A.]

**5. Condition as to Time in Executory Contracts.]**

—A firm of engineers undertook to supply a printing machine, the machine to be delivered in six weeks. The contract was contained in a series of letters and telegrams. The sellers failed to deliver the machine in the time stipulated.

**HELD**, on a construction of the terms of the correspondence, that time was not an essential element of the contract, and that the purchasers, although entitled to damages for the breach of the stipulation, were not entitled to reject the machine.

*PATON (HUGH) & SONS v. PAYNE & Co., LD.*, (1897) 35 Sc. L. R. 112—H. L. (Sc.).

**6. Condition Precedent—Delivery in Installments—Payment on due Date—Default in Payment—Refusal of further Deliveries.]**—By a contract for the sale of steel tinplate bails to be delivered over a period of three months, payment to be made in cash in fourteen days after delivery, it was provided that all payments should be made on due date as a condition precedent to future deliveries. The purchasers having made default in payment on due date:—

**HELD**—that the vendors were justified in unconditionally refusing to make any further deliveries.

*EBBW VALE STEEL, IRON AND COAL Co., LD. v. BLAINA IRON AND TINPLATE Co., LD.*, (1901) 6 Com. Cas. 33—C. A.

**7. Condition Precedent—Delivery by Installments—Waiver by Purchaser.]**—The plaintiff sold to the defendants in London 100 tons of Honduras rosewood to be delivered in two instalments in 1903, cash to be paid against bills of

lading. After the first instalment had been shipped the defendants heard that the plaintiff had shipped rosewood to another buyer in the trade, and they wrote to the plaintiff repudiating the whole contract, upon the ground that there was a collateral oral agreement, which was a condition of the contract, that the plaintiff would not ship any rosewood to any other buyer during 1903. When the bill of lading for the first consignment arrived it was tendered to the defendants, who refused to accept it upon the ground that they had already repudiated the contract on account of the breach of the collateral agreement. When the bill of lading for the second consignment arrived it was tendered to the defendants, who refused it on the same ground. The plaintiff sold the wood against the defendants and claimed the difference between the contract price and the price realised. At the trial *Kennedy, J.*, found that the collateral agreement was not proved, and that, therefore, the repudiation of the contract by the defendants was wrongful. He further found that part of the first consignment was not in accordance with the quality specified in the contract, and that the defendants might have refused to accept that consignment upon that ground, but he held that they could not avail themselves of that ground as they had previously wrongfully refused to take any of the wood under the contract. He therefore gave judgment for the plaintiff, subject to a reduction on account of the inferiority in quality of part of the first consignment. The defendants, on appeal, contended that, admitting that the repudiation of the entire contract was wrongful, the plaintiff could not recover any damages in respect of the first consignment, as he was never in a position to tender a consignment which the defendants could have been compelled to accept.

**HELD**—that the defendants, by refusing to accept the bill of lading for the first consignment upon the ground that they had already repudiated the entire contract, waived the performance by the plaintiff of the conditions precedent on his part to be performed, and, therefore, could not now say that the plaintiff was never in a position to tender a consignment which the defendants would have been bound to accept.

*BRAITHWAITE v. THE FOREIGN HARDWOOD Co.*, [LD., [1905] 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; 10 Com. Cas. 189; 10 Asp. M. C. 52—C. A.]

**8. Condition Precedent—Impossibility of Performance—Shipment between Specified Dates—Measure of Damages.]**—The defendants contracted with the plaintiffs to ship 250 bales of Manila hemp at a stipulated price by sailer or sailers between May 1st and July 31st. No shipment was made by the defendants or for them between such dates. On or about September 15th a shipment was made, and on October 27th the defendants made a declaration of a shipment within the terms of the contract. On October 29th the plaintiff returned the declaration, refusing to accept the hemp. On November 4th the defendants wrote saying that they could not make any other declaration.

**Conditions—Continued.**

**HELD**—that the stipulations were conditions precedent; that there was no implied condition in the contract that it should be possible to ship between the named dates by sailer or sailors; that there was an express condition, viz, "Should the goods or any portion thereof not arrive in London from loss or other unavoidable cause, this contract to be void," which contemplated goods that had been shipped and declared; that the non-arrival of the goods in London (by reason of the Spanish-American war) was not caused by any unavoidable cause within the meaning of the contract.

The difference between the contract price and the market price on November 4th was the measure of damages.

**ASHMORE & SON v. C. S. COX & Co.**, [1899] 1 Q. B. 436; 68 L. J. Q. B. 72; 15 T. L. R. 55; 4 Com. Cas. 48—*Ld. Russell of Killowen, C.J.*

**9. Condition Precedent—Impossibility of Performance—Shipment by Named Steamer at Specified Date—Damage to Steamer by Stranding.**—By a contract dated October 24th, 1899, the defendants sold to the plaintiffs a cargo of cotton seed to be shipped from Egyptian ports in January, 1900, by a named steamer. The contract contained the following clause: "In case of prohibition of export, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." In November the steamer in question stranded and sustained damage, which it was impossible to repair in time for the steamer to load a cargo in January. On December 20th the defendants informed the plaintiffs that, owing to the damage to the steamer, they would not be able to perform the contract. In February the plaintiffs brought this action for breach of contract, claiming as damages the difference between the contract price and the market price at the end of January.

**HELD** (by A. L. Smith, M.R., and Romer, L.J., Vaughan Williams, L.J., dissenting)—that the parties must have known that the performance of the contract would become impossible unless the particular thing specified, that is, the named ship, continued to exist as a cargo-carrying ship down to and during the month of January, 1900; that there was no express or implied warranty that the ship should continue to exist: that the event had happened; and that there had, therefore, been no breach of contract.

**Taylor v. Caldwell** ((1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 11 W. R. 726; 5 L. T. (N.S.) 356) and **Howell v. Coupland** ((1876) 1 Q. B. D. 258; 46 L. J. Q. B. 147; 24 W. R. 470; 33 L. T. (N.S.) 832—C.A.) followed.

Judgment of Mathew, J. ([1900] 2 Q. B. 298; 69 L. J. Q. B. 640; 82 L. T. 761; 16 T. L. R. 370; 5 Com. Cas. 252; 9 Asp. M. C. 94) affirmed.

**NICKOLL AND KNIGHT v. ASHTON, EDRIDGE & Co.**, [1901] 2 K. B. 126; 70 L. J. K. B. 600; 49 W. R. 513; 84 L. T. 804; 17 T. L. R. 467; 6 Com. Cas. 151, 9 Asp. M. C. 209—C. A.

**10. Condition Precedent—"To be Delivered after Approval on Full and Complete Inspection"—Bonâ fide Refusal—Capricious Objection—Recovery of Deposit.**—Where a buyer has the right of approving of an article, e.g., a ship, to be purchased, that approval is a condition precedent of the contract coming into effect, so long as the buyer do not act deceitfully. A capricious objection on the part of the buyer will not do, but, provided that he acts in good faith, the fact that he magnifies defects will not disentitle him to reject the article. A deposit may be recovered.

**REPETTO v. FRIARY STEAMSHIP CO., LD.**, [(1901) 17 T. L. R. 265—Mathew, J.]

**11. Sale of Goods by Description—Implied Condition—Acceptance—Passing of Property—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 13, 17, 35.**—Where a specific article is sold by description without having been seen by the buyer, there is an implied condition, under sect. 13 of the Sale of Goods Act, 1893, that the goods shall correspond with the description, and the vendor cannot make the property pass by delivering something which does not correspond with the description.

**VARLEY v. WHIPP**, [1900] 1 Q. B. 513, 69 L. J. Q. B. 333; 18 W. R. 363—*Div. Ct.*

**12. Wheat for Shipment—Clearance not later than May 31—Certificate of Clearance issued before Completion of Loading.**—A contract for the sale of wheat for shipment from Galveston, in the United States, contained the following clause: "Clearance not later than May 31." On May 28th a certificate of clearance was issued to the master of the ship by the Customs authorities authorising the ship to proceed to sea. At that time part only of the cargo had been loaded, but the remainder was alongside waiting to be put on board. The certificate was granted in these circumstances in accordance with the usual and recognised practice in America. The loading was completed, and the ship sailed on June 2nd.

**HELD**—that the condition of the contract as to clearance had been complied with.

Judgment of Bigham, J. ((1889) 15 T. L. R. 171; 4 Com. Cas. 265) affirmed.

**THALMANN v. TEXAS STAR FLOUR MILLS**, [(1900) 82 L. T. 833, 16 T. L. R. 460; 5 Com. Cas. 321, 9 Asp. M. C. 321—C. A.]

**III. CONSTRUCTION.**

**13. Agreement to take Delivery of a Certain Specified Quantity per Month—Breach.**—By an agreement dated July 30th, 1896, the defendants were appointed sole agents for the sale of the plaintiffs' cocoa in Great Britain and Ireland for the period of five years. The plaintiffs were to pay the defendants the sum of £2,700 in certain instalments to be expended in advertising, the defendants undertaking to accept delivery of 40,000 lbs. of cocoa in the space of 18 months. This agreement was modified in certain respects on January 27th, 1897, the plaintiffs undertaking to pay the defendants much larger sums for

**Construction—Continued.**

advertising, and the latter undertaking to accept a much larger amount of cocoa in a period of two years—10,000 lbs. in the first year, and 6,000 lbs. in the second, not less than one-twelfth of the yearly quantity to be taken each month. On April 14th, 1897, a further alteration was made in the agreement, whereby the defendants undertook to take and pay for an average of 6,000 lbs. of cocoa per month from April 1st, 1897, to April 1st, 1899, in consideration of the plaintiffs advancing further sums for the purpose of pushing the sale of the cocoa. The defendants, as from April 1st, 1897, took delivery of considerably less than the 6,000 lbs. per month contracted to be taken, and in February, 1898, when the present action was commenced, they had in ten months only taken delivery of 24,012 lbs. The plaintiffs sued the defendants for breach of contract.

**HELD**—that under the agreement of April 14th, 1897, the defendants were bound to take monthly deliveries; that these monthly deliveries were not to be rigidly fixed at 6,000 lbs. each, that they might be something more or something less, but still something that might be fairly and reasonably described as an average of 6,000 lbs. As the defendants had not done this they had committed a breach of their contract, and this breach could not be healed by their taking larger quantities in succeeding months.

**NEDERLANDSCHE CACAOFABRIK v. DAVID [CHALLEN, LD., (1898) 14 T. L. R. 322—Bigham, J.]**

**14. Custom—Coal Trade of Newcastle—Sale of "about" Specified Weight of Coal—Coal to be Delivered in Monthly Instalments—Short Delivery—Option to Vendor up to 5 per cent. in Either Direction.**—The defendants sold to the plaintiffs "about" 18,500 tons of Northumberland coal under two contracts, deliveries to be in as nearly equal monthly instalments as possible over a given period. The defendants, having so far made the deliveries in approximately equal quantities, delivered as their last monthly instalment a shipment of 455 tons short. In an action by the purchasers for short delivery.—

**HELD**—that there is a reasonable custom of the Newcastle coal trade that the word "about" gives to the vendors an option up to 5 per cent. in either direction, and that, the custom being proved, the defendants had made no default in fulfilling their contracts, inasmuch as the word "about" referred to the total amounts to be delivered under each contract respectively, and not merely to the "last instalment."

**SOCIÉTÉ ANONYME L'INDUSTRIELLE RUSSO-BELGE v. SCHOLEFIELD, (1902) 7 Com. Cas 114—C. A**

**15. Export Duty on Coal—Duty imposed after Contract made—Pending Action—Right to add New Duty to Contract Price—Finance Act, 1901 (1 Edw. 7, c. 7), s. 10, sub-s. 1.**—Under sect. 10, sub-sect. 1, of the Finance Act, 1901, the seller of goods under a contract made before the new duties on goods were imposed can add

the new duty to the contract price of the goods, in the absence of an agreement to the contrary, even though an action relating to the price of the goods was pending at the time when the Act was passed.

**CONWAY BROS. AND SAVAGE v. MULHERN [& Co., LD., (1901) 17 T. L. R. 730—Mathew, J.]**

**16. Export Duty on Coal—Sale of Coal for Export—Delivery Free on Board—New Export Duty imposed after Contract made—Vendor held Liable for—Finance Act, 1901 (1 Edw. 7, c. 7), s. 3.**—A vendor who had contracted to deliver coals for export at 10s. per ton free on board was held liable (as between himself and the purchaser) for the export duty of 1s. per ton imposed by the Finance Act, 1901, after the making and before the fulfilment of the contract.

**BOWHILL COAL CO., LD. v. TOBIAS, (1903) [5 F 252—Ct. of Sess. (diss., Lord Young).]**

**17. Export Duty on Coal—Sale f.o.b.—Contract made before April 19th, 1901—Coal not Applied by Purchaser for Fulfilling a Contract for Sale at a Specified Price—Liability of Seller to Pay Duty in First Instance—Finance Act, 1901 (1 Edw. 7, c. 7), s. 3, sub-ss 1, 2; Sched. IV. cl. 6.**—Where coal is sold to a purchaser free on board for export in pursuance of a contract made before April 19th, 1901, and the coal is not applied by the purchaser for the purpose of fulfilling a contract made by him before the above date for its sale at a specified price, the seller is liable in the first instance under the f.o.b. contract to pay the export coal duty imposed by sect. 3 of the Finance Act, 1901, and in the absence of an agreement to the contrary he can recover it back from the purchaser.

**Decision of Phillimore, J. (22 T. L. R. 344) affirmed.**

**INSOLE & SON v. GUERET, LD., (1907) 23 T. L. R. [294—C. A.]**

**18. Implied Term—Goods to be Delivered from Ship on to Purchaser's Wharf—Ship too Large for Berth—Expenses of Dredging.**—The appellants purchased from the respondents a cargo of oil in bulk to be shipped by a named steamer and to be delivered by the steamer into buyers' storage tanks, and the buyers undertook to receive the oil from the steamer through their pipe lines at the discharging berth. By a contract between the buyers and the dock company the preferential use of a certain wharf in the Thames was granted to the buyers, and facilities for pipelines to the storage tanks were also given to them, and the dock company agreed to clear out a berth to enable a steamer 350 feet long to lie safely alongside, but the purchasers had no right as between themselves and the dock company to have vessels of greater length than 350 feet at the wharf. The sellers knew that the buyers' pipe lines were at that wharf, and they contracted with reference to that place of discharge. The steamer named in the contract of sale was 471 feet long and could not therefore

**Construction—Continued.**

lie at the berth. Dredging operations had accordingly to be undertaken, and then the steamer came alongside and delivered her cargo. The sellers did not know that the berth was too short for the steamer, and the buyers did not know the length of the steamer, though both parties might by inquiry have ascertained these facts.

**HELD**—that on the true construction of the contract the buyers undertook to procure for the sellers the right to have the steamer at the berth for the purpose of discharging there, and that if the dredging operations were necessary in order to get the consent of the dock company to the steamer coming alongside, the expense of dredging must be borne by the buyers as being an expense necessary to enable them to perform their contract.

**IN THE MATTER OF AN ARBITRATION BETWEEN**  
[THE SHELL TRANSPORT AND TRADING CO.  
AND THE CONSOLIDATED PETROLEUM CO.,  
(1904) 20 T. L. R. 517—Channell, J.]

**19. Non-warranty Clause in Invoice—Goods Supplied of a Wholly Different Character from those Ordered.**—The following clause was placed at the head of a seed merchant's bill: "Messrs. Howcroft give no warranty, express or implied, as to description, quality, productiveness, or any other matter connected with the seeds they send out, and they will not in any way be responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned."

**HELD**—that this clause could not be construed to mean that no action could be brought, and that where one particular kind of seed had been ordered, the seller was not entitled to deliver something quite different. The custom of a trade might qualify a contract but it could not destroy it.

**HOWCROFT v. LAYCOCK**, (1898) 14 T. L. R. 160  
[—Div. Ct.]

**20 "Payment by Cash in Exchange for Shipping Documents"—Time for Payment—Reasonable Time—Right of Vendor to Sell Goods against Purchaser**—The plaintiffs sold to the defendants a cargo of Newfoundland codfish for delivery by ship at Lisbon, "payment to be made by cash in London in exchange for bill of lading and policy of insurance." The ship arrived at Lisbon on October 24th, 1901, and shortly afterwards the plaintiff tendered the shipping documents and requested payment in exchange. Payment not having been made by November 1st, the plaintiff a day or two later sold the cargo, and sued to recover the loss caused by the re-sale.

**HELD**—that the contract meant that payment must be made upon the shipping documents being tendered—that was, within a reasonable time in a business sense; and that, the defendants having refused payment within a reasonable time, the plaintiff was entitled to sell against them.

**RYAN v. RIDLEY & Co.**, (1903) 19 T. L. R. 44;  
[8 Com. Cas. 105—Kennedy, J.]

**21. Right to Reject—Stipulation against.**—A contract for the sale of teak logs "to be of fair merchantable quality, conversion and condition" expressly provided that, if any dispute arose under the contract, the buyers were nevertheless to take delivery and pay the price, and the dispute was to be referred to arbitration.

**HELD**—that this provision precluded the buyers from rejecting logs on the ground that they were not of "fair merchantable quality, conversion and condition."

**LEARY & Co. v. BRIGGS & Co.**, (1905) 6 F. 857—  
[Ct. of Sess.]

**22. Sale—"C. I. F. to Buyer's Wharf"—Obligation of Seller—London Clause Rate—Payment of London Charges.**—Goods which had been sold "C. I. F. to buyer's wharf, Victoria Docks, London," were discharged elsewhere in London, and certain charges were paid under the "London clause" in the bill of lading.

**HELD**—that the seller must bear these charges  
**ACME WOOD FLOORING CO., LD. v. SUTHERLAND**  
[**INNES CO., LD.**, (1904) 9 Com. Cas. 170—  
Bruce, J.]

**23. Sale of Cattle on c.i.f. Terms—Insurance to be against "All Risks"—Policy with Clause "Warranted Free of Capture, Seizure, and Detention"—Cattle not Landed in consequence of Government Prohibition—Loss.**—The plaintiffs purchased cattle from the defendant on c.i.f. terms, the terms as to insurance in the contract being that it was to be "against all risks." The defendant delivered to the plaintiffs a policy against all risks, but it contained the clause "warranted free of capture, seizure, and detention, and the consequences thereof."

**HELD**—that the policy containing that clause (although as between an insurance broker and underwriters its insertion was usual in an "all risks" policy) did not comply with the terms of the contract of sale, and therefore that the defendant was liable for loss occurring to the plaintiffs by reason of the cattle not being allowed to be landed owing to a Government prohibition.

**G. S. YUILL & Co. v. SCOTT-ROBSON**, [1907]  
[1 K. B. 685, 76 L. J. K. B. 469; 96 L. T.  
842; 23 T. L. R. 217; 12 Com. Cas. 196—  
Channell, J.]

**Affirmed**, [1908] 1 K. B. 270; 77 L. J. K. B.  
259; 24 T. L. R. 180—C. A.]

**24. Specification for Manufacture of Iron to be Given "in the beginning of May"—Delivery of Specification between May 12th and 15th—Repudiation of Contract by Buyers.**—In construing a contract, the Court must ascertain the intention of the parties to be collected from the instrument, and the circumstances legally admissible in evidence with reference to which it is to be construed.

The defendants, who were manufacturers, agreed to deliver to the plaintiffs 1,000 tons of a certain description of iron on the following terms contained in the sale note: "Delivered



**Construction—Continued.**

... cost and freight Japan, direct post specification to be given in the beginning of May. Time of shipping, May and June, from Antwerp." The plaintiffs and defendants knew that the specification had to be sent from Japan to Antwerp. The whole quantity of iron could be produced by the defendants at their works in less than eight days, and the opportunities of shipment from Antwerp to Japan, during the months of May and June, were known to be frequent. The specification was delivered in several parts between May 12th and 15th. The defendants at once declared the contract at an end.

**HELD**—that the delivery by the plaintiffs of the specification was in accordance with their obligation, as it did not put upon the defendants, from a business point of view, any unreasonable burden to manufacture the goods, ordered as they were, by May 15th, and ship them in May and June; and that even if the delivery of the specification was not "in the beginning of May," the clause was not a condition precedent the non-compliance with which entitled the defendants to declare the contract at an end, and unless there was a breach of it so extensive as to frustrate the intention that the goods should be shipped before the end of June, the promise was one which could give rise properly if transgressed only to a right to compensation in damages.

*Semble*, that delivery of the specification on May 15th was a delivery "in the beginning of May," as such expression covered the first half of May.

KIDSTON v. MONCEAU IRONWORKS, (1902) 86 [L. T. 556; 18 T. L. R. 320; 7 Com. Cas 82—Kennedy, J.

**25. Supply of Stone "in such Quantities and at such Times as may be required."**—The Admiralty, by circular, invited the respondents to tender for the supply of stone "in such quantities and at such times as may be required" by the Admiralty.

The Admiralty accepted a tender from the respondents for the supply, for the new breakwater at Portland, of "about 2,000,000 tons, or such quantity as may be required," of refuse stone. After a small quantity had been delivered, the Admiralty gave notice that they had entered into a contract with a contractor for the completion of the breakwater, and no more stone would be required from the respondents.

**HELD**—that there was no contractual obligation to take 2,000,000 tons, but only to take stone "in such quantities and at such times" as the Admiralty might require; that was, that the respondents were to supply the stone when the Admiralty demanded it; and that there was at no time an undertaking to take a definite quantity.

Decision of C. A. (*sub nom. Stewards and Co., Ltd. v. The Queen*, (1901) 17 T. L. R. 111) reversed.

ATTORNEY-GENERAL v. STEWARDS & Co., LD., (1902) 81 T. L. R. 131—H. L. (E.).

**26. Trader's "Requirements" — Proof — Character of Business — Previous Course of Dealing.**—A manufacturer agreed to supply a broker and merchant, for one year, with "all your requirements in" manilla-hemp, rope, &c., at a fixed price.

**HELD**—that the word "requirements" was ambiguous; that it might mean either all that the purchasers might demand, or all that they might need in the prosecution of their business, or some department of it, and that it was competent to prove the circumstances surrounding the parties, the character of their business, and the previous course of dealing (if any) between them, for the purpose of determining the true construction of the language used.

VON MEHREN & Co. v. EDINBURGH ROPERIE [AND SAIL CLOTH Co., LD., (1902) 4 F. 232.

**IV. DAMAGES.**

**27 Acceptance of Subject-matter by Purchaser — Right to reject Machinery after it has been tried and paid for.**—When the purchaser of machinery accepts and uses it, but subsequently discovers latent defects in it, his remedy is not by rescission of the contract of sale, but for indemnification for the costs which he may incur in having the same put into working condition.

MORRISON AND MASON, LD. v. CLARKSON BROS., [(1898) 25 R. 427; 35 Sc. L. R. 335—Ct. of Sess.

**28. American Grain Contract—London Corn Trade Association—Suspension of Payment by Seller—Repurchase by Buyer at a Price less than the Contract Price—Claim by Seller for Difference.**—A contract for the sale of oats by the plaintiff to the defendants, made in the form known as the American Grain Contract of the London Corn Trade Association, provided that, "in case either party shall suspend payment of his debts, . . . the other party shall be entitled immediately to resell or repurchase as the case may be." Before delivery of any portion of the goods the plaintiff suspended payment and the defendants repurchased. At the date of the repurchase the market price was less than the contract price.

**HELD**—that the plaintiff was not entitled to recover from the defendant the difference between the contract price and the market price at the date of the repurchase.

SIMMONDS v. MILLAR & Co., (1899) 4 Com. Cas. [64—Kennedy, J.

**29. "Cost, Freight, and Insurance" Contract — Shortage in Goods — Breach of Contract — Insurance by Vendors for more than Invoice Price—Purchasers' Right to Proceeds of Insurance.**—By a "c.f.i." contract the defendants sold to the plaintiffs 500 loads of timber for shipment at Quebec for Belfast. The defendants shipped 470 loads instead of 500. The ship and cargo were lost on the voyage. The defendants had a floating policy open with underwriters under which they were entitled to declare 92 per cent. of their risks (being their own insurers

**Damages—Continued.**

as to 8 per cent.), and a further 20 per cent. for "profit." They declared under the policy the invoice price of the shipment as the value, and 20 per cent. of that for the "profit." The plaintiffs claimed to recover damages for the defendants' breach of contract to sell; or in the alternative for the proceeds of the insurance.

**HELD**—that the plaintiffs were entitled to damages for breach of contract, as no shipment was ever made within the meaning of the contract; for the shipment could not be made piecemeal, but must be in one parcel; and that, if the defendants had fulfilled their contract, the plaintiffs were not entitled to the proceeds of the insurance as it was not effected under the terms of the contract or at the plaintiffs' request.

**HARLAND AND WOLFF v. BURSTALL & Co.**,  
[(1901) 84 L. T. 324; 17 T. L. R. 338; 6 Com.  
Cas. 113; 9 Asp. M. C. 184—Bigham, J.]

**30. Custom—Fur Trade—Goods ordered to be Delivered "on Memorandum" or "on Approval"—Liability for Loss of Goods by Burglary—Measure of Liability**—There is a reasonable custom in the fur trade that a party ordering goods to be delivered "on memorandum," or, in other words, "on approval," is liable to the party of whom he orders them for any loss of, or injury occurring to, the same while in the hands of the party so ordering them before he may have signified his approval of the same.

*Semble*, the price stated in the invoice fixes the measure of liability.

**BEVINGTON v. DALE**, (1902) 7 Com. Cas. 112—  
[Kennedy, J.]

**31. Delay in Delivery—Measure of Damages—Notice of Special Circumstances.**—A steamship of 4,000 tons was lying at P. with a piston broken; and her owners, having had a new one cast at G., agreed with the defendant company to carry the casting at company's risk, by passenger train and at a high special rate.

Delivery was unduly delayed for three or four days, and the owners sued the company for damages, including outlays and loss of profit caused by the detention of the ship, amounting to £300. It was proved that the railway company received notice from the shipowners' agents that the carriage was urgent, and that any delay in the delivery of the casting would cause the detention of the ship, but the company were not informed of the size of the ship, and that it had a crew of fifty-seven men on board, and that the casting was a piston and formed part of the machinery of the vessel.

**HELD**—that the railway company were not liable for the loss of profit, and were only liable for part (estimated at £50) of the outlays caused by the detention of the ship.

**"DEN OF OGIL" Co. v. CALEDONIAN RY.**, (1903)  
[5 F. 99—Ch. of Sess.]

**32. Inspection and Approval—Payment after Inspection immediately on Arrival—Failure to**

*Inspect—Goods not in accordance with Contract—Right to Damages.*—Goods were sold "Payment net cash after inspection of goods immediately on arrival of steamer."

**HELD**—that buyer was entitled to damages, the goods not being in accordance with contract, although he had failed to inspect, or had inspected so carelessly as to overlook the defect.

**KHAN v. DUCHÉ**, (1905) 10 Com. Cas. 87—  
Bigham, J.]

**33. Measure of Damages—Article Sold for Specified Purpose—Breach of Contract**—Defendant sold plaintiff mortar for some building operations, and subsequently the building was condemned by the London County Council on the ground that the mortar was bad.

**HELD**—that the plaintiff was entitled to recover from the defendant the cost of pulling down and rebuilding.

**SMITH v. JOHNSON**, (1899) 15 T. L. R. 179—  
[Bruce, J.]

**34. Measure of Damages—Sale of Orchid—Breach of Warranty.**—The plaintiff purchased an orchid from the defendant at an auction for twenty guineas with the warranty that it was "Cattleya Acklandiae alba, only known plant." After two years it flowered, and produced not a white but a purple flower. The value of such a plant is 7s. 6d.

In an action for breach of warranty the county court judge found as a fact that, if the orchid had been an actual alba, it was at the time of sale worth £50, but that until it showed its real nature there was no probability that an orchid grower would give more than twenty guineas for it.

**HELD**, upon this finding, that judgment must be entered for the plaintiff for £50.

**ASHWORTH v. WELLS**, (1898) 78 L. T. 136; 14  
[T. L. R. 227—C. A.]

**35. Measure of Damages—Sale of Sugar for Brewing containing Poisonous Matter—Cost of Notices to Customers of Change of Brewing Materials—Cost of Beer Destroyed—Loss of Profits.**—An action was brought by the plaintiffs, who were brewers, against the defendants in respect of the supply by the defendants to the plaintiffs of sugar for use in the manufacture of beer, which was found to contain poisonous matter, in consequence of which large quantities of beer, which had been previously brewed by the plaintiffs, and in which the sugar supplied by the defendants had been used, had to be destroyed. The question arose whether the plaintiffs were entitled to recover as part of their damages two items—(1) £50, cost of printing and advertising notices as to the change of brewing materials; (2) a sum of £300, being the amount of profits which the plaintiffs would have realised by the sale of the beer which they had in stock and which had to be thrown away. The £300 was the difference between the cost price of the beer and its value to the plaintiffs.

**HELD**—that to advertise so as to minimise

**Damages—Continued.**

any possible loss of business was a reasonable step, the cost of which, having been *bona fide* incurred by the plaintiffs with that object, they were entitled to recover from the defendants; and that the plaintiffs were entitled to recover the £300 as representing the measure of damages caused to the plaintiffs by the breach of contract of the defendants, as the measure of damages to the plaintiffs was the value to them of the beer as they possessed it on the day when it had to be destroyed, and in the absence of special circumstances, of which there was no evidence in this case, the ordinary measure of that damage was the market price at which it could be replaced, or, in other words, the market value of the beer in their cellars.

HOLDEN v. BOSTOCK & CO, LD., (1902) 50 W. R. [323, 18 T. L. R. 317—C. A.]

**36. Measure of Damages—Implied Condition—Breach—Treated as Breach of Warranty—Sub-contracts—Loss naturally resulting—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 11, 13, 14 (2), 53 (2).]**—The defendants agreed to sell to the plaintiffs sulphuric acid commercially free from arsenic. The plaintiffs did not impliedly or expressly intimate the purpose for which it was required, but they in fact used it for a well recognised and ordinary purpose, viz., to manufacture invert and glucose for sale to brewers. The plaintiffs did not discover, as they might have done by the exercise of ordinary care, that the acid contained arsenic. The result was that the beer brewed from it was poisonous.

HELD—that the plaintiffs could only treat the breach of condition as a breach of warranty; that they could recover (1) the price paid for the acid, and (2) the value of the goods spoilt by being mixed with it, but not (3) damages for injury done to their business reputation as makers of glucose, nor (4) the amount of damages for which they had become liable to the brewers. The first two items were, but the other two were not, losses directly and naturally resulting in the ordinary course of events from the defendants' breach of warranty.

BOSTOCK & CO, LD. v. NICHOLSON & SONS, LD., [1904] 1 K. B. 725; 73 L. J. K. B. 524; 20 T. L. R. 342; 9 Com. Cas. 200; 53 W. R. 155; 91 L. T. 629—Bruce, J.

**37. Quality of Goods—Some up to Standard, others not—Where Examination of Goods to be Made—Expenses of Transit—Loss of Profit—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 35.]**—The plaintiffs, a firm of colour printers in Germany, contracted to supply the defendants in England with a number of books, some of which were for sale in England and some for sale in America. The plaintiffs supplied the defendants with a parcel of 40,000 books which they knew were intended for America. The defendants, without inspecting the books, sent them to America, where they were inspected and rejected as not being of the quality agreed, and were sent back to England. The defendants gave notice to the plaintiffs that they intended

to reject them all, except such as were saleable, and they sold 13,000 of them and rejected the rest.

HELD—that as the plaintiffs knew that the books were intended for America, that was the proper place for inspection, and that the defendants were therefore entitled to reject them, and that the defendants could recover the cost of sending them to America and back to England.

HELD, also, that, as each of the books had to be up to standard, the defendants could accept some and reject the others.

MOLLING & CO. v. DEAN AND SON, LD., (1902) [18 T. L. R. 217—Div. Ct.]

**38. Repudiation—Impossibility of Performance—Non-acceptance by other Party—Measure of Damages—Duty to Mitigate Damages.]**—The plaintiffs sold to the defendants 1,500 to 1,700 tons of Tredegar large steam coal at 16s. a ton for delivery f.o.b. Cardiff, Penarth, Barry, or Newport, during February, 1901, for exportation to Sicily. Before the month of February had expired the defendants found that, by reason of circumstances over which they had no control, there was a practical difficulty, if not an impossibility, of shipping the coal to Sicily. They tried to free themselves from the contract. At that time there was a rising market for coal. The plaintiffs refused to make terms. They told the defendants that they insisted upon the performance of the contract. Some days before the end of February the defendants repudiated the contract, and notified the repudiation to the plaintiffs. The plaintiffs did not accept this repudiation.

HELD—that the repudiation was a nullity unless it was accepted by the plaintiffs; that there was no breach of contract until the expiration of the time for the delivery of the goods, and the plaintiffs retained the right to claim that the defendants should take delivery of the coal at the time fixed in the contract; and damages were to be calculated as at that time and not at the date of repudiation.

TREDEGAR IRON AND COAL CO, LD. v. HAWTHORN BROS. & CO, (1902) 18 T. L. R. 716—C. A.

**39. Sale of Provisions by Wholesale Dealer—Breach of Warranty—Provisions unfit for Human Food—Retailer fined for having them on his Premises—Liability of Dealer to Indemnify him—Fine—Costs—Expenses—Value of Goods.]**—If a retailer buys provisions with an implied or express warranty, and such provisions are seized and destroyed, and he himself is fined, because, unknown to him, they are unfit for food, he may recover from his vendor, in addition to their value, the costs of his defence and costs ordered to be paid by him; and,

Seem, also the amount of the fine, if he can show that it was not imposed, or increased, in consequence of any default on his part.

CRAIG v. FRY AND ANOTHER, (1903) 67 J. P. [210; 1 L. G. R. 253—Kennedy, J.]

## V. FORMATION OF CONTRACT.

40. *Parties not ad idem*—*Sale of Hermaphrodite Animal*.]—The plaintiff bought at a fair a bullock, a heifer, and a third animal from the defendant. The third animal was in fact a hermaphrodite, as the defendant was aware. No warranty was given, but the plaintiff bought under the impression that he was buying two bullocks and a heifer, or two heifers and a bullock; and the defendant knew well that the plaintiff would not have bought had he noticed the malformation. The defect would have been revealed by careful examination.

HELD—that the parties were never *ad idem*, and that (apart from any question of fraud, as to which the Court differed) the plaintiff could recover the price of the animal, which had since died in consequence of its malformation.

*Smith v. Hughes* ((1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; 19 W. R. 1059; 4 L. T. 212) followed.

GILL v. McDOWELL. [1903] Ir. R. 463—[K. B. Div.]

41. *Sale by Tender*—"Highest net Money Tender"—*Tender by reference to another Tender*.]—The liquidator of the defendant company asked for sealed tenders for the purchase of certain property of the company, and wrote to the two parties who were desirous of purchasing, saying that he would accept "the highest net money tender" he received. One of the proposing purchasers tendered £31,000 for the property, and the plaintiff company tendered "such a sum as will exceed by £200 the amount to-day offered by the other proposing purchaser."

HELD—that the plaintiff's tender did not answer the description of "the highest money tender."

Decision of North, J. (78 L. T. 8; 14 T. L. R. 176) affirmed.

SOUTH HETTON COAL CO., LD. v. HASWELL, [SHOTTON AND EASINGTON COAL AND COKE CO., LD., [1898] 1 Ch. 465; 67 L. J. Ch. 238; 78 L. T. 366; 14 T. L. R. 277; 46 W. R. 355—C. A.]

## VI. MISCELLANEOUS.

42. *Delivery Order*—*Negotiable Instrument*—*Endorsee suing Vendor for Short Delivery*—*Pledge—Factors Act, 1889* (52 & 53 Vict. c. 45), ss. 1, 2, 3, 9.]—A delivery order signed by the vendor of goods on board a ship and addressed to the master porter of the ship is not a negotiable instrument so as to give an endorsee the right to sue the vendor upon it for short delivery, the delivery order, upon the evidence, not being a representation by him to an endorsee that the goods are in the master porter's hands to his order.

GILBERTSON & CO. v. ANDERSON AND COLTMAN, [LD., AND OTHERS, (1902) 18 T. L. R. 224—Wills, J.]

43. *Goods to be Manufactured*—*Chattel to be made by certain Date and delivered f.o.b.*—*Readi-*

*ness and willingness of Parties to deliver and accept.*]—In a contract for the manufacture of a chattel, the one party must be ready and willing to deliver and the other ready and willing to accept delivery.

A steam launch was to be built by the plaintiffs and delivered f.o.b. at the port of London within four months from a certain date. The vessel on board which the launch was to be delivered at the port of London was to be found by the defendants. The plaintiffs were not ready in time, but the defendants did not give notice that they had a vessel ready to receive the launch on board.

HELD (affirming judgment of Bucknill, J.)—that neither party could bring an action against the other for breach of contract, because neither party was ready and willing to do his part of the concurrent acts.

FORREST & SON, LD. v. ARAMAYO, (1901) 83 [L. T. 335; 9 Asp. M. C. 134—C. A.]

44. *Holding out*—*Manager of Business*—*Held out as having Authority to Contract*—*Scope of Authority*—"All our Requirements."—H., being about to erect a factory for the purpose of carrying on the business of manufacturing explosives under the name of the defendant company, appointed a manager to have sole charge of the business. The manager's office was used as the office of the company. The manager, without express authority from H., entered into a contract for the purchase by the company from the plaintiffs of "all our requirements" of nitric and sulphuric acids, estimated at 500 and 750 tons respectively, during twelve months from the date of the contract. Subsequently the manager gave notice to the plaintiffs to deliver fifteen tons under the contract. The company never started business, and the undertaking was abandoned by H. within the twelve months. The acceptance of the fifteen tons was refused. In an action by the plaintiffs against the company for breach of contract to purchase 500 tons of nitric acid and 75 tons of sulphuric acid:—

HELD—that the manager had been held out by H. as having authority to enter into and complete the contract, and that the contract was binding on H., but that by the contract the company had only agreed to buy such acid as might be required, and that, none having been in fact required, there had been no breach, except as to the fifteen tons for which H. was liable to pay.

BERK v. INTERNATIONAL EXPLOSIVES CO., [(1902) 7 Com. Cas. 20—Walton, J.]

45. *Mistake*—*Contract of Sale*—"Cost, Freight, Insurance"—*Delivery of Goods*—*Duty of Vendor*—*Bill of Lading for wrong Port of Destination*.]—Under a "c.f.i." contract of sale there is an absolute duty on the vendor to procure the shipment of the goods under such a bill of lading as will, subject to the exceptions contained therein, ensure their delivery at the port of destination mentioned in the contract.

A "c.f.i." contract provided for the sale of goods by the defendants to the plaintiffs, shipment to

**Miscellaneous—Continued.**

be from Calcutta to Tripoli. There are two ports called Tripoli, one in Africa and the other in Syria. The contract was intended to refer to the former. The defendants made arrangements with a shipping company for the carriage of the goods to Tripoli in Africa, but the goods were shipped under a bill of lading drawn in such a form that it was on its face a bill of lading for Tripoli in Syria, and the goods were delivered at that port. The defendants were not guilty of negligence, and, without knowing that it was not a bill of lading for Tripoli in Africa, indorsed it to the plaintiffs.

**HELD**—that the plaintiffs had a right of action against the defendants under the contract of sale for non-delivery of the goods.

Judgment of Mathew, J., affirmed.

LECKY & Co., LD. v. OGILVY, GILLANDERS & Co., (1898) 3 Com. Cas.—C A.

**46 Offer by Advertisement by Dealer to sell Goods of Manufacturer at less than Trade Price, such Goods not being at the time in Dealer's Possession—Damage alleged to be caused thereby to Manufacturer—Injunction—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5**—A dealer offered by advertisement to sell goods of a manufacturer at less than trade price, such goods not being at the time in the dealer's possession.

In an action by the manufacturer claiming an injunction to restrain such advertisements, and damages:—

**HELD** (1) that, having regard to *Allen v. Flood* ((1898) A. C. 1), the motive in such cases could not be inquired into; (2) that, having regard to sect. 5 of the Sale of Goods Act, 1893, the mere fact of the goods not being in stock was no ground of complaint, and that in the absence of fraud the defendant was entitled to offer the goods at any price he thought fit; (3) that the advertisement was not fraudulent nor the damage complained of the result of the misrepresentation contained therein.

That, therefore, the action failed and must be dismissed.

AJELLO v. WORSLEY, [1898] 1 Ch. 274; 67 L. J. [Ch. 172; 77 L. T. 783; 14 T. L. R. 168; 46 W. R. 245—Stirling, J.]

**47. Rescission of Contract—Declaration of Insolvency by one Party to the Contract—Right of other Party to Rescind.**—A mere declaration of insolvency by one party to a contract does not entitle the other party to put an end to the contract. It is otherwise if the declaration is made in such circumstances as to show that the insolvent either cannot, or does not intend to, carry out the contract. In the latter case it is open to the solvent contractor to rescind the contract.

MESS v. DUFFUS, (1901) 6 Com. Cas. 155—[Bigham, J.]

**48. Sale on Credit—Agreement to give Bills—Failure to do so—Rights of Parties.**—Where upon a sale of goods the vendor agrees to give credit and the purchaser agrees to give accept-

ances for the price, the failure of the latter to give such acceptances does not entitle the former to treat the period of credit as at an end and to sue at once for the price. If, however, he can prove any damage, he may sue the purchaser for breach of his agreement.

*Anderson v. Carlisle Horse Clothing Co., Ltd.* ((1870) 21 L. T. 760) followed.

RABE v. OTTO, (1904) 89 L. T. 562; 20 T. L. R. 27—Kennedy, J.

**49. Tender—"About" 4,000 Cases of Currants—Rules of London Dried Fruit Association—Five per Cent. more or less—Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 30.**—The plaintiffs sold to the defendants, upon the terms of the conditions and rules of the London Dried Fruit Association, "about 4,000" cases of currants, to be shipped per steamer to London. By one of the rules of the association, "about" in reference to quantity of packages meant not more than five per cent. more or less. The question arose whether a tender of 4,202 cases was a good tender.

**HELD**—that the purchasers had waived any objection they might have taken to the tender.

Decision of Kennedy, J. ((1901) 17 T. L. R. 437) reversed.

FRANGOPULO & Co. v. LOMAS & Co., (1902) 18 [T. L. R. 461—C. A.]

**VII. NOTE OR MEMORANDUM.**

**50. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4—Applicability to Arbitration.**—On September 21st H. & Co. offered verbally to C. & Co. 3,000 bales of jute, and on the same day C. & Co. accepted the offer verbally and agreed to buy.

On September 22nd two documents purporting to be contracts, one for 1,000 bales and the other for 2,000 bales, were sent by H. & Co. to C. & Co. They bore the words "Bought per account of C. & Co. of Messrs. S. Bros." and they were signed "H. & Co per C. P." C. & Co. objected to these contracts by reason of the words importing that S. Bros. were the sellers, and they returned them mutilated. C. & Co. then sent to H. & Co. other contracts, omitting all reference to S. Bros., which were returned with the words "Sellers, Messrs. S. Bros." on the attached receipts. C. & Co. refused to accept these

**HELD**—that there was no sufficient memorandum to satisfy sect. 4 of the Sale of Goods Act, 1893.

**HELD**, further, that the statutes applied to an arbitration

Decision of Bray, J. (95 L. T. 121) affirmed.

COX, M'EUEN & Co. v. HOARE, MANN & Co., [(1907) 96 L. T. 719—C. A.]

**51. Note-book and Leather Cover—Seller's Name only on Cover—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.**—A buyer of hops gave the sellers a paper memorandum signed by him in a paper memorandum or note-book in which orders were generally put. This book was

**Note or Memorandum—Continued.**

slipped into a leather cover, upon which the name of the sellers was stamped.

**HELD**—that there was a sufficient memorandum to satisfy the Sale of Goods Act, 1893, s. 4.

JONES BROS. v. JOYNER, (1900) 82 L. T. 768  
[—Div. Ct.]

**VIII. PART PAYMENT.**

**52. Retainer of Sum previously Overpaid—Statute of Frauds** (29 Car. 2, c. 3), s. 17—*Sale of Goods Act*, 1893 (56 and 57 Vict. c. 71), s. 4, sub-s. 1.]—Where one of the terms of an oral contract for the sale of goods of a greater value than £10 was that the seller should retain in part payment a sum which the buyer had by some mistake previously overpaid him:—

**HELD**—that there had been no part payment sufficient to satisfy sect. 4, sub-sect. 1, of the Sale of Goods Act, 1893.

*Walker v. Nussey* ((1847) 16 M. & W. 302; 16 L. J. Ex. 120; 11 Jur. 23) followed.

NORTON v. DAVISON, [1899] 1 Q. B. 401, 68 L. J. [Q. B. 265; 47 W. R. 275, 80 L. T. 139; 15 T. L. R. 160—C. A.]

**53. Cheque sent by Post and Returned—Sale of Goods Act**, 1893 (56 & 57 Vict. c. 71), s. 4, sub-s. 1.]—The plaintiff verbally agreed by telephone with the defendants to buy from them certain goods above the value of £10, and to send them a cheque for £10 in part payment. The plaintiff sent a cheque for £10 by post, and later on, in answer to a telephonic message from the defendants, he sent a second cheque for the balance by post. These two cheques were received by the same post, and the defendants at once returned them, alleging that there was no concluded contract. The plaintiff sued to recover damages for non-delivery of the goods.

**HELD** that, as the cheques were not accepted by the defendants, there was no payment within the meaning of sect. 4, sub-sect. 1, of the Sale of Goods Act, 1893, and the post office was not the defendants' agent to accept payment on their behalf so as to take the case out of the Act.

DAVIS v. PHILLIPS, MILLS & Co, (1907) 24 T. L. R. 4—Channell, J

**IX. PASSING OF PROPERTY IN GOODS.**

**54. Appropriation—Contract to build Ship—Bankruptcy of Shipbuilders—Materials designed for Ship, but not yet Incorporated—Property of Trustee—Mercantile Law Amendment (Scotland) Act**, 1856 (19 & 20 Vict. c. 60), s. 1—*Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), ss. 16, 17, 18.]—A firm of shipbuilders became bankrupt whilst building under contract a ship to be classed 100 A1 at Lloyds'. At the date of the bankruptcy there were lying at railway stations a quantity of plates consigned to their order, already passed by Lloyds' surveyor and marked by the makers as intended for particular positions in this vessel.

Thereupon the owners, for whom the vessel was

being built, claimed these plates as against the trustee in bankruptcy, and they relied on a clause in the contract to the effect that "The vessel as she is constructed . . . and all materials from time to time intended for her . . . shall immediately, as the same proceeds, become the property of the purchasers . . . but the builders shall at all times have a lien thereon for their unpaid purchase money."

**HELD**—that the contract was for the purchase of a complete ship, and that the owners had no claim to the plates.

*Seath & Co v. Moore* ((1886) App. Cas. 350; 55 L. J. P. C. 51; 54 L. T. 690; 5 Asp. M. C. 586) followed.

Decision of Ct. of Sess. ((1901) 4 F. 345) reversed.

REID v. MACBETH AND GRAY, [1904] A. C. 223; [73 L. J. P. C. 57; 90 L. T. 422; 20 T. L. R. 316—H. L. (E.).]

**55. Ascertained Article—Deliverable State—Breach of Contract—Sale of Goods Act**, 1893 (56 & 57 Vict. c. 71), ss. 17, 18 (1), 49, 62 (4).]—An engineer sold to a customer a steam crane which, at the customer's request, he agreed to keep in his yard until it should be required for erection upon a vessel. It was a stipulation of the contract that the seller should make slight alterations upon the crane. It was proved that these alterations fell to be done in course of erection. The purchaser having, after six months, refused to take delivery—

**HELD**—that the property had not passed, and that the seller's remedy was a claim for damages.

BROWN BROS. v. CARRON CO, (1898) 6 S. L. T. [297—Ct. of Sess. (O. H.).]

**56. Cf. Contract—One-half of Price to be Paid on Shipment—Unpaid Moiety to be Paid on Delivery of the Goods.**]—An action was brought to recover the price of two cargoes shipped at Buenos Ayres for Beira, in South Africa, one on board the steamship "Jeanara," and the other on the steamship "Hindustan"; or, in the alternative, damages for the non-acceptance of those cargoes. The contract in each case was a c f i contract—that was to say, the price which the defendants contracted to pay was to include cost, freight, and insurance. In each case one-half of the price was, by the terms of the contract, to be paid, and was paid, by the defendants to the plaintiffs at Buenos Ayres through the London and River Plate Bank upon completion of shipment and against bills of lading made out to the order of the defendants, which, with the policy of insurance relating to the shipment, were by the terms of the contract to be, and which in fact were, handed over by the plaintiffs to the bank, and by the bank to the defendants in London. In each case, as regards the unpaid moiety of the price, the contract was interpreted to be that it should be paid in Cape Town upon delivery of the shipments at Beira.

**HELD**—that in these circumstances the proper legal inference from the facts was that the property in each of the shipments was intended to

**Passing of Property in Goods—Continued.**

pass, and did pass, to the defendants upon the completion of the shipment; that the payment of the unpaid balance of the price was dependent upon delivery at Beira, *i.e.*, upon the readiness and the ability of the plaintiffs to do their part in delivery from shipboard at Beira.

DUPONT AND OTHERS *v.* BRITISH SOUTH AFRICA  
[Co., (1902) 18 T. L. R. 24—Kennedy, J.]

**57. Consignment of Goods to Correspondents—Directions as to Disposal of Goods—Course of Business—Acceptance of Bills of Exchange drawn Against Shipments—Letter of Advice—Taking Advantage of Bills of Lading—Appropriation—Claim of Lien.**—W. P., R. & Co. were a mercantile firm carrying on business in Buenos Ayres. The defendants were correspondents of theirs in London. The plaintiffs were persons in London who had dealings with W. P., R. & Co. The defendants received instructions by telegraph from W. P., R. & Co to sell 500 tons of linseed at a specified price. The defendants shortly afterwards entered into a contract for the sale of that amount of linseed to arrive accordingly. Two days afterwards a further telegram was received by the defendants with reference to 300 tons of linseed. The defendants sold that in the same way. In both cases the contracts entered into by the defendants were—as was their course of business—entered into with purchasers in their own names. W. P., R. & Co. began to fulfil the contracts, and they wrote to the defendants that they had drawn upon them for £9,000 against shipments, and afterwards that they had drawn upon them against the linseed contracts, and handed the defendants bills of lading and invoices for the linseed contracts. W. P., the head of the firm of W. P., R. & Co., died suddenly, and the defendants became aware that there was some question as to the financial position of W. P., R. & Co., who were largely indebted to the defendants. The bills of lading were indorsed in favour of the defendants, and the defendants took possession of those bills of lading and applied them in satisfying, so far as they would go, the contracts of sale which they had entered into. They declined to accept the bills for £9,000 which had been forwarded to them against a shipment of wheat. The plaintiffs sought to restrain the defendants from parting or dealing with the proceeds of the linseed.

**HELD** that, according to the course of business between W. P., R. & Co. and the defendants, the defendants were entitled to take the linseed and to sell it, and to appropriate the proceeds of sale to the general account as between them and W. P., R. & Co.; and that immediately W. P., R. & Co. sent to the defendants the bills of lading representing the goods indorsed to their order, the property passed to the defendants, and that the defendants were entitled to take that property, and the proceeds of that property, and to deal with it according to the course of business as between them and W. P., R. & Co., and the proceeds would go to the general credit of the account as between the parties.

KONIG *v.* BRANDT, (1902) 9 Asp. M. C. 199—  
[C. A.]

**58. Goods “about the Specification stated below”—Property to pass on Shipment—Goods not to be rejected—Dispute to be referred to Arbitration.**—The plaintiffs sold to the defendants two parcels of sawn laths to be shipped at a foreign port for England, of “about the specification stated below.” The contract provided that the property in the goods was to be deemed to have passed to the buyers when the goods were put on board, and if any dispute arose under the stipulations of the contract the buyers were not to reject the goods, but the dispute was to be referred to arbitration. A large part of the goods shipped were wholly different from the specification, and the defendants refused to accept them.

**HELD**—that the property in the goods had not passed to the defendants on the shipment, the provision to that effect in the contract only applying to goods coming within the meaning of the contract; and that the defendants were entitled to reject the goods, the clause as to non-rejection not operating so as to force the defendants to take goods which were neither within nor about the specification, nor commercially within its meaning.

VIGERS BROS. *v.* SANDERSON BROS., [1901]  
[1 K B 608; 70 L. J. K B. 383; 49  
W. R. 411; 84 L. T. 464; 17 T. L. R. 316; 6  
Com. Cas. 99—Bigham, J.]

**59. Goods sent on Approval—Failure to return before Time stated**—If goods are delivered to a buyer on approval, and if the buyer does not intimate his disapproval at or before the time stated, or if no time is stated a reasonable time, the property in the goods passes to him.

A horse was offered for sale by means of an advertisement. The defendant intimated he wished to have him on trial, and a telegram taken in conjunction with what preceded constituted a contract on the part of the defendant to take the horse on approval for a week, and if he approved of him to buy. The horse was sent. The time for the trial had expired before the horse was returned by the defendant.

**HELD**—that the plaintiff was entitled to the price of the horse.

MARSH *v.* HUGHES-HALLET, (1900) 16  
[T. L. R. 376—Bruce, J.]

**60. Intention of Parties—Security—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61.**—A., having advanced money to B., was anxious to get security. B. had furniture. It was explained to A. that he could not have a security over the furniture and leave possession with B. A. accordingly bought the furniture, and hired it to B. The L. O. was of opinion that the transaction was genuinely intended to pass the property, and preferred A.'s claim to that of B.'s trustee in bankruptcy.

LAWRENCE *v.* LAWRENCE'S TRUSTEE, (1899)  
[6 S. L. T. 435—Ct. of Sess. (O. H.).]

**61. Sale or Return—Pledge of Goods—Passing of Property—Estoppel—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 18, r. 4; 21; 25,**

**Passing of Property in Goods—Continued.**

*sub-s. 2.*]—The plaintiff, who was a manufacturing jeweller, handed certain articles of jewellery to a person named H., upon the terms of the following note:—"On approbation. On sale for cash only or return. From S. W., Diamond Mounter and Manufacturing Jeweller. Goods had on approbation or on sale or return remain the property of S. W. until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession." H. entrusted the articles to one L., who represented that he had a particular customer. L., who had no customer, pledged the goods with the defendants. In an action to recover the articles:—

HELD—that the articles were not delivered to H. on "approval or on sale or return or other similar terms" within the meaning of sect. 18, r. 4, of the Sale of Goods Act, 1893; that the property in them did not pass when they were pledged by L., there being no intention on the part of the plaintiff or H. that the property should pass until the plaintiff received cash, or agreed to give credit to the purchaser; that the plaintiff had done nothing to give rise to an estoppel, and that, therefore, he was entitled to recover

Decision of Bray, J. ([1905] 2 K. B. 172; 74 L. J. K. B. 815; 53 W. R. 553; 92 L. T. 843, 21 T. L. R. 478; 10 Com. Cas. 213) affirmed.

WEINER v. GILL; WEINER v. SMITH, [1906] 2 K. B. 574; 75 L. J. K. B. 916; 95 L. T. 438; 22 T. L. R. 699; 11 Com. Cas. 240—C. A.

**X. PASSING OF TITLE TO GOODS.**

**62. Sale by Person not the Owner—Goods obtained by Fraud—Vesting of Property.**—A person who obtains goods under a contract of sale by false pretences can, until the contract is disaffirmed, give a good title to the goods to a *bonâ fide* purchaser for value.

KING'S NORTON METAL CO., LD. v. EDRIIDGE, [MERRETT & CO., LD., (1898) 14 T. L. R. 98—C. A.

**63. Sale by Person not the Owner—Fraudulent Conversion of Goods—Two Innocent Parties—Fraud of Clerk—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21.**—The plaintiffs were importers of timber, who carried on business at an office in the City, and they were accustomed to store timber imported by them at the Surrey Commercial Docks, the timber being delivered by the dock company upon their orders as required to their customers. By a document they authorised the dock company to accept all transfer or delivery orders which should be signed on their behalf by C., their confidential clerk; and this document was sent to the dock company in a letter, which stated that the plaintiffs had made arrangements whereby in future C. would sign delivery orders on behalf of and in addition to the other members of the firm. C., by means of orders signed by him, obtained possession of a number of small lots of timber

belonging to his employers at the docks, and sold them to the defendants. It was admitted that the defendants purchased the timber in good faith, believing that their vendor was entitled to sell it to them. The plaintiffs sued the defendants on the ground that they, for a period of four years over which the sales extended, had detained timber belonging to the plaintiffs.

HELD—that C. simply stole the plaintiffs' goods and sold them to the defendants, and the defendants' title was not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike; that the defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; that the plaintiffs were not, therefore, precluded from denying C.'s authority to sell; and that the plaintiffs were entitled to recover the value of the timber from the defendants.

Decision of C. A. ([1901] 2 K. B. 697; 70 L. J. Q. B. 985; 49 W. R. 673; 85 L. T. 264; 17 T. L. R. 689) reversed.

FARQUHARSON BROS. & CO. v. KING & CO., [1902] A. C. 325; 71 L. J. K. B. 667; 51 W. R. 94; 86 L. T. 810, 18 T. L. R. 665—H. L. (E.).

**64. Sale or Return—Goods Pawned by Retail Dealer—Title of Pawnbroker—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18 (4).**—E., a wholesale jeweller, in accordance with his usual practice sent a necklace to A, a retail dealer, together with an "appropriation note" stating that the goods were to remain E's property until he invoiced them to A. Goods so sent to A were always marked with the wholesale price, and he was at liberty to sell and deliver them, making what profit he could.

He at once pawned the necklace in question.

HELD, that, as E. had put A. into a position to give a good title to a purchaser, A. could validly pledge the necklace to the pawnbroker.

BRYCE v. EHREMAN, (1905) 7 F. 5—Ct. of Sess.

**XI. SALE OF BUSINESS.**

And see PARTNERSHIP—TRADE.

**65. Benefit of Pending Contracts—Burden of such Contracts—Indemnity.**—An agreement for the purchase and sale of a newspaper business contained a term or condition that the vendors should sell and the purchasers should purchase "the full benefit of all pending contracts and engagements, and of all other property to which the vendors are or may be entitled in connection with the said journal."

HELD—that the purchasers took the burden of pending contracts, and did not merely acquire an option to take the benefit of such contracts; and that without an express indemnity there was an implied indemnity.

BOWATER & SONS v. MIRROR OF LIFE CO., [LD.; TOPICAL TIMES CO., LD. (Third Parties), (1902) 50 W. R. 381—Kennedy, J.



**Sale of Business—Continued.**

**66. Business Books and Documents included in Absence of Express Stipulation.**—In the absence of some express restriction or limitation on a sale of a business of tailors and clothiers the business books and documents are included in the sale.

MORRISON *v.* MORRISON, (1900) 2 F. 382—Ct. of Sess.

**67. Vendor — Canvassing former Customers** ]  
—A person who has sold the goodwill of a business is not entitled thereafter to canvass former customers in the interests of a similar business.

DUMBARTON STEAMBOAT Co., (1899) 36 S. L. R. [771; 7 S. L. T. 106—Ct. of Sess.

**68 Vendor soliciting old Customers—Such Customers dealing with Vendors before the Solicitation** ]—As laid down in *Trego v. Hunt* ([1896] A. C. 7; 65 L. J. Ch. 1, 44 W. R. 225; 73 L. T. 514), the vendor of a business may not solicit customers of the old business; and this rule is not to be restricted so as to allow him to solicit such customers, even if of their own accord they deal with him before such solicitation.

CURL BROS., LD. *v.* WEBSTER, [1904] 1 Ch. [685; 73 L. J. Ch. 540; 52 W. R. 413; 90 L. T. 479—Farwell, J

**XII. SALE BY SAMPLE.**

**69. Grain Contract—Goods not in accordance with Sample—Custom of Trade—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 15, 55.**—A contract for the sale of foreign barley provided that it should at time of shipment be "about as per sample," and that any dispute arising out of the contract should be decided by arbitration in London. The buyers having refused to accept delivery on the ground that the bulk did not correspond with the sample, the dispute was referred to arbitration. The arbitrator found that, by a custom and usage of the London corn trade applicable to the sale of barley and other grains in contracts in the form employed in this case, a buyer was not entitled to reject for difference or variation in quality unless the same was excessive or unreasonable, and was so found by arbitration under the contract. He further found that the barley, although somewhat inferior to the sample in quality, and in this respect not "about as per sample" so as to entitle the sellers to insist on payment of the full contract price without any allowance, was commercially within the contract, and the inferiority was not excessive or unreasonable, nor was it so great as to amount to a difference of description.

HELD—that the custom was a reasonable one, and therefore good in law, and that it was not inconsistent with the contract.

WALKERS, WINSER AND HAMM *v.* SHAW, [SON & CO., [1904] 1 K. B. 152; 73 L. J. K. B. 325; 90 L. T. 454; 53 W. R. 79; 20 T. L. R. 274; 9 Com. Cas. 174—Channell, J.

**70. Right to Reject—Cash on Delivery—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15, sub-s. 2 (b).**—Upon a sale of goods by sample, "payment to be made in cash in London on the arrival of the" goods "against shipping or railway documents," the buyer is not entitled to insist on the provisions of sect. 15, sub-sect. 2 (b), of the Sale of Goods Act, 1893, and to have an opportunity of comparing the bulk with the sample before paying the price. The right to reject, if the goods do not correspond with the sample, is not impaired by the payment being made.

POLENGHI BROS. *v.* DRIED MILK Co., LD., [(1905) 53 W. R. 318; 92 L. T. 64; 21 T. L. R. 118; 10 Com. Cas. 42—Kennedy, J.

**XIII. STOPPAGE IN TRANSITU.**

**71. Agent to take Delivery—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45.**—The plaintiff sold to the defendants, who carried on business at Hamburg, ten tons of waggon brass *ex* York stores, to be forwarded to the Co-operative Wholesale Society at Goole. The defendants at the same time wrote to the Co-operative Society, who were shipping agents, informing them that they would receive the brass, and directing them to forward it by steamer to Hamburg. The plaintiff, who knew that the goods were going to be forwarded by steamer, but had received no instructions where they were to be sent after arrival at Goole, forwarded them to the Co-operative Society at Goole, who received them and sent them on to Hamburg. When the brass arrived at Hamburg the plaintiff, who had not been paid, telegraphed to the Co-operative Society's branch there not to deliver it.

HELD, that, as the plaintiff had only received instructions to send the goods to the Co-operative Society at Goole, the goods were received there by the society as agents in that behalf for the defendants, and fresh instructions to the society as to the further destination of the goods were necessary; that therefore the transit was at an end at Goole, and the notice to stop was too late.

JOBSON *v.* EPPENHEIM & Co., (1905) 21 T. L. R. [468—Channell, J.

**72. Duration of Transit—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 44, 45.**—The defendants, who were timber merchants in New Brunswick, sold timber to S. & Co. of Glasgow on c.i.f. terms. The timber was shipped by the sellers at M. in New Brunswick, and it was by the bill of lading deliverable to their order or assigns at Glasgow.

The sale contract bore, "the goods are deliverable in the usual and customary manner at M. with all reasonable despatch according to the season of the year and agreeably to the custom of the port."

HELD—that the transit was not complete at M., and that the defendants might stop the goods on arrival at Glasgow, S. & Co. having become insolvent.

REID *v.* SNOWBALL Co., LD., (1905) 7 F. 35—[Ct. of Sess.

## XIV. WARRANTY.

And see FOOD AND DRUGS.

**73. Article Required for Particular Purpose—Sale of Specific Article—Warranty of Fitness—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14, sub-s. 1**—The plaintiff, who was a draper, went to the shop of the defendant, who was a retail chemist, and asked for an india-rubber hot-water bottle, for the use of his wife, who was suffering from cramp. The defendant produced a bottle, and, upon the plaintiff asking him whether it would stand boiling water, he said that it would not, but that it would stand hot water. The plaintiff purchased the bottle, and a few days afterwards the bottle burst while in use, and scalded the plaintiff's wife. In an action to recover damages for breach of warranty, the jury found that the bottle when sold was not fit for use as a hot-water bottle, and that this was the cause of its bursting. The judge, who had power to draw inferences of fact, held that the bottle was sold for use as a hot-water bottle, and that the plaintiff in buying it relied on the defendant's skill and judgment, and that therefore there was an implied warranty of fitness.

**HELD**—that the judge was right in holding that there was an implied warranty of fitness for the particular purpose for which the bottle was required, within the meaning of sect. 14, sub-sect. 1, of the Sale of Goods Act, 1893.

Decision of Walton, J. (19 T. L. R. 278) affirmed.

**PRIEST AND WIFE v. LAST**, [1903] 2 K. B. 148. [72 L. J. K. B. 657; 51 W. R. 678, 89 L. T. 33; 19 T. L. R. 527—C. A.]

**74. Beer from a Particular Brewery—Sale by Description—Warranty of Merchantable Quality—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14**—The plaintiff was made ill by arsenic contained in beer which he bought at a tied public-house kept by the defendant. The defendant only sold beer brewed at one particular brewery, and the plaintiff was an habitual customer of the house. The jury found that the plaintiff (1) did not buy the beer in reliance on the defendant's skill or judgment, but that (2) he intended to get, and asked for, the particular kind of beer.

**HELD**—that he was entitled to recover; for the second finding of the jury implied a sale by description within sect. 14 (2) of the Sale of Goods Act, 1893, and therefore there was a warranty of merchantable quality, whilst the defect was not one that examination would reveal.

Decision of Wills, J., affirmed.

**WREN v. HOLT**, [1903] 1 K. B. 610; 72 L. J. [K. B. 340; 51 W. R. 435; 67 L. J. P. 191; 88 L. T. 282; 19 T. L. R. 292—C. A.]

**75. Fitness and Quality of Materials and Workmanship—Sale of Specified Article by its Trade Name—Negligence—Evidence—Omnia presumuntur contra spoliatores—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14**—The plaintiff purchased an 1896 Royal Rover bicycle

from G, an agent of defendants in Belfast. The machine was described in the company's catalogue (which the plaintiff read before purchasing), and was in accordance with the description in it. The catalogue contained an express guarantee excluding the guarantee implied by statute or otherwise as to quality or fitness, and guaranteeing that all precautions usual and reasonable had been taken to secure excellence of material and workmanship, and undertaking to make good at any time within a year any defects in these respects. The plaintiff used the machine constantly for over seven months in Belfast, when he took it to pieces and packed it up. The plaintiff then went to England, and after four months he had the bicycle sent over to him at Leeds, where he rode it constantly for two months, when, while riding it at a good pace along a good road for cycling, the steering-post of the machine broke just below the crown plate, the front wheel became detached, and the plaintiff was thrown and injured. After the accident the plaintiff had the machine examined by three persons, who all stated that the break was a clean one—not the result of a flaw, or defective materials or workmanship. The plaintiff sent the broken machine to the defendants "for inspection," when the defendants replaced the broken parts, and threw them away.

In an action for breach of contract in the sale of the bicycle, the plaintiff obtained a verdict for £120. On motion by the defendants to set aside the verdict and to enter judgment for them, the Queen's Bench Division (Pallès, C.B., dissenting) gave judgment for the defendants, [1901] 2 Ir. R. 189. On appeal—

**HELD** (affirming the decision of the Q. B. D.)—(1) that the mere happening of the accident, and the fracture and appearance of the tube, were not evidence of the breach of the catalogue guarantee, and (2) (agreeing with the majority of the Queen's Bench) that as three of the plaintiff's witnesses had seen the broken pieces of the machine, the loss and non-production of these broken pieces did not make the defendants *spoliatores*, or shift upon them the burden of proof.

**WILLIAMSON v. ROVER CYCLE CO.**, [1901] 2 Ir. R. 615—C. A.

**76. Fitness for Purpose for which Required—Supply of Limestone**—The plaintiffs, who were the owners of limestone quarries, had for some years before December, 1881, supplied limestone to the defendants, who owned iron smelting works, from a certain quarry. This quarry was known to be a second-grade quarry in which were beds of limestone of varying quality. In December, 1881, the defendants agreed to obtain from the said quarry and from no other place, so long as the plaintiffs should supply the same, all the limestone they should from time to time require for the smelting and other purposes of their works, and the plaintiffs agreed to supply from the said quarry all the limestone so required by the defendants.

**HELD**—that the plaintiffs were bound to supply limestone reasonably fit for use in the defendants' works, which were known to be iron

**Warranty—Continued.**

smelting works, and that in determining what was reasonable fitness the fact that the limestone was to come from a particular quarry, which was known to be a second grade quarry, and from which the defendants had for some years before the date of the contract taken limestone, must be taken into consideration

**STRONGITHARM v. THE NORTH LONSDALE IRON [AND STEEL CO., LD., (1905) 21 T. L. R. 357 —C. A.]**

**77. Goods Dangerous to the Knowledge of Vendor—Implied Warranty—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14—Duty of Vendor apart from Warranty**—Where goods likely to be dangerous to a purchaser are sold to a person ignorant of their nature, the seller, if he knows the character of the goods, owes a duty to the purchaser to warn him thereof.

The plaintiff suffered injury to her eyes in opening a tin of disinfecting powder bought from the defendants; no warning was given to her as to the necessity for care in opening the tin, although the manager was aware of the danger, and had ordered warning to be given to all purchasers.

**HELD**—that the defendants were liable in accordance with the rule stated above.

*Semble*, also, that there was an implied warranty under sect. 14 of the Sale of Goods Act, 1893, and that such warranty would not be excluded by a regulation that only a manager could give a warranty binding on the company

Decision of Wills, J. (unreported) upheld.

**CLARKE AND WIFE v. ARMY AND NAVY CO-OPERATIVE SOCIETY, LD., [1903] 1 K. B. 155, 72 L. J. K. B. 153, 88 L. T. 1; 19 T. L. R. 80—C. A.]**

**78. Reliance on Seller's Skill or Judgment—Ferer Germs in Milk—Defect not practically discoverable—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14, sub-s. 1.**—The defendants, who were a dairy company, supplied milk to the plaintiff for consumption by himself and his family. When the plaintiff first became a customer of the defendants, they supplied him with a pass-book in which they stated the precautions taken by them—such as medical inspection of the farms from which the supply of milk was derived, milk analysis, and examination of the cows by veterinary surgeons—to ensure that only pure milk, free from all germs of disease and adulteration, was supplied. The plaintiff's wife contracted typhoid fever, and died in consequence of drinking some milk supplied by the defendants. In an action to recover the expenses caused to him thereby:—

**HELD**—that the plaintiff had made known to the defendants the particular purpose for which the milk was required—namely, for consumption as a food—so as to show that he relied upon their skill or judgment, the defendants having held themselves out to the plaintiff as possessing special skill and judgment in the supply of pure milk, and there was therefore an

implied warranty, under sect. 14, sub-sect. 1, of the Sale of Goods Act, 1893, that the milk was fit for that purpose; that there was this implied warranty, even if it was impossible, owing to the necessity of delivering the milk fresh twice a day to each customer, to find out in time that any particular consignment of milk contained the germs of typhoid fever, and that therefore the defendants were liable.

**FROST v. AYLESBURY DAIRY CO., LD., [1905] 1 K. B. 608; 74 L. J. K. B. 386; 21 T. L. R. 300, 53 W. R. 354; 92 L. T. 527—C. A.]**

**79. Sale of Foods for a "particular Purpose"—Reliance on Seller's Skill and Judgment—Implied Warranty—Reasonably fit for use—Latent Defect—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14, sub-s. 1.**—The warranty implied by sub-sect. 1 of sect. 14 of the Sale of Goods Act, 1893, on a sale of goods is not confined to manufactured goods

Where the purpose indicated for which the goods are required, viz., for consumption as human food, is made known to the seller so as to show that the buyer relies on the seller's skill and judgment, it is a "particular purpose" within the meaning of the sub-section.

**WALLIS v. RUSSELL, [1902] 2 Ir. R. 585—[C. A.]**

**80. Verbal Warranty—Collateral to Written Contract of Sale—Parol Evidence.**—A warranty in a sale is not one of the essential elements of a contract of sale, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, forming part of the contract, by the agreement of the parties expressed or implied. A warranty in consideration of which a purchaser enters into a contract of sale is part of the contract, and although it involves a stipulation collateral to the contract, yet it is not an independent or collateral contract.

Oral evidence may be given of a collateral verbal warranty forming part of the consideration of a contract of sale and not contained in the written contract of sale, but oral evidence may not be given to extend the scope of a warranty contained in a written contract.

*Kann v. Old* ((1824) 2 B. & C. 627) not followed.

**EDWARD LLOYD, LD. v. STURGEON FALLS PULP [Co., LD., 85 L. T. 162—Div. Ct.]**

**SALE OF LAND.**

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And see AGENCY, 1, COMPULSORY PURCHASE, EXECUTORS, 131-133; LIEN IN EQUITY; REVENUE, 30-49; WILLS, 242, 334-344.

## I. ABSTRACT OF TITLE.

1. *Delivery of—Vendor refusing to deliver through misunderstanding the Contract—Wilful Neglect or Default without Moral Delinquency—Interest on Balance of Purchase-money.*—A purchaser has, as a general rule, a right to investigate the title to the property he has purchased. In the absence of any special stipulation to the contrary, he only buys subject to the production of a good title, and has a right to require the vendor to show a good title. That right may be modified by agreement or stipulation. Owing to a mistake on the vendors' part, they declined to deliver to him an abstract of title until the completion of his purchase, on the ground that by the statement in writing in his contract, that he desired to take a free conveyance, he had waived his right to investigate the title.

HELD—that the purchaser had not waived that right, that the title was not shown to the purchaser because the vendors did not so understand the contract, but they ought so to have understood it, and it was their duty to deliver an abstract of title to the purchaser.

HELD, also, that the non-delivery of the abstract was wilful neglect or default of the vendors, as it is now settled that moral delinquency, intentional delay, wilful obstruction on the part of a vendor, may all be absent, and yet there may be wilful default on his part disentitling him to interest on the balance of the purchase-money.

*In re Hetling and Merton's Contract* ([1893] 3 Ch. 269, 62 L. J. Ch. 783, 42 W. R. 19, 69 L. T. 266—C. A.) applied.

IN RE PELLY AND JACOB'S CONTRACT, (1899) [80 L. T. 45—North, J.

2. *Leases—Defective Title—Legal Estate Outstanding in the Crown—Requisitions out of Time—Requisitions not to Root of Title, but to subsequent Devolution—Absence of Special Condition—Costs.*—Property stated to be held on leases was contracted to be sold subject to a condition requiring the purchaser to deliver requisitions and objections on or to the title within fourteen days after actual delivery of the abstract, and in this respect time was to be deemed of the essence of the contract. The abstract showed that the vendors had only an equitable title, and that the legal estate was outstanding owing to the non-execution by a company (which had since been

dissolved), through whom the vendors made title, of any actual assignment of the leases. Upon the purchaser raising an objection upon this point out of the time prescribed by the condition:—

HELD—that the abstract was the most perfect the vendors could furnish at the time of its delivery; that it was not imperfect or insufficient because it showed a defective title or even no title at all; that the requisitions that were made with reference to the legal estate in the two leases were not as to the root of title, but as to the subsequent devolution, and could not be insisted on, not having been made within the limited time; that the purchaser would obtain possession of the property, would get a perfectly good equitable title and could not be disturbed, and he would, no doubt, obtain the legal estate from the Crown; and that an order must be made on the vendors' summons without costs because the vendors ought to have provided for the particular circumstances of the case by a special condition.

PRYCE-JONES v. WILLIAMS, [1902] 2 Ch. 517; [71 L. J. Ch. 762; 50 W. R. 586; 87 L. T. 260—Joyce, J.

3. *Leaseholds—Assignment of Lease recited but not abstracted in chief—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 6.*—A vendor contracted to sell two leasehold houses held under separate leases. An assignment of one of the leases to an intermediate assignee was not abstracted in chief in the abstract of title, though it was recited in the abstract of a subsequent assignment in the same abstract of title.

HELD—that the assignment must be abstracted in chief and verified at the vendor's expense.

*In re Johnson and Trustin* ((1885) 30 Ch. D. 42; 54 L. J. Ch. 889, 33 W. R. 737; 53 L. T. 281—C. A.) followed.

*In re Ebsworth and Tidy's Contract* ((1889) 42 Ch. D. 23; 58 L. J. Ch. 665; 37 W. R. 657, 60 L. T. 841—C. A.) considered.

IN RE STAMFORD, SPALDING AND BOSTON [BANKING CO. AND KNIGHT'S CONTRACT, [1900] 1 Ch. 287; 69 L. J. Ch. 126; 48 W. R. 244, 81 L. T. 708—North, J.

## II. BUILDING ESTATE.

4. *Conditions—Mutual Gable—Party Wall—Right to Half Cost of Erection.*—It is now well established by the law of Scotland that where the owner of several plots of land laid out for building purposes builds the gable wall of his house with the consent of the owner of the adjoining plot, one half on his own land and the other half on the adjoining land, when the owner of that adjoining plot afterwards makes use of that gable by building upon it, he becomes bound to pay the owner of the original building one half of the cost of that gable wall. This right also attaches not only in the case of the person who originally built

**Building Estate—Continued.**

the wall, but one which passes on a disposition of the house to the person ultimately owning it, at the time when the adjoining owner builds and makes use of that party wall. The same rule, moreover, applies in the case of a house built with the gable one half upon the adjoining projected plot, if at the time when it was built the same person owned both the plot on which the house was built and the adjoining plot; and in such a case the owner for the time being of the house with the gable is entitled to recover one half of the cost of the gable wall from the person who builds upon that gable in connection with his house upon the adjoining plot.

*Quære*, how far this right to claim one half of the cost of the mutual gable may be excluded by a contract made between the owner of the two plots and the original disposee of the plot on which the house is standing at the time when that disposition took place.

BAIRD v. BELL, [1898] A. C. 420—H. L. (Sc)

5. *Conditions of Sale—Party Wall—Adjoining Owners—Implied Contract for Sub-purchaser to pay for use of Party Wall*—A building estate was being developed and various purchasers entered into contracts as they bought different plots of land from the common vendor. All of the contracts included certain conditions. P. bought one plot, and mortgaged it to a building society, who sold it to the plaintiff, the adjoining plot also falling into the hands of the building society, who sold it to the defendants. A house was built on the first plot with a party wall, half of which extended over the plot of land ultimately sold to the defendants. One of the conditions was that "where another purchaser shall have built or made . . . any division wall . . . adjoining the site now being purchased, the present purchaser shall pay to the former purchaser one half the cost of the wall . . . so built or made."

HELD—that when the defendants had built up against and used the party wall which was already erected there arose an implied contract to pay for that convenience according to the terms of the condition.

IRVING v. TURNBULL, [1900] 2 Q. B. 129; 69 [L. J. Q. B. 593—Div. Ct.]

6. *Land Sold in Plots for Private Residences—Restrictive Covenant by Purchaser of each Plot—Erection of Private Dwelling-houses—Houses proposed to be used as Almshouses for Aged Poor—Injunction*—The plaintiff purchased some plots of a building estate, which was put up for sale, and was described in the particulars as "consisting of 133 large choice plots for the erection of private residences" and also as "residential plots"; there was a condition that "no building of any kind other than a detached or semi-detached house, with appropriate offices and outbuildings to be appurtenant thereto or occupied therewith, shall be erected on any plot." The defendants had three days before the sale to the plaintiff purchased two

of these plots upon the same conditions, and covenanted in their conveyance to the same effect.

The defendants afterwards put up a board with a notice that they intended to build on their plots a home for poor people, and asked for subscriptions.

The plaintiff thereupon commenced an action in which he sought to restrain the defendants from erecting houses to be occupied otherwise than as private residences.

HELD (affirming Byrne, J.)—that the conditions drew a distinction between "residential plots" and "shop plots," but not between "residential plots" and "private residential plots"; and that the defendants were not acting in breach of the conditions.

WRIGHT v. BERRY, (1903) 19 T. L. R. 259—C. A.

7. *Mutual Covenants—Waiver—Highway—Cul-de-sac—Dedication to the Public*—A corporation, having acquired land to widen a street, sold surplus land by auction, under conditions requiring the purchasers to observe the bye-laws as to building. The corporation reserved the right to waive or alter any stipulations as to any land not sold at the sale, or, with the consent of the purchaser, as to any land so sold. The corporation consented to alter the plans of a purchaser so that the air space required by the bye-laws was provided out of a square, and not out of land sold at the sale. The square was a *cul-de-sac*, but not separated by any bar from the highway. It had never been paved or repaired by the local authority, but the soil of it had been acquired by the corporation.

HELD—that there was, under the circumstances, no building scheme which the corporation was not at liberty to alter, and that, although a *cul-de-sac* may be a highway, no dedication of the square to the public had been proved, and that the purchaser was not building upon a highway.

ATTORNEY-GENERAL AND LONDON PROPERTY INVESTMENT TRUST, LD. v. RICHMOND CORPORATION AND GOSLING & SONS, (1904) 68 J. P. 73; 89 L. T. 700; 20 T. L. R. 131; 2 L. G. R. 628—Eady, J.

8. *Power to vary Scheme—Plan annexed to Conveyance—Vacant Space marked on Plan—Space used as Road—Subsequent Building on Road*—The plaintiff's predecessor in title purchased from a land society certain plots of land, the plots being part of an estate which was laid out under a building scheme. Upon the plan annexed to the conveyance some adjoining plots were shown as a vacant space, and this space was occasionally used as a road, the road being a *cul-de-sac*. The conveyance was made subject to the condition that the society reserved the power of allowing a variation in the plans and conditions. The society subsequently conveyed the plots occupied by the roadway to the defendant, who built houses upon them. The plaintiff brought an action to restrain the defendant from building on the roadway in contravention of the building scheme.

HELD—that the plan alone, even if it showed

**Building Estate—Continued**

a road, was not sufficient ground for holding that the vendors could not alter what appeared thereon, and therefore there was no representation that the ground should remain vacant; that the vendors had expressly reserved to themselves the power to allow a variation in the plans and conditions; that the plan merely showed a vacant space, and, the road being a *cul-de-sac*, mere user was not sufficient to constitute a dedication to the public; and that therefore the plaintiff was not entitled to succeed.

Decision of Kekewich, J. ([1906] 1 Ch. 253; 75 L. J. Ch. 154; 51 W. R. 294; 94 L. T. 333; 22 T. L. R. 89) affirmed.

WHITEHOUSE v. HUGH, [1906] 2 Ch. 283; 75 [L. J. Ch. 677; 95 L. T. 175; 22 T. L. R. 679—C. A.]

**9. Restrictions as to Building on certain Plots—Infringement by User after Building completed.**—It was stipulated by a vendor that no hotel, tavern, public-house, beer-house, shop or other building for the sale of wines, spirits, ale or stout, or any spirituous, malt, or excisable liquor of any kind, should be built upon any lot offered for sale, except on the lots marked "tavern lots." The defendants, when they showed their plans, called their building a restaurant. They built a restaurant which at first was conducted without and afterwards with the sale of excisable liquors. The vendor and a purchaser of a "tavern lot" moved for an interlocutory injunction.

HELD—that the stipulation meant that no building on the lots should be used for the forbidden purposes, and not merely that no building should be built for those purposes; that it was impossible to tell, as to many of the things mentioned, whether or not a house, when it is in course of building is intended for an hotel, tavern, public-house, &c. The user of the house has to be looked at before declaring that the covenant has been infringed, the plaintiffs were therefore entitled to the injunction claimed.

WEBB v. FAGOULT BROS., (1899) 79 L. T. 683 [—C. A.]

**10. Restrictive Conditions—Annexation of to Registered Land—Modifications of Registered Conditions—Consent—Proof that Modifications are beneficial to the Persons principally interested.**—*Land Transfer Act, 1875* (38 & 39 Vict. c. 87), s. 81.—The plaintiff company bought certain building land in Middlesex which formed part of a larger estate belonging to the defendants. On the treaty for the purchase by the company, the defendants required that certain restrictions should be agreed to and, amongst others, particular restrictions with regard to the class of house to be built, frontage, costs, and the area of the plots. These restrictions were embodied in the instrument of transfer and were included in the land certificate. The defendants were under no obligation to impose these restrictions, but they thought it desirable that some restrictions as to the buildings should

be exacted. An application was made by the company, by originating a summons under sect. 84 of the Land Transfer Act, 1875, for the modification by the Court of certain restrictions registered in the Land Registry. The consents to the alterations had been obtained of the person who had contracted to purchase from the defendants the remaining portion of the estate, a previous purchaser from the defendants of other land in the neighbourhood, the sole incumbrancers on the company's estate, and purchasers from the company of various portions of the estate. The only other purchasers from the company were the purchasers of three outlying plots, whose consent had not been applied for, but it was not expected that they would object. The defendants also consented to the alterations.

HELD—that there must be proof to the satisfaction of the Court that the modifications would be "beneficial to the persons principally interested" in the performance of the conditions; that all persons having notice of the scheme, which was binding on all persons having notice until modification, were "persons principally interested" within the meaning of sect. 84, and they were persons who must either consent or must be proved to be benefited by the modifications; and that the consent of the purchasers of three outlying plots must be obtained.

GROUND RENT DEVELOPMENT CO., LD. v. WEST, [1902] 1 Ch. 674; 71 L. J. Ch. 354; 86 L. T. 403; 18 T. L. R. 430—Kekewich, J.

**11. Restrictive Covenants—Action for Injunction by one Purchaser against another—Trivial Breach by Plaintiff himself—Whether a Bar to his Action.**—A plaintiff, one of the purchasers under a building scheme, does not lose his right to enforce the provisions of the scheme against other purchasers merely because he has himself committed a trivial breach of covenant, which has caused no injury or annoyance, and of which no complaint has ever been made.

Western v. McDermott ((1877) L. R. 2 Ch. 72; 36 L. J. Ch. 76; 15 W. R. 265; 15 L. T. 641) followed.

HOOPER v. BROMPT. RAPHAEL THIRD PARTY, [(1903) 89 L. T. 37—Tinsell, J.]

And see No. 15, *infra*.

**12. Restrictive Covenants—Covenants running with the Land—"One Messuage or Dwelling-house"—"Private Residence only"—"Residential Plots."**—When the benefit of a restrictive covenant has been once clearly annexed to one piece of land, it passes by assignment of that land and may be said to run with it in contemplation as well of equity as of law without proof of special bargain or representation on the assignment. In such a case it runs not because the conscience of either party is affected, but because the purchaser has brought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral while it is affected by notice

**Building Estate—Continued.**

of those which touch and concern land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion.

The erection of a block of flats is a breach of a covenant not to erect more than one messuage or dwelling-house on a plot.

Residential flats, involving the use of a public entrance and staircase, do not answer the description of a messuage "adapted for and used as and for a private residence only."

Decision of Farwell, J. (69 L. J. Ch. 59; 48 W. R. 202; 81 L. T. 515, 16 T. L. R. 20) affirmed.

ROGERS v. HOSEGOOD, [1900] 2 Ch. 388; 69 [L. J. Ch. 652, 48 W. R. 659; 83 L. T. 186; 16 T. L. R. 489—C. A.]

**13 Restrictive Covenants—"House"—Block of Flats.]**—The term "house" in a restrictive covenant in a conveyance on sale prohibiting the erection of more than a certain number of houses on a certain piece of land will be construed, in the absence of indications to the contrary, as being equivalent to a block of flats, but not to each single flat.

Decision of Cozens-Hardy, J. ((1900) 64 J. P. 185; 82 L. T. 22) affirmed.

KIMBER v. ADAMS, [1900] 1 Ch. 412; 69 L. J. [Ch. 296; 48 W. R. 322, 82 L. T. 136, 16 T. L. R. 207—C. A.]

**14 Restrictive Covenants—Lots—Right to Enforce—Notice.]**—Where an estate is sold in lots at successive sales under a building scheme, the conditions on the occasion of each sale providing that "the sale of the respective lots is subject to the following stipulations," &c., a purchaser at any sale can only enforce the stipulations in respect of lots then shown as laid out, and as to which the restrictions are then defined.

The fact that a purchaser's own conveyance departs from the terms of the stipulations does not disentitle him to enforce the real stipulations against the other lots, nor does the fact that after the date of his own contract one of the other purchasers obtains a conveyance not in accordance with the stipulations.

*Knight v. Simmonds* ([1896] 1 Ch. 653, 74 L. T. 188—Romer, J., and [1896] 2 Ch. 294; 65 L. J. Ch. 583; 44 W. R. 580, 74 L. T. 563—C. A.) followed.

A sub-purchaser of a portion of an original buyer's purchase is not precluded from enforcing the stipulations because his vendor has committed a breach of them on another portion.

The conveyance of a lot A. was by mistake drawn so as to allow the erection of a shop (instead of a private house). A. sold this lot to B., who employed A.'s solicitor to carry out the matter. The solicitor knew of the scheme *ab initio*, but it was held on the facts that there was nothing in the title deeds or the transaction which would have brought it to the knowledge of an independent solicitor, if B. had employed

one; and that therefore B., having bought in good faith what he thought was a "shop plot," was not affected with notice of the restrictions.

ROWELL v. SATCHELL, [1903] 2 Ch. 212; 89 L. T. [267, 73 L. J. Ch. 20—Eady, J.]

**15 Restrictive Covenants—Notice imputed to Sub-purchaser.]**—A sub-purchaser of a plot in a building estate was told by his vendor in good faith that the original deed was lost. He was shown a copy, which eventually proved to be incorrect.

HELD that, having notice of the deed, he was affected with notice of its actual contents.

HOOPER v. BROMET, RAPHAEL, THIRD PARTY. [1903] 89 L. T. 37—Farwell, J.]

And see No. 11, *supra*.

**16 Restrictive Covenants—Sales at Different Times of Parts—Agreement—Implied from Transaction of Sale and Purchase—Assigns of Vendor.]**—Restrictive covenants can be enforced by one purchaser against the others; they all really taking parts of one property. That the property is not all sold at one time does not affect the question if it is all part of one building scheme. However, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others, where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase.

*Nottingham Patent Brick and Tile Co. v. Butler* (1886) 16 Q. B. D. 778; 55 L. J. Q. B. 280; 34 W. R. 405; 54 L. T. 441—C. A.) and *Renals v. Cowlishaw* (1879) 11 Ch. D. 866; 48 L. J. Ch. 830; 41 L. T. 116—C. A.) referred to.

Decision of Kekewich, J. (64 J. P. 358; 82 L. T. 594) affirmed.

NALDER AND COLLYER'S BREWERY CO. v. [HARMAN, (1900) 83 L. T. 257—C. A.]

**17. Surplus Unsold Lands in Hands of Local Authority—Affirmative Covenant—Implied Negative Stipulation—Obligation of Vendor of Unsold Lots to observe Conditions—Injunction—Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, sub-ss. (b) and (c).]**—In September, 1894, the defendants offered property described as building land adapted for first-class shops or any business requiring roomy premises for sale by auction in lots. The ninth condition of sale provided that the purchasers of lots 3 to 7 inclusive should erect within two years of the day of sale, on each of the lots respectively purchased by them, a shop and dwelling-house of a certain minimum value, and should enter into covenants to that effect with

**Building Estate—Continued**

the vendor. The plaintiff purchased the lands comprising lot 2, which adjoined lots 3 to 7, but the remaining lots were unsold, and, although efforts were subsequently made to effect a sale, such lots remained unsold.

In 1897 the defendants took steps to erect on the unsold lands a fire-engine station of a value exceeding the aggregate of the buildings contemplated by the conditions of sale. The plaintiff sought to restrain the defendants from erecting the fire-engine station.

**HELD**—(1) that the defendants as vendors, apart from their position as a local authority, were under an obligation to the plaintiff to observe the condition of sale, but (2) that, such conditions being silent as to the user of the buildings when erected, or their maintenance as shops and dwelling-houses, a negative stipulation that such buildings and no other were to be erected ought not to be implied, and, consequently, that the action must be dismissed with costs to be taxed as between solicitor and client.

**HOLFORD v. ACTON URBAN DISTRICT COUNCIL**, [1898] 2 Ch. 240; 67 L. J. Ch. 636; 78 L. T. 829; 14 T. L. R. 476—Stirling, J.

**III. CONDITIONS AND PARTICULARS OF SALE.**

**18 Annuling Sale—Defective Title**—“*Matter or Thing relating or incidental to Sale*”—*Matter of Conveyance*—A leasehold house was put up for sale, the particulars stating that it was held on a lease for ninety-nine years, and that the sale was by a mortgagee. One of the conditions of sale provided that, if any objection whatever should be made “as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale, which the vendor is unable or unwilling to comply with,” the vendor should have full power to annul the sale. It afterwards appeared that the vendor’s title was under a mortgage by sub-demise, the legal estate in which was outstanding in a mortgagee, who was said to have been paid off, and that certain days of the original term were still outstanding.

The purchaser required that several persons should join in the assignment to get in these outstanding interests.

**HELD**—that the condition was wide enough to include a matter of conveyance as well as a matter of title, and that the vendor was entitled to annul the sale under the condition.

**Bowman v. Hyland** (8 Ch. D. 588) distinguished.

Decision of Kekewich, J., reversed.

**RE DEIGHTON AND HARRIS’ CONTRACT**, [1898] 1 Ch. 458; 67 L. J. Ch. 240, 78 L. T. 430, 46 W. R. 341—C. A.

**19. Condition of Sale—Condition stating Defect of Title—Delegation of Trust.**—A condition of sale of leasehold premises stated that a testator, by his will, bequeathed the premises to his wife, in trust for herself and her children, to be applied

by her as she should deem most expedient, and that, to give effect to the trusts contained in the will, the widow, on her re-marriage, conveyed the premises to trustees, upon trust, by sale or mortgage, to raise £1,000 for the benefit of the said children, and that, in pursuance of this trust for sale, the vendors were selling and would convey the premises as trustees, and not otherwise, and should not be bound to procure the concurrence of any other parties. The will contained no provision authorising this to be done.

The purchaser refused to complete, on the ground that a good title had not been shown, as the widow had no power to delegate her trust. The vendors relied on the condition.

**HELD**—that the widow committed a breach of trust by assigning the premises to trustees, and that the purchaser was not precluded by the condition from objecting to the title on this ground, inasmuch as he was entitled to assume that a power to do what was done by the widow should be shown.

**IN RE O’FLANAGAN AND RYAN’S CONTRACT**, [1905] 1 Ir. R. 280—M. R.

**20. Cost—Conveyance—Mortgagees’ Concurrence.**—A condition in a contract for the sale of freehold property required the assurance and every other instrument required for getting in or releasing any outstanding estate, right or interest, or for completing or perfecting the vendor’s title, or for any other purpose, to be prepared by and at the expense of the purchaser.

**HELD**—that the expense of procuring the concurrence of the mortgagees was not provided for, and according to the ordinary rule it fell on the vendor.

*In re Wallott and Argent* ((1889) 60 L. T. 735) distinguished.

**IN RE SANDER AND WALFORD’S CONTRACT**, [(1900) 83 L. T. 316—Fairwell, J.

**21 Delay in Completion—“Purchaser in Default”—Default of Vendor in Performance—Damages.**—A vendor claimed interest on the balance of the purchase-money from the date fixed for completion to the actual date of completion under a condition of sale providing that, if from any cause whatever the completion of the purchase was delayed beyond the date mentioned, “the purchaser in default” should pay interest on the remainder of his purchase-money at the rate therein specified until completion. A very considerable part of the delay in carrying out the contract arose entirely from the default of the vendor in doing what he could reasonably and fairly have done had he been careful to fulfil his contract. The contract might have been carried out three months earlier than the actual date of completion. There was no question of want of good faith.

**HELD**—that the purchasers were not in default within the meaning of the condition.

**Denning v. Henderson** ((1847) 1 De G. & Sm. 689, 17 L. J. Ch. 8, 12 Jur. 89, 10 L. T. (o.s.) 302) followed.



**Conditions and Particulars of Sale—Continued.**

HELD, also, that damages could be recovered for the delay caused by the vendor by reason of his not having cared, or troubled, or taken reasonable pains to perform his contract.

*Jaques v. Miller* ((1877) 6 Ch. D. 153; 47 L. J. Ch. 544, 25 W. R. 846, 37 L. T. 151—Fry, J.) followed

*JONES v. GARDINER*, [1902] 1 Ch. 191; 71 [L. J. Ch. 93; 50 W. R. 265; 86 L. T. 74—Byrne, J.]

**22 Delay in Completion—Dispute as to Form of Conveyance—Whether “Wilful Default” of Vendor—Liability of Purchaser to pay Interest—Vendor Accounting for Rents and Profits—Whether liable for Occupation Rent of Land in his Occupation**—A sale of real property was to be completed on January 2nd, 1899, and the contract provided that, if completion should be delayed “from any cause whatever other than wilful default on the part of the vendor,” the purchaser should pay interest at 5 per cent. on the purchase-money. Disputes arose as to the form of the conveyance; and ultimately, in an action brought by the purchaser, Buckley, J., gave judgment for specific performance with costs, holding that, although the point in dispute was really unimportant, the vendors were wrong in their contention, and ought to have accepted the conveyance tendered by the purchaser.

He, however, ordered the purchaser to pay interest on the purchase-money on the ground that (1) there had been no “wilful default” on the part of the vendors, and (2), even if there had, the delay was really caused by the purchaser being unable to find the purchase money. On appeal:—

HELD—that in considering the question of “wilful neglect” there is no distinction between a vendor’s mistakes as to title, as to evidence of title, or as to conveyance, but that the appeal must be dismissed for the second reason given by Buckley, J.

Per Stirling and Cozens-Hardy, LJJ., the delay was not due to the “default,” if any.

Per Vaughan Williams, L.J., it was due to the “default.”

Per Vaughan Williams and Stirling, LJJ., there was “wilful default” on the part of the vendor within the meaning of the contract.

The rule laid down in *In re Young and Hurston’s Contract* ((1885) 31 C. D. 168; 50 J. P. 245; 34 W. R. 84, 53 L. T. 837—C. A.) per Bowen, L.J., is not affected by the language of Lindley, L.J., in *In re London Corporation and Tubbs’ Contract* ([1894] 2 Ch. 524; 63 L. J. Ch. 580; 70 L. T. 719—C. A.).

Per Cozens-Hardy, L.J., there was no “wilful default.”

HELD, also, that in accounting for rents and profits the vendor could not be charged with an occupation rent in respect of land in his own occupation.

Decision of Buckley, J. ([1902] 1 Ch. 226, 71

L. J. Ch. 60, 50 W. R. 118; 85 L. T. 753 affirmed.

*BENNETT v. STONE*, [1903] 1 Ch. 509; 72 L. J. [Ch. 240, 51 W. R. 358; 88 L. T. 35—C. A.]

**23 Delay in Completion—“Wilful Default”—Inability to give Possession on Day Agreed—Interest on Purchase-money**—A contract for the sale of freeholds provided that the purchase should be completed on August 1st, 1904; that on completion the purchaser should be given possession; that the purchaser should pay the purchase-money on that date; and that if, from any cause other than the wilful default of the vendors, the purchase should not be completed on or before that date, the purchaser should pay interest on the purchase-money. On the stipulated day the vendors found themselves unable to give vacant possession of a part of the property which they had assumed to have been held under a quarterly tenancy. On that assumption they had served a three months’ notice to quit for August 1st; but in ejectment proceedings it was held that the tenancy was a yearly one, commencing on May 1st, and that therefore the notice was insufficient. The premises in question consisted of a public-house which had been held for more than thirty years at an annual rent, payable quarterly. The tenancy had commenced on May 1st, 1871, but the vendors had no record or recollection of the exact terms of the letting.

HELD that, in assuming the tenancy to be quarterly, and in fixing the date for completion on that assumption, the vendors had been guilty of wilful default, and that therefore they were not entitled to be paid interest on the purchase-money.

*IN RE POSTMASTER-GENERAL AND COLGAN’S CONTRACT*, [1906] 1 Ir. R. 287, 477—Barton, J., and C. A. (Ir.)

**24 “Error, Misstatement, or Omission” in Particulars—Notices to Sewer, Flag, and Pave under the Public Health Act, 1875—Non-disclosure to Purchaser—Compensation—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257**—Leasehold property in a town was sold subject to a condition that, if any “error, misstatement, or omission” should be discovered in the particulars, the same should not annul the sale, but should be a subject for compensation. It was subsequently discovered, before the completion of the purchase, that notice to sewer, flag, and pave the adjoining street had prior to the sale been served upon the vendor by the local authority under the provisions of the Public Health Act, 1875. These notices had not been complied with, nor had they—without any fraudulent intent—been disclosed to the purchaser at the time of the sale. The purchaser elected to complete his purchases without prejudice to any claim that he might have to compensation for the non-disclosure of the notices in question.

HELD that, inasmuch as the property would always have continued liable to the service of these notices in the hands of the purchaser from the moment of his purchase, supposing they had

**Conditions and Particulars of Sale—Continued.**

not been previously served, and inasmuch as it was accordingly impossible to believe that the market value of the property could be affected in the slightest degree by the question whether such notices, as a matter of fact, had or had not been given at the time of the sale, the purchaser must be taken to have suffered in fact no practical injury (*damnum*) from the non-disclosure of what had actually happened.

Held accordingly (Collins, L.J., *dissentiente*)—that even if such non-disclosure constituted an "error" or "omission" within the meaning of the condition, yet since no practical injury (*damnum*) had in fact been done, no compensation could be given the purchaser under the provision of that condition.

Per Collins, L.J.—The non-disclosure of the notice constituted an "error" or "omission" on the part of the vendor within the meaning of the condition.

IN RE LEYLAND AND TAYLOR'S CONTRACT,  
[1900] 2 Ch. 625, 69 L. J. Ch. 764; 49  
W. R. 17, 83 L. T. 380, 16 T. L. R. 566—  
C. A.

**25 "Error or Misstatement—Defect of Title—Compensation after Conveyance—Common Mistake—Rescission"**—Certain hereditaments were sold by the Court in a partition action subject to a condition that "if any error or misstatement shall appear to have been made in the particulars of sale or these conditions such error or misstatement is not to annul the sale, or entitle the purchaser to be discharged from his purchase, and a compensation is to be made to or by the purchaser as the case may be and the amount of such compensation is to be settled by the Judge or Chambers." More than a year after the conveyance to the purchaser it was discovered that a certain part of the hereditaments belonged to a third party whose interest the purchaser bought out. The purchase-money had been paid into Court and partly distributed.

Held—that the purchaser was not entitled to claim compensation under the condition inasmuch as it did not, and was not intended to, apply to the case of a defect of title, but only to error or misstatement in the description of the subject-matter of the sale such for example as an error in quantity or nature, or tenure, or amount of the vendor's interest; that there was no error or misstatement in the description of the property, the real complaint being that no title could be shown to a part of the property so described; that, assuming that there had been a common mistake on the part of the vendor and purchaser, and assuming that there need not be a total failure of consideration to justify rescission after conveyance, the error had not been of such a nature as to justify it, and that as the purchase-money had been dealt with by the order of the Court, the trustee vendor must be exonerated from liability.

DEBENHAM v. SAWBRIDGE [1901] 2 Ch. 98,  
[70 L. J. Ch. 525, 19 W. R. 502, 84 L. T.  
519, 17 T. L. R. 441—Byrne J.]

**26. Indemnity against Rent—Misleading Condition—Sale under the Court—Constructive Notice—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78)**—Certain premises, described as lot 2, were sold by public auction, under the direction of the Court. The particulars stated that lot 2 was held, with other premises, under a lease of 1877, for a term of years, subject to rent, and further stated that the said lot 2 was sold "subject to the said rent, but is indemnified therefrom by an indenture, dated 16th August, 1881, whereby the said lot was assigned to A. J." The 12th condition of sale was as follows: "Lot 2 was assigned by deed dated 16th August, 1881, indemnified against the rent reserved by the said lease (of 1877), as in the said deed mentioned, and the purchaser shall not require any information as to the person or persons, or premises liable to the said rent, or bound by the said indemnity." The indenture of assignment of 1881 assigned lot 2 to A. J., "indemnified from the rent, but subject to the covenants by the lessee and the conditions of the said lease."

M was declared the purchaser of lot 2. At the time he believed that the other premises demised by the lease of 1877 were bound to indemnify lot 2 against the rent reserved by the lease.

The purchaser applied to be discharged from his contract on the ground that the provision as to indemnity contained in the deed of 1881 did not give him any real or adequate indemnity against the rent as he was entitled to under his contract.

Held—that there was not an indemnity within the contract, and that the condition of sale was one which taken in connection with the particulars rendered the information given by the document misleading and misleading and that therefore the purchaser should be discharged from his contract.

MANFOLD v. JOHNSTON [1902] 1 L. R. 7—M. R.

**27 Interest on Purchase-money—Delay in Completion—Defect in Title—Default of Vendor**—By an agreement for the sale of leasehold property, it was provided that "if from any cause whatever, other than the default of the vendor, the purchase should not be completed on the day named in the agreement the purchaser should pay to the vendor interest at 1 per cent per annum on the residue of the purchase-money from that date until the completion of the purchase. Owing to a defect in the title of the vendor, who held the property under an absolute conveyance from persons who purported to convey under the powers of a certain section of a private Act of Parliament which did not in fact authorize them to do so, a deed of confirmation executed by the proper person in accordance with the Act was required by the purchaser, and procured by the vendor at his own expense. This caused a delay in the completion of the purchase and the vendor claimed interest under the agreement up to the date of the completion. A summons was taken out by him under the Vendor and Purchaser Act, 1874 asking for a declaration that there had

**Conditions and Particulars of Sale—Continued.** been no "default" on his part disentitling him to interest on the purchase-money.

**HELD**—that the omission by the vendor to detect and provide for this defect in his title did not amount to "default" on his part; and that therefore he was entitled to interest on the purchase-money.

Decision of *Romer, J.* ([1898] 1 Ch. 433; 78 L. T. 250; 46 W. R. 373) affirmed.

*IN RE WOODS' AND LEWIS' CONTRACT*, [1898] 2 [Ch. 211; 67 L. J. Ch. 475; 78 L. T. 665, 14 T. L. R. 457; 46 W. R. 643—C. A.]

**28. Misdescription—Action by Purchaser for Return of Deposit, Rescission, and Expenses—Notice by Vendor to Rescind.**—The mere issue of a writ by a purchaser will not deprive a vendor of his right to rescind the contract under the usual rescission clause in conditions of sale, even though the words "notwithstanding any intermediate litigation" are wanting in the clause. In order to preclude the exercise of the right, there must be an actual waiver either by acquiescence in the litigation or otherwise, and there is no general rule as to the length of time which must elapse from the commencement of the litigation in order to prove such waiver.

*ISAACS v. TOWELL*, [1898] 2 Ch. 285; 67 L. J. [Ch. 508; 78 L. T. 619—Byrne, J.]

**29. Misdescription of Quantity—Knowledge of Purchaser—Compensation.**—The particulars of a contract for the sale of land contained a misdescription of the quantity of land in one parcel. The plaintiff, the purchaser, knew perfectly well the land he intended to buy; he had lived in the neighbourhood of it and had been negotiating for it for some time.

**HELD**—that the plaintiff was not entitled to compensation.

*COBBETT v. LOCKE-KING*, (1900) 16 T. L. R. [379—Wright, J.]

**30. Misleading Condition—Not to Inquire into Prior Title—Defect in Prior Title within Vendor's Knowledge.**—In 1865 C. demised to F. a farm for twenty-one years subject to a covenant against assignment without written consent. F. devised the farm in trust for his daughter and died. On the daughter's marriage the farm was by two deeds assigned to trustees in trust for her husband A. for life with other trusts over. C.'s consent to these assignments was not obtained. In 1901 C. granted a twenty-one years' lease of the farm to A. In 1904 A. sold it by auction, describing it as being held under the lease of 1901, and stipulating that the purchaser should not inquire into his prior title. The purchaser discovered the memorials of the assignments, and refused to complete.

**HELD**—(1) that the new lease obtained in 1901 by A. might probably be held by him subject to the trusts affecting the old lease; and (2) that the stipulation in the conditions of sale

was misleading and unfair, and that A. could not make a good title.

*IN RE TURPIN AND AKEEN'S CONTRACT*, [1905] [1 Ch. 85—C. A.]

**31. Misrepresentation—Title—Enlargement of Long Term into Freehold—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 65 (1).**—A vendor of property, where he has reasonable grounds for so stating, is entitled to describe in the particulars of sale the property as being held on a particular tenure, and in the conditions of sale to limit the proof of title which the purchaser might otherwise require.

A vendor described property as freehold. The conditions stated that it was held under a 500 years' lease from 1672 at a rent of 1s., but had in 1828 been assigned free of the rent, which had never since been paid, and the purchaser was required to assume that the rent had been released. The vendor had executed a deed poll enlarging his estate into a fee simple, and the purchaser was also required to assume that such deed poll operated as an effectual enlargement. All facts were truly stated.

**HELD**—that the vendor was justified in describing the property as freehold, and in requiring the purchaser to assume the facts in question.

*Torrance v. Bolton* (21 W. R. 134; L. R. 14 Eq. 124; 8 Ch. 118) distinguished.

*BLAIBERG v. KEEVES*, [1906] 2 Ch. 175, 75 [L. J. Ch. 464; 54 W. R. 451; 95 L. T. 412—[Warrington, J.]

**32. Obligation of Purchaser to Discharge "Outgoings"—Compulsory Sanitary Work.**—Conditions of sale provided for completion of the purchase on a certain day, and for the apportionment of rents, rates, taxes, and outgoings up to that day, and also in the event of completion being delayed beyond such day for the purchase-money bearing interest, or, at the vendor's option, he to receive the rents up to the day of actual completion of the purchase.

**HELD**—that in the event of completion being delayed beyond the appointed day, the vendor had the option of either claiming interest and accounting to the purchaser for rents since the appointed day, or of keeping all sums in fact received by the vendor since that day from tenants; but there being no words expressly relieving the purchaser from the obligation to discharge outgoings after the appointed day, and no ground for inserting anything by implication, the expense of complying with a sanitary notice under the Public Health (London) Act, 1891, after the appointed day and after the title having been accepted, must be borne by the purchaser.

*Tubbs v. Wynne* ([1897] 1 Q. B. 74; 66 L. J. Q. B. 116—Collins, J.) applied.

*BARSHT v. TAGG*, [1900] 1 Ch. 231, 69 L. J. Ch. [91; 48 W. R. 220; 81 L. T. 777; 16 T. L. R. 100—Cozens-Hardy, J.]

**33. Right to Rescind—Limit to—No Title to Minerals—Right to Purchaser to Claim Conveyance with Compensation.**—A condition giving a

**Conditions and Particulars of Sale—Continued.**

vendor the right to rescind if he be unwilling to comply with any objection to his title is not unrestricted. He must show some reasonable ground for his unwillingness, and there must have been no failure on his part to act as a prudent man would do in contractual dealings with others.

J agreed to sell to H. a freehold villa under a contract which provided that (1) the vendor might rescind the contract if the purchaser insisted on any objection or requisition "as to title" which the vendor should be "unable to remove or comply with"; and (2) that any misstatement or omission in the particulars should form the subject of compensation.

H. discovered that J. had showed no title to the minerals, and made and insisted on a requisition in respect thereof. J. believed that it was well known that the minerals were in other hands.

**HELD**—that J., having regard to his conduct and the facts, could not claim to rescind; and that H. was entitled to a conveyance of all J.'s interest with compensation.

*Bourman v. Hayland* ([1878] 8 Ch. D. 588, 17 L. J. Ch. 581, 39 L. T. 90—Hall, V.-C.) explained.

Decision of Buckley, J. ([1905] 1 Ch. 603, 71 L. J. Ch. 389, 53 W. R. 128, 92 L. T. 1591) affirmed on other grounds.

**IN RE JACKSON AND HADEN'S CONTRACT.** [1906] 1 Ch. 412, 25 L. J. Ch. 226, 54 W. R. 431, 91 L. T. 418—(A.

**34. Right to Rescind—Limit to—Requisitions which Vendor may be "unwilling to comply with"—Arbitrary Refusal—Right to Claim Specific Performance.**—Conditions of sale stated that the vendor was a trustee for sale, and gave him power to rescind a contract if the purchaser made any objection or requisition which he was "unable or unwilling to remove or comply with."

The abstract showed that the first for sale only arose, and the vendor could only make a title in W. (who died in 1858) left at least one child surviving her. In answer to requisitions the vendor gave the date and place of W.'s marriage and the names of her children but not their addresses. He knew the address of one child and the address of the solicitor acting for the others, but when pressed for further information declined to give it and purported to rescind the contract.

**HELD**—that the requisition was reasonable and that his refusal was arbitrary and that the purchaser was entitled to specific performance.

*QUINTON v. HORNE*, [1906] 1 Ch. 596, 75 L. J. Ch. 293, 54 W. R. 311—Farwell J.

**35. Right to Rescind—Limit to—Sale under Direction of Court—Purchaser discharged from Contract on Ground of Misrepresentation—Vendor's Right to Rescind—Costs recoverable by Purchaser.**—Land was sold under direction of the Court. Subsequently, on the purchaser's application the Court discharged him from the contract on the ground of misrepresentation.

The vendor thereupon claimed to rescind on the ground of unwillingness to comply with the objection to title forming the subject-matter of the misrepresentation.

**HELD**—(1) that he could not do so; and (2) that as the sale was under the direction of the Court, the purchaser could recover the costs occasioned by his bidding and purchase in addition to the costs of the application to the Court and of investigating the title.

*HOLLIWELL v. SEACOMBE*, [1906] 1 Ch. 426, 75 L. J. Ch. 289, 54 W. R. 355, 94 L. T. 186—Kekewich, J.

**36. Sale by the Court—Conditions of Sale—Abstract of Title—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 70.]**

—By order of the Court, certain landed property was put up for sale. In the contract for its sale a clause was inserted that "all facts or matters appearing to be proved or to be certified by a chief clerk or Master attached to the chambers of the said judge, or to be stated or implied in any judgment or order in the action in which this sale is made are to be deemed thereby sufficiently and conclusively evidenced." The Master certified that the property to be sold formed part of the estate of one Joseph Whitham deceased, from whom the title was derived. The purchaser asked for an abstract of certain deeds.

**HELD**—that having regard to sec. 70 of the Conveyancing Act 1881, and to the terms of the contract, a good title had been shown.

**IN RE WHITHAM, WHITHAM v. DAVIES**, (1901) 49 W. R. 597, 81 L. T. 585—Cozens-Hardy, J.

**37. Substantial Misdescription—Compensation—Specific Performance—Possessory Title.]**—The

plaintiff, at a sale by auction purchased a freehold residential and building estate. The particulars of sale described the property as covering an area of about 5a 0r 26p, and bordering the nine-sheet of ornamental water on Shortwood Common. Clause 5 of the conditions of sale was as follows: "The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise . . . and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." At the trial it was found that a strip running along the ornamental water was not comprised in a deed which formed the root of title, and that the acreage of the property was only 1a. 3r. The plaintiff claimed rescission and return of the deposit paid by him.

**HELD**—that the property which the vendors offered for sale was property a material part of which they had not got and as the purchaser said that if he had known that those parts were not included in the sale he would not have purchased he was entitled to rescind and to a return of the deposit.

**HELD**, also that, the contract being an open one as to the outlying parts a possessory title

**Conditions and Particulars of Sale—Continued.** must be shown, not for twelve years only, but for forty years.

JACOBS v. REVELL, [1900] 2 Ch. 858; 69 [L. J. Ch. 879, 49 W. R. 109, 83 L. T. 629—Buckley, J.]

**38. Trustees for Sale—Leasehold Property—Sale in Lots—Purchaser to take by Sub-demise—Objection—Rescission—Return of Deposit—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9.]**—Vendors, who were trustees with an ordinary power of sale, put up for sale by auction certain leasehold property, of which they were assignees, in lots, the lease comprising more than one tenement. Under advice which was considered by conveyancers, and found in practice, the best means of selling such property, they inserted a condition that each purchaser should take a sub-demise of the house purchased by him for the whole term, less one day, at an apportioned rent. The objection was taken that this was a power of sale and not a power of leasing. The same instrument—a marriage settlement—containing the power of sale also contained a power of leasing. Under a vendors' summons.—

HELD—that the transaction was a sale carried out by means of a sub-lease and not a sale within the contemplation of the trustee's ordinary power of sale, and that the purchaser was entitled to have the contract rescinded, and to a return of the deposit, together with interest and costs.

*In re Higgins and Percival* ((1888) 57 L. J. Ch. 807, 59 L. T. 213—Kay, J.) followed.

IN RE WALKER AND OAKSHOTT'S CONTRACT, [1901] 2 Ch. 383, 70 L. J. Ch. 666; 50 W. R. 41; 84 L. T. 809—Kekewich, J.

Overruled by *In re Judd and Poland*, *infra*.

**39. Trust for Sale—Leaseholds—Sale by way of Underlease—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13.]**—Trustees for sale offered by auction in separate lots five leasehold houses held under one lease. It was a condition of sale that if all the lots were sold at the sale the purchaser of the most valuable should execute underleases to the other purchasers at apportioned rents, and that if (as in fact happened) some remained unsold the vendors would grant underleases of the lots sold to the respective purchasers.

HELD—a valid exercise of the trust for sale

*In re Walker and Oakshott's Contract* ([1901] 2 Ch. 383; 70 L. J. Ch. 666; 50 W. R. 41; 84 L. T. 809—Kekewich, J., *supra*) overruled.

IN RE JUDD AND POLAND AND SKELCHER'S CONTRACT, [1906] 1 Ch. 684; 75 L. J. Ch. 403; 54 W. R. 513; 94 L. T. 695—C. A.

**40. Vendor to show Twelve Years' undisturbed Possession—Prior Title not to be objected to—Grant of Administration to Vendor—Return of Land sold as Assets—Objection of Purchaser.]**—G. was declared the purchaser of a leasehold

farm, the subject of a judicial tenancy, which was sold by public auction. By the conditions of sale the vendor was required to show that he had been in the undisturbed possession of the lands for upwards of twelve years, and prior to that period the title was not to be investigated, nor any objection or requisition made in reference to it. From 1879 the vendor had been admittedly in absolute possession, but in 1897 he took out letters of administration to his father, and returned the farm as part of his assets. The purchaser becoming aware of this refused to complete. The vendor having taken out a summons under the Vendor and Purchaser Act.—

HELD—that the taking out of letters of administration to his father by the vendor, after the acquisition by him of the absolute title under the statute, could not have any greater effect than an acknowledgment in writing would have; that such an acknowledgment could not be relied on by the next of kin to revive a right in the case of land, where the right itself was barred by the statute, and not merely the remedy for enforcing it; and that consequently a good title was shown so far as was required by the conditions of sale.

IN RE MCCLURE AND GARRETT'S CONTRACT, [1899] 1 Ir. R. 225—V.-C.

**41. "Vendor's Title is accepted by the Purchasers"—Non-Disclosure of Onerous and Unusual Covenants—Objections.]**—It is well established that, whether a sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases. A condition of sale stipulating that "the vendor's title is accepted by the purchasers" does not preclude them from showing that a good title has not been shown. The purchaser has a right to assume when such a stipulation is made that the vendor has disclosed what it is his duty to disclose, and that the condition can only be read as precluding objection on that footing.

IN RE HAEDICKE AND LIPSKI'S CONTRACT, [1901] 2 Ch. 666, 70 L. J. Ch. 811; 50 W. R. 20; 85 L. T. 402; 17 T. L. R. 772—Byrne, J.

**42. Warranty—Conveyance not corresponding with Warranty—Merger of Particulars of Sale in Conveyance.]**—Where a preliminary contract of any description, whether verbal or written, is intended to be superseded by, and is in fact superseded by, one of a superior character, then the later contract—the superior contract—prevails, and the stipulations in the earlier one can no longer be relied upon.

On the sale of a house by auction, a statement was made in the particulars of sale as to the sanitary arrangements, and subsequently a conveyance of the house was executed. In an action by the purchaser for breach of an alleged warranty in the particulars of sale as to the sanitary arrangements.—

HELD, assuming that the statement in the particulars amounted to a warranty, that the

**Conditions and Particulars of Sale—Continued.**

terms of the original contract were merged in the subsequent conveyance which contained no warranty; and that, in the absence of fraud, the warranty in the particulars of sale could not be relied on by the purchaser.

GREYWOLDE - WILLIAMS AND OTHERS *v.* [BARNEBY, (1901) 49 W. R. 203, 83 L. T. 708; 17 T. L. R. 110—Wills, J.]

**IV. CONTRACT.**

*And see* BANKRUPTCY, 7.

**43 Act of Bankruptcy by Vendor after Contract and before Date of Completion—Payment after Notice of Act of Bankruptcy—Return of Deposit—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49.]**—The plaintiff entered into a contract to purchase a public-house, the purchase to be completed within four weeks, and paid a deposit. By the contract the deposit was to be forfeited in case of neglect or refusal on the part of the purchaser to perform his part of the contract, and to be returned in case of such neglect or refusal on the part of the vendor. Before the expiration of the four weeks the vendor committed an act of bankruptcy. The plaintiff thereupon gave notice refusing to complete the purchase, and requiring the deposit to be returned. The vendor never, in fact, became bankrupt.

**Held** that as the plaintiff had at the date fixed for completion notice of an available act of bankruptcy, payment of the purchase-money to the vendor would not have been protected by sect. 49 of the Bankruptcy Act, 1883, in the event of the vendor's bankruptcy upon a petition presented within three months of the act of bankruptcy, and the vendor was not in a position to complete the purchase by executing a conveyance and giving a good receipt for the purchase-money, and that the plaintiff was accordingly entitled to the return of the deposit.

POWELL & MARSHALL PARKES & CO. [1899] 1 Q. B. 710, 68 L. J. Q. B. 477; 17 W. R. 119; 80 L. T. 509; 15 T. L. R. 289; 6 Manson, 157—C. A.

**44. Agreement by Lessor to purchase Lessee's Interest—Premises partly destroyed by Fire—Not Insuring to the Full Value.]**—A vendor is, after the acceptance of the contract, in the position of trustee for the purchaser, and is bound to take reasonable care of the property comprised in the contract.

A lessor agreed to purchase from his lessees their interest in certain premises. No time was fixed for completion of the contract. The lessees had covenanted to insure. They had not insured to the full value. Before completion of the sale part of the premises was destroyed by fire. The insurance office paid the lessees £200.

**Held**—that there was no breach of the covenant to insure, except so far as the amount was concerned; and that as the £200 might fairly be regarded as the amount due to the plaintiff, he

was not entitled to any damages, and must specifically perform the contract.

NEWMAN *v.* MAXWELL, (1899) 80 L. T. 681—[Kekewich, J.]

**45. Assignment of Leasehold Public-house—Open Contract—Qualified Covenant not to Assign without Lessor's Consent—Consent unreasonably withheld.]**—The lessee of a public-house contracted to sell under an open contract the lease to a brewery company. The lease contained a covenant that the lessee would not assign, underlet, or otherwise part with the demised premises without the written consent of the lessor, but that such consent should not be unreasonably withheld in the case of a respectable and responsible tenant. The lessor refused to consent chiefly on the ground that he wished to retain the house as a "free house."

**Held**—that the vendor had not made out a sufficient title which could be forced on the purchaser.

IN RE MARSHALL AND SALT'S CONTRACT, [1900] 2 Ch. 202; 69 L. J. Ch. 542, 48 W. R. 508; 83 L. T. 147—Byrne, J.]

**46. Bankruptcy of Vendor—Disclaimer by Trustee—Specific Performance—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55—Bankruptcy Act 1890 (53 & 54 Vict. c. 71), s. 13.]**—A contract was entered into for the sale to the plaintiff of the equity of redemption in certain leasehold property. A deposit was paid by the purchaser and the title was accepted by him. The vendor became bankrupt. The draft assignment was sent in by the purchaser, and the engrossment was forwarded. The trustee in the vendor's bankruptcy said he would disclaim the contract without disclaiming the lease keep the deposit, and leave the purchaser to take such steps in the bankruptcy as he might think fit.

**Held**—that the trustee could not be allowed to disclaim the contract without disclaiming the lease as he could not separate the subject-matter of the contract from the contract and keep the property, and that the plaintiff disclaiming any right of proof against the bankrupt's estate execution of the engrossment must be ordered.

HOLLWAY *v.* YORK (1877) 25 W. R. 627 distinguished.

Re KIRKHAM ((1886) 80 L. T. Jo. 322) followed.

PEARCE *v.* BASIBLES TRUSTEE IN BANKRUPTCY [1901] 2 Ch. 122; 70 L. J. Ch. 446; 84 L. T. 525; 17 T. L. R. 366; 8 Manson 287; Cozens Hardy, J.]

**47. Condition that Mortgage shall allow Mortgage to Remain—Time for Completion—Time for Procuring Consent of Mortgagee—Premature Rescission by Intervening Purchaser.]**—A public-house was leased to the defendant for a term of years. The lessor had lent to the defendant £900 upon mortgage. The defendant was desirous of selling the lease, and the plaintiff offered to purchase it, provided the lessor would allow

**Contract—Continued**

the amount then due on the mortgage to remain standing, so that the plaintiff need not find ready money to that extent. An agreement was accordingly made between the plaintiff and the defendant for the sale, which was to be completed on November 10th following. The plaintiff on signing the contract was to pay £100, and in case of default due to the plaintiff's action the deposit was to be forfeited. The contract was subject to the condition that the lessor would transfer the loan to the plaintiff. The lessor, on October 4th, said he would only consent to the sum of £700 remaining on mortgage. The plaintiff then and there said he would have nothing more to do with the purchase, and that the contract was off. The vendor did not treat the refusal of the mortgagee as final.

**HELD**—that the defendant had, until November 10th, the day fixed for completion, to procure the consent of the lessor to the condition as to the mortgage; that it was through the plaintiff's fault that the contract was not completed, and therefore he was not entitled to recover back the deposit.

**SMITH v. BUTLER**, [1900] 1 Q. B. 694, 69 L. J. [Q. B. 521; 48 W. R. 583; 82 L. T. 281; 16 T. L. R. 208—C. A.]

**48. Construction—Whether Contract Absolute or Optional.**—The plaintiff sued the defendant for breach of an agreement to sell him certain premises known as Nos. 1 & 2, Milton Villas, Southend, for £1,500. Under the terms of the agreement, it was provided that this contract was to be delivered within 14 days, or the deposit was to be returned. The plaintiff paid £20 by way of deposit, and this amount the defendant returned to him within the 14 days, with an intimation that he had determined not to sell the premises.

**HELD**—that the defendant had 14 days within which to deliver the contract, or to return the deposit; and that, if he took the latter course, the contract was at an end, and that the plaintiff's action therefore failed.

Decision of Channell, J. ((1898) 14 T. L. R. 180) reversed.

**SYER v. ALDER**, (1898) 14 T. L. R. 550—C. A.

**49. Contract in Letters—Contract "Subject to an Agreement"—Reference to Formal Contract—Intention—Statute of Frauds**—In answer to an offer to purchase land for £275, the vendor accepted "subject to the conditions of sale and an agreement." At that time the property was subject to some incumbrances which the vendor had not yet removed though he was trying to do so. The purchaser had apparently been allowed to go on the land, and had executed some repairs there, but the vendor had remained in occupation. The conditions of sale referred to were conditions used at an abortive auction at which the property had been offered for sale.

**HELD**, on the facts, in an action by the purchaser for specific performance, that there was in this case no concluded contract.

**Winn v. Bull** ((1878) 7 C. D. 29; 47 L. J. Ch. 139; 26 W. R. 230—Jessel, M.R.) applied.

**Fulby v. Hounsell** ([1896] 2 Ch. 737; 65 L. J. Ch. 852; 45 W. R. 232; 75 L. T. 270—Romer, J.) distinguished.

**CLARK v. ROBINSON**, (1903) 51 W. R. 443—[Byrne, J.]

**50. Contract—Contract in Letters—Offer "Subject to Agreement stating fully the Conditions being Prepared and Signed"—Held no Contract.**—W.'s solicitors wrote on his behalf to M. as follows: "Re Mason's Arms, Dinnington—We agree to sell the above for £1,775, subject to agreement stating fully the conditions being prepared and signed at our office on Monday, say at eleven o'clock." The agent of M. replied, "I beg to accept yours of this date re Mason's Arms on behalf of Mr. M."

**HELD**—that these two letters did not constitute a contract between the parties, the preparation of a full agreement being a condition precedent to the conclusion of the bargain, and also that further correspondence showed that they were not intended to be the final bargain, and that the case was therefore within the decision of *Bristol, &c., Aerated Bread Co. v. Maggs* ((1880) 44 Ch. D. 616, 59 L. J. Ch. 472; 38 W. R. 393; 62 L. T. 416—Kay, J.).

**Winn v. Bull** ((1878) 7 Ch. Div. 29; 47 L. J. Ch. 139; 26 W. R. 230—Jessel, M.R.) discussed.

**WATSON v. MCALLUM**, (1903) 87 L. T. 547—[Joyce, J.]

**51. Contract in Letters—Subsequent Correspondence—Want of Title—Fee Farm Grant—Root of Title—Title to Converted Leasehold—Refusal to make Title—Breach of Contract—Discharge of Purchaser—Rescission.**—By letters of February 6th, 1897, C. offered to purchase his interest in certain lands, subject to the satisfaction of C.'s solicitor, the purchase to be concluded on April 25th, and M. accepted the offer. The premises were held under a fee farm grant, dated August 21st, 1852, and made pursuant to the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105). On February 11th M.'s solicitors sent to C.'s solicitor a draft agreement for sale, which provided that the title should commence with the fee farm grant. C.'s solicitor declined to have this agreement executed, alleging that the letters were the contract; he, however, agreed to waive proof of the grantor's title. A correspondence ensued in which C.'s solicitor called for an abstract of title; M.'s solicitors replied that if C. would accept title on the basis of the draft agreement they would furnish it, but that M. would not make further title. On February 22nd M.'s solicitors sent the abstract stating, "It is distinctly understood that no title prior to the fee farm grant . . . is to be required." C.'s solicitor replied, "In reference to the understanding . . . I don't seek to investigate the title of the grantor," and on March 1st he furnished requisitions, one of which required that the grantor's title to the leasehold interest should be shown. Replies were sent on March 5th stating,

**Contract—Continued**

among other matters, that it had been expressly stipulated that no inquiry should be made behind the grant. C's solicitor would not accept this, and on March 10th M.'s solicitors wrote that if C. would not accept the title as stipulated in his previous letters the matter could not proceed further, the letter concluded, "Please let us know as soon as possible whether your client will proceed or not." On March 13th C's solicitor wrote that the title was not a marketable one, and that without it C refused to go on with the sale, concluding, "so nothing remains but to send for particulars of my client's costs." M.'s solicitors replied that from the first they had intimated that title would not be shown prior to the grant, adding, "We shall, however, make further inquiries, and we might be able to find some document." On the 16th they again wrote saying they had procured a deed which made this matter perfectly clear, and they would send a copy. C's solicitor answered that as M. had declined to carry out the agreement, he had, on receipt of the letter of March 10th, written to C. stopping a sale of the house, and saying that the contract was off. On March 16th a copy of the deed showing the prior title was furnished, but C refused to complete, and his solicitor returned all documents, and furnished his costs to M.'s solicitors. They therefore wrote declining to admit C's right to terminate the contract. In an action by M. for specific performance.—

**HELD**, by the Vice-Chancellor, that the contract was to be found in the letters of February 6th, that having regard to sect. 7 of the Renewable Leasehold Conversion Act, the fee farm grant could not be relied on as the root of title, that C was justified in her requisition as to the prior title, and that her solicitor had not waived her right to evidence of same. But that a rescission of the contract could only be by a new contract, showing in clear and unequivocal terms that both parties had agreed to rescind the contract for sale; that the letters of March 10th and 13th had not that operation; that C. had not, under the circumstances, prior to April 25th a right to rescind the contract; and that M. was entitled to specific performance, provided good title could be made.

**On Appeal.—**

**HELD** (reversing the decision of the Vice-Chancellor)—that by the contract the vendor was to give a marketable title to the lands. that by their letter of March 10th the vendor's solicitors declared his incapacity to fulfil this part of the contract and renounced the same; and the purchaser, having by her solicitors' letter of March 13th elected to treat this letter of March 10th as a breach of the contract, was thereby discharged and released from the contract, and was not liable specifically to perform the same.

**MACONCHY v. CLAYTON**, [1898] Ir. R. 291—  
[C. A. (Ir)]

**52. Deposit—Action for Specific Performance—Absence of Forfeiture Clause—Whether Deposit returnable.**—In an action by a vendor for

specific performance of a contract for the sale of land, it was proved that the purchaser had paid a deposit of £1,000, but there was no forfeiture clause. The vendor sought the usual order for rescission and asked for a declaration that she was entitled to the deposit of £1,000.

**HELD**—that the vendor could not have rescission and at the same time damage for breach of the contract, and that the declaration could not be made.

*Howe v. Smith* ((1884) 27 Ch. D. 89) distinguished.

**JACKSON v. DE KADICH**, [1904] W. N. 168—  
[Farwell, J.]

**53. Deposit—Purchaser's Lien for—Optional Rescission by Purchaser of 300 Houses not built—Sale and Conveyance by Mortgagee of Vendor with Notice of Contract—Rescission by Purchaser.**—The lien which a purchaser has for his deposit is a right invented for the purpose of doing justice as between vendor and purchaser.

Where a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part payment of the purchase-money, and by reason of the vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off and cannot be completed, the purchaser has a lien on the estate for his deposit.

*Wythes v. Lee* ((1855) 3 Drew. 396, 402, 2 Jur. (N.S.) 7; 25 L. J. Ch. 177, 4 W. R. 185, 316; 26 L. T. (O.S.) 192) and *Rose v. Watson* ((1864) 10 H. L. C. 672; 3 N. R. 673; 10 Jur. (N.S.) 297; 33 L. J. Ch. 385, 12 W. R. 585, 10 L. T. (N.S.) 106) followed.

In 1897 F. S. agreed in writing to sell to the plaintiffs a freehold public-house plot on a certain building estate for £500, to be paid as to £200 by way of deposit on the signing of the contract, and as to the balance on the completion of the purchase with interest. The purchase was to be completed as soon as 300 houses should have been erected on the estate. If 300 houses should not have been erected on the estate within two years from the date of the agreement, the plaintiffs had the right to rescind and cancel the agreement. The plaintiffs paid the £200. F. S. sold the estate to one who mortgaged it, and the mortgagees sold and conveyed the estate to the defendant with notice of the agreement of 1897. The 300 houses were not built on the estate within the time, nor had F. S. paid or accounted for the deposit to any of his successors in title. On December 3rd, 1900, the plaintiffs wrote to the defendant rescinding the agreement of 1897, and claiming payment of the £200, which was refused.

**HELD**—that the plaintiffs had a lien on the plot by way of security for the repayment of £200.

Decision of Farwell, J. ([1901] 1 Ch. 911, 70 L. J. Ch. 515; 49 W. R. 534; 84 L. T. 419) affirmed.

**WHITBREAD & CO. LD. v. WATT**, [1902] 1 Ch. [835; 71 L. J. Ch. 424; 50 W. R. 442; 86 L. T. 395; 18 T. L. R. 465—C. A.]



**Contract—Continued.**

**54. Deposit—Vendor willing but unable to complete—Right to Recover.**—The plaintiff sued to recover the sum of £500 paid by him to the defendant by way of deposit upon a contract to purchase the lease of a public-house. This contract was entered into on October 26th, 1896, and was an agreement for the sale of a free house. The Wenlock Brewery Company were the lessors to the defendant, and the lease granted by them bound him to buy his beer from the company. Although their solicitors wrote saying that they would free the house and join in the assignment of the lease, they were not under any legal liability to do so, nor had they in fact done so when the day specified for completion arrived, namely, December 17th, 1896.

**HELD**—that as in the sale of a public-house as a going concern time is of the essence of the contract, and that as on December 17th the defendant, though willing, was not ready to complete, the plaintiff was entitled to recover back his deposit.

Decision of Hawkins, J. ((1897) 14 T. L. R. 138) affirmed.

**WARREN v. MOORE**, (1898) 14 T. L. R. 497—C. A.

**55. Interest in Land—A requesting B. to purchase Land—A. agreeing to repay to B. the sum laid out**—29 Car. 2, c. 3, s. 4.]—The Statute of Frauds only applies where, by the terms of the contract, some interest in land is dealt with as part of the contract.

A wife asked her husband to buy a certain leasehold property, and verbally agreed to pay to him, if he did so, the amount which he expended. The husband had bought the property, and now sued his wife upon her promise.

**HELD**—that the contract was not one within sect. 4 of the Statute of Frauds, because the husband was not bound by its terms to acquire any interest in land, and that therefore the husband could recover from his wife the amount expended by him.

*Angell v. Duke* ((1875) L. R. 10 Q. B. 174, 23 W. R. 548; 32 L. T. 320) followed.

**BOSTON v. BOSTON**, [1904] 1 K. B. 124; 73 [L. J. K. B. 17; 52 W. R. 65; 89 L. T. 468; 20 T. L. R. 23—C. A.]

**56. Interest in Land—Part Performance—Specific Performance.**—By a parol contract the plaintiffs agreed to sell to the defendant a plot of land with a house thereon, which they were to build for her.

During the progress of the building she frequently visited the site, and made suggestions for improvements, which the plaintiffs thereupon carried out.

**HELD**—that the acts done by the plaintiffs in compliance with her suggestions were acts of part performance entitling the plaintiffs to a decree for specific performance.

*Caton v. Caton* ((1866) L. R. 1 Ch. 137; 35

L. J. Ch. 292—C. A.), *dictum* of Lord Cranworth, considered.

**DICKINSON v. BARROW**, [1904] 2 Ch. 339; 73 [L. J. Ch. 701; 91 L. T. 161—Kekewich, J.]

**57. Leaseholds—Open Contract—Title—Breach of Covenant to Repair—Production of Receipt for Rent—Assumption that Covenants have been performed**—“Unless the contrary appears”—*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 4.]—On a sale of leaseholds the production of the last rent receipt is only *prima facie*, and not conclusive, evidence that there has been no breach of covenant. A lessee, whose lease contained a covenant to keep the premises in good repair, sold his leasehold interest under an open contract on July 1st, 1901. No date for completion was fixed by the contract, but Swinfen Eady, J., fixed November 6th, 1901, as the governing date for ascertaining the liabilities of vendor and purchaser. On September 27th, 1901, the tenant brought to the vendor a notice in writing left upon the premises by the county council, requiring the owner or occupier forthwith to take down, or underpin, or otherwise secure, the front bay of the house. On November 9th, 1901, the vendor was served with an order made on November 1st, 1901, by the Lambeth Police Court requiring him to do the work within fourteen days. The vendor took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the purchaser was not entitled to require him to bear the expense of complying with the order of the police court.

**HELD** that, as the sale was under an open contract, the purchaser was entitled to proof that the covenants and conditions in the lease had been performed and observed up to November 6th, 1901; that the receipt for the last payment of rent was not (under sect. 3, sub-sect. 4, of the Conveyancing Act, 1881) conclusive evidence that all the covenants of the lease had been duly performed up to the actual completion, for the contrary appeared; that the knowledge of the purchaser, at the time of the sale, that the title was bad by reason of the breach of a covenant to repair was not material; and that the expense of complying with the order of the Lambeth Police Court must be borne by the vendor.

*Barnett v. Wheeler* ((1841) 7 M. & W. 864) followed.

*Quære*, whether the purchaser could have enforced specific performance, as he knew of the disrepair, and had in consequence bought at a low figure per Romer, L.J.

Decision of Eady, J. ([1902] 2 Ch. 214; 71 L. J. Ch. 508; 50 W. R. 424; 87 L. T. 159) affirmed.

**IN RE HIGNETT AND BIRD'S CONTRACT**, [1903] 1 Ch. 287; 72 L. J. Ch. 220; 51 W. R. 227; 87 L. T. 697—C. A.]

**58. Memorandum in Writing signed by Purchaser—Signature of Vendor's Agent as “Witness.”**—Certain lands were sold to a purchaser by private treaty, through an auctioneer

**Contract—Continued**

authorised to act as agent for the vendor, subject to conditions originally prepared for a sale by public auction. The purchaser signed the usual memorandum in writing attached thereto, acknowledging that he had purchased from the vendor the premises mentioned in the annexed particulars, subject to the conditions of sale thereunto annexed. The memorandum was also signed by the auctioneer as "witness." The vendor refused to complete.

**HELD**—that the vendor was bound by the signature of the auctioneer, although merely purporting to sign as "witness," he having been duly authorised to sell by the vendor.

WALLACE v. ROE, [1903] 1 Ir. R. 32—V.-C.

**59 Mistake—Condition precedent—Repudiation of Contract by Vendor—Wilful Default—Interest—Form of Order—Specific Performance**—An agreement was entered into for the sale of 36 acres of land for £3,600 to be measured, the boundary on one side being undefined, and "subject to approval of conditions and form of agreement by purchaser's solicitor." The purchase-money was to bear interest at 4 per cent. from July 6th, 1897, until actual completion. Owing to a mistake on the part of the vendors they required the purchaser to take 12 acres at £100 per acre. He refused, and brought an action for specific performance of the contract for the sale of 36 acres. The vendors alleged the contract was not binding, and, if it was asked for rescission. No form of agreement was prepared or approved by the purchaser's solicitor.

**HELD**—that the mistake did not touch the substance of the contract, that the provision as to the form of agreement to be approved by the purchaser's solicitor was not a condition precedent to a complete contract, and that the purchaser was consequently entitled to the specific performance he asked.

**HELD**, also, that the repudiation of the contract by the vendors did not amount to wilful default on their part so as to prevent interest running against the purchaser.

NORTH v. PERCIVAL, [1898] 2 Ch. 128; 67 [L. J. Ch. 321; 78 L. T. 615, 46 W. R. 552—Kekewich, J.

**60 Mistake—Offer and Acceptance—Unilateral Mistake—Defendant acting without Advice—Discretion of Court—Damages**.—The defendant offered freehold land to the plaintiff at a price based upon a valuation made in 1895, forgetting the existence of a recent valuation at a much higher figure. The plaintiff accepted the offer in terms which were not identical in every respect, but sufficient to constitute an open contract.

**HELD**—that the Court would not enforce the contract.

HODSON v. THETARD, (1907) 51 Sol. Jo. 482—[Joyce, J.

**61. Person Contracted with—Agent—Misrepresentation—Specific Performance**—In 1895 the defendants, who were trustees of a Congregational chapel, put up for sale by public auction a building, which had formerly been used as their chapel. The conditions of sale imposed no restrictions on the user of the building. After the sale C made an offer for the building, but the defendants declined to accept it, on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, and the defendants objected to sell for that purpose. The committee then told the plaintiff, who was the manager of a mineral water company, that if he could get the property they would buy it of him at £100 profit. The plaintiff's solicitors wrote to the defendants' agent, making an offer for the property "on behalf of our client, the manager of the E. Mineral Water Company." After some negotiations, a contract was signed by the defendants for sale of the building to the plaintiff at £1,025, a price less than C's offer. No direct statement was made that the plaintiff was buying for the company, but it was admitted that the defendants, during the negotiations, believed that he was, and that the plaintiff knew it. The plaintiff signed the contract as principal without protest from the defendants' agent. The defendants refused to complete on the ground that the plaintiff was buying, as agent, for the Roman Catholic committee, to whom he knew they would not sell, and had obtained the contract by misrepresentation.

**HELD**, on the evidence, that the plaintiff was not buying as agent for the Roman Catholic committee, but for himself with a view to re-sell to them at a profit; that the misrepresentation as to the mineral water company was immaterial because the vendors did not care whether they sold to the company or the plaintiff, and as between them no consideration of the person with whom they were contracting entered as an element into the contract.

Smith v. Wheutcroft (9 Ch. Div. 223, 230) followed.

NASH v. DIX, (1898) 78 L. T. 445—North, J.

**62. Purchase-money payable by Instalments—Default in Payment of Last Instalment—Disappearance of Purchaser—Lease by Vendor—Repudiation—Damages**.—The breach of one stipulation in a contract does not of itself amount to an entire repudiation of the contract. It may do so if the circumstances lead to such an inference, but the further the parties have proceeded in the performance of the contract, the less likely is it that by the breach of one stipulation by one party he should intend to declare his incapacity to perform the contract, or his intention not to carry it out.

The plaintiff was the purchaser and the defendant was the vendor of certain land for £150 under a written agreement providing for payment of the purchase-money by certain instalments. By this agreement, if the purchaser made default in payment of any instalment for thirty days, the whole price was to become immediately due, but provision was made for this time being

**Contract—Continued.**

extended by agreement, and in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest, the vendor was empowered to resell. The plaintiff took possession under this agreement, and paid all the instalments except one, but then disappeared and never made any further payment to the defendant. More than a year afterwards the defendant let the property to B. with an option of purchase, and B. built a house on the land, and was in possession. The plaintiff thereupon made an offer to the defendant to "make the final instalment and settlement of the ground purchased," which offer was refused. The purchaser commenced an action for specific performance of the above agreement and damages, or alternatively damages for breach of contract and repayment of the purchase-money with interest. The claim of specific performance was practically abandoned at the hearing.

**HELD**—that upon the facts the vendor never brought to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment the vendor would treat the contract as abandoned; that the defendant had dealt with the property in a way in which he was not justified in doing, and the Court assessed the damages.

Decision of Cozens-Hardy, J. ([1899] 2 Ch. 710; 68 L. J. Ch. 749, 48 W. R. 42; 81 L. T. 113; 15 T. L. R. 544) reversed.

CORNWALL v. HENSON, [1900] 2 Ch. 298; 69 [L. J. Ch. 581; 49 W. R. 42; 82 L. T. 735; 16 T. L. R. 422—C. A.]

**63. Rescission—Common Mistake** ]—A tenant for life sold a public house, portion of a settled property. After conveyance it was found that the public house was subject to a reversionary lease granted by the predecessor in title of the tenant for life of which all parties were ignorant.

**HELD**—that this did not furnish any ground for rescission.

**BUT HELD**—that the repurchase of the public house by the trustees out of capital moneys in their hands might be sanctioned.

*Bennett v Wyndham* ((1862) 4 De G. F. & J. 259) applied.

RE TYRELL, TYRELL v. WOODHOUSE, (1900) 64 [J. P. 665; 82 L. T. 675—Cozens-Hardy, J.]

**64 Rescission—Misdescription—Return of Deposit with Interest at 4 per cent.**—Property was offered for sale as "the capital freehold building site . . . in the midst of a capital letting class of property . . . ripe for immediate development." The land had been excavated to a depth in places of twenty feet for the purpose of getting out the sand and gravel it contained. These excavations had been filled in with road scrapings, dustbin refuse, and other offensive matter, and under the bye-laws of the London County Council could not be used for building purposes without excavating the rubbish and

filling in. The plaintiff claimed rescission of the contract.

**HELD**—that there had been a serious misdescription in essential particulars in this property, as the land could not be used for building without going to such excessive expense as practically to make it useless for the purpose for which it was offered for sale, and for which the plaintiff bought it; and that the contract must be rescinded and the deposit money repaid with interest at 4 per cent.

BAKER v. MOSS, (1902) 66 J. P. 360—Joyce, J.

**65. Rescission—'Notwithstanding any Intermediate or Pending Litigation'—Rescission pending Litigation—Costs.** ]—By one of its clauses a contract of sale provided that "If the purchaser shall insist on any objection or requisition which the vendors shall be unable or unwilling to remove or comply with, and shall not withdraw the same after being required so to do, the vendors shall (notwithstanding any attempt to remove the same, or that there shall have been any intermediate or pending negotiation, proceeding, or litigation, and although they may have insisted that all or any of the objections and requisitions are or is untenable) be at liberty, by notice in writing signed by their solicitors, to rescind the contract, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatsoever."

The vendors allowed a summons taken out under the Vendor and Purchaser Act, 1874, by the purchasers for a declaration that his objections to the title had not been sufficiently answered, and that the title was defective, to be proceeded with after filing evidence and up to the moment of hearing, and then gave notice to rescind the contract.

**HELD**—that the vendors were unreasonable in allowing the proceedings to go on instead of giving notice to rescind directly the summons was issued, and they must be ordered to pay the costs of the proceedings.

*Duddell v. Simpson* ((1866) L. R. 2 Ch. 102; 36 L. J. Ch. 70, 15 W. R. 115, 15 L. T. (N.S.) 305) followed.

IN RE SPINDLER AND MEARS' CONTRACT, [1901] [1 Ch. 908; 70 L. J. Ch. 420, 49 W. R. 410; 84 L. T. 295—Farwell, J.]

**66. Rescission—Specific Performance—Decree for with Costs—Purchaser failing to Comply—Vendor moving to rescind Contract and for Costs—Form of Order.** ]—Where, after decree for specific performance with costs, the purchaser fails to comply, and the vendor moves to rescind the contract and for costs, the order may follow the form in *Westerman v Pantlin* (Seton on Judgments, 6th ed. vol. iii. p. 2289), i.e., granting rescission of the contract with costs of the motion, all further proceedings to be stayed except such as might be necessary for the recovery of the

**Contract—Continued.**

costs of the action already ordered to be paid, and the costs of the motion.

OLDE v. OLDE, [1904] 1 Ch 35, 73 L. J. Ch 81, [52 W. R. 260, 89 L. T. 604—Farwell, J.

**67. Sale by Purchaser under Original Contract subject "to the same terms as to title, &c.," as in such Original Contract—Time fixed for Completion—Interest.]**—In May, 1897, B. contracted to sell to K. certain lands, the purchase to be completed on October 11th, and, failing completion on that date, interest to be paid by the purchaser at £5 per cent. on the balance of purchase-money then due.

In June, 1897, K. contracted to sell the same premises to S, subject "to the same terms as to title, &c.," as in the original contract. S eventually refused to complete until January.

On a summons by K asking for a declaration that October 11th was, by reference to the original contract, the time fixed for completion, and that the defendant might be ordered to pay interest from that date:—

**HELD**—that a clause of this kind, which might possibly involve serious liability on the purchaser, could not be read into the agreement of June, 1897, and that the contract was therefore an open one, but that, as interest was payable from the time when the purchaser could prudently have taken possession and the abstract was delivered on October 22nd, interest should run from November 1st, 1897.

RE KEEBLE AND STILLWELL'S FLETON BRICK [Co., (1898) 78 L. T. 383—Stirling, J.

**68. Signature by Purchaser—Name and Address of Vendor printed on Note Paper—No Signature by Vendor—Statute of Frauds (29 Chas. 2, c. 3), s. 4.]**—Signing for the purposes of the Statute of Frauds does not necessarily mean a person writing his name, but means his ratifying by writing, in some form or other, the document which contains the contract. Therefore for an intending purchaser to write and sign a letter on a sheet of note paper, with the address and name of the intending vendor printed thereon as a heading, but not signed by him, does not satisfy the Statute of Frauds so as to bind the vendor.

*Schneider v. Norris* ((1814) 2 M. & S. 286; 15 R. R. 250), *Evans v. Hoare* ([1892] 1 Q. B. 593; 61 L. J. Q. B. 470; 56 J. P. 664; 40 W. R. 465; 66 L. T. 345—Div. Ct.), and *Touret v. Cripps* ((1879) 48 L. J. Ch 567, 27 W. R. 706) distinguished.

HUCKLESBY v. HOOK, (1900) 82 L. T. 117—[Buckley, J.

**69. Validity—Question raised as to Validity—Questions as to the Construction of the Contract—Summons—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6, sub-s 2.]**—Under sect. 9 of the Vendor and Purchaser Act, 1874, although a question may be raised as to the validity of the contract as it stands, yet questions as to the construction of

the contract ought to be determined—*e.g.*, a question of right of way, or whether or not the purchaser could insert in the conveyance such a grant of rights of way as is provided for by sect. 6, sub-sect 2, of the Conveyancing Act, 1881.

A vendor is entitled, in the absence of indications in the contract of a contrary intention, to insist on the express insertion in his conveyance of general words of less import than those which would be implied in the absence of such express insertion, by virtue of sect. 6 of the Conveyancing Act, 1881.

IN RE HUGHES AND ASHLEY'S CONTRACT, [1900] [2 Ch 595; 69 L. J. Ch. 741, 49 W. R. 67; 83 L. T. 390—C. A.

**70. Vendor to complete House and Outbuildings in a proper and workmanlike Manner—Breach of Contract—Claim for Damages after Completion of Conveyance.]**—By a contract made on December 24th, 1897, between the plaintiff and the defendant, the plaintiff agreed to buy a house, then in the course of erection, from the defendant. The defendant was to finish certain things and fix stoves, drains, fixtures, &c., and he further agreed to find, supply, and fix all requisite good materials and all labour, and in all other respects to complete the house and outbuildings in a proper and workmanlike manner, fit for habitation. The purchase was completed and possession given. The plaintiff subsequently brought an action for damages for breach of the contract.

**HELD**—that the rule is that if the contract is collateral, and is independent and in addition to the description of the property, an action can be brought despite the completion of the conveyance; and that the plaintiff could therefore bring the action.

SAUNDERS v. COCKRILL, (1902) 87 L. T. 30—[Div. Ct.

**71. Warranty—Easement—Light and Air—Deed of Acknowledgment—Non-disclosure—Specific Performance—Compensation—Costs.]**—A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land.

Prior to an agreement for the sale of a new house which had windows overlooking a recreation ground belonging to the town council, the vendor by deed covenanted for himself and the owner for the time being of the house to pay to the town council 1s a year, and declared each of such payments to be a fresh acknowledgment that the owner was not entitled to any right of light or air to any windows overlooking the ground in question. The vendor did not disclose this deed when the agreement for sale was entered into. The purchaser, upon hearing of the deed, refused to complete.

In an action for specific performance

**HELD**—that the purchaser was not bound by the covenant to pay contained in the deed, and its effect, as against the purchaser, was merely

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to postpone the commencement of the statutory period until she had given notice of repudiation, which she could do as soon as she had completed the purchase; that there was no ground for refusing to grant specific performance or for giving compensation, but no order would be made as to costs, as the vendor ought in fairness to have informed the purchaser before the contract of his covenant with the corporation.

*Bonner v. Great Western Ry. Co.* ((1883) 24 Ch. D. 1, 47 J. P. 580, 32 W. R. 190, 48 L. T. 619—C. A.) followed.

*GREENHALGH v. BRINDLEY*, [1901] 2 Ch. 324; [70 L. J. Ch. 740; 49 W. R. 597; 84 L. T. 763, 17 T. L. R. 574—Farwell, J.

**V. CONVEYANCE.**

**72 Boundary — Mistake — Expenditure — Acquiescence — Compensation.** — In 1895 a purchaser took possession of land in excess of that purported to be conveyed to him, and spent money on such land, enclosing it with a wall. The vendors, in 1899, brought an action to recover the piece of land.

**HELD**—that the defendant was bound to give up so much of the land as did not pass by his conveyance, and was not entitled to compensation for his expenditure thereon.

*MARRIOTT v. REID*, (1900) 64 J. P. 376 — [Kekewich, J.

**73 Covenant by Purchaser—Covenant to perform original Covenants—Proper Form—Intended only as Indemnity.** — Upon a sale of freehold land, subject to restrictive and other covenants, the proper form of covenant by the purchaser is to perform and observe the original covenant and to indemnify the vendor, prefacing the covenant with the words “with the object and intent of affording to the vendor, his executors and administrators, a full and sufficient indemnity, but not further or otherwise.”

*Semble*, however, even without these words (and in the case of leaseholds as well as of freeholds) the Court would construe the covenant as being merely an indemnity; and would not allow the vendor to sue the purchaser on it unless the covenantee threatened proceedings.

*IN RE POOLE AND CLARKE'S CONTRACT*, [1904] 2 Ch. 173, 73 L. J. Ch. 612; 91 L. T. 275; 20 T. L. R. 604, 53 W. R. 122—C. A.

**74. Grant—Construction—Use of Garden — Grant to Lessees, Sub-lessees, and Tenants, being Occupiers of certain Houses and their Tenants—Members of a Club.** — A vendor granted the right of using certain ornamental gardens to the purchaser, his heirs, &c., and his and their lessees, sub-lessees, or tenants, being occupiers of certain houses, and their families and friends.

A limited company, owner of some of these houses and lessee of another, conveyed them into a proprietary residential club for ladies, there were bedrooms in the club allotted to

members at a weekly rent payable in advance, subject to the rules of the club.

**HELD**—that the resident members were not “lessees, sub-lessees, or tenants” of the company, nor “friends”, and that, therefore, they had no right to use the gardens.

*KEITH v. TWENTIETH CENTURY CLUB, LD.*, [(1904) 73 L. J. Ch. 545, 52 W. R. 554; 90 L. T. 775; 20 T. L. R. 462—Buckley, J.

**75 Grant—Exception to be Ascertained by Subsequent Election—Limitation of Estate in futuro—Invalidity of Exception—Operation at Common Law—Perpetuity—Statute of Uses** (27 Hen. 8, c. 10), s. 1.—It is a settled rule of construction that where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor, and to be construed in favour of the grantee. If then the grant be clear, but the exception be so framed as to be bad for uncertainty, the grant is inoperative and the exception fails.

By a conveyance on sale, certain freehold lands were conveyed unto and to the use of the purchaser in fee simple, with the exceptions and reservations set forth in the first schedule to the conveyance. This schedule contained the following words: “Save and except, and reserving unto the vendors a piece of land not less than forty feet in width,” commencing at a specified point and terminating “at the nearest road to be made by the purchaser or his assigns on the estate so as to give access to such road” from other lands of the vendors. The purchaser afterwards constructed certain roads on the estate. In an action brought to determine whether a plot of land on which a road had been commenced but not completed was excepted from the conveyance.

**HELD**—that the conveyance operated at common law, and not under the Statute of Uses, and that the exception was bad, but that even if the conveyance operated under the Statute of Uses, it was equally bad as infringing the rule against perpetuities.

*SAVILL BROTHERS, LD. v. BETHELL*, [1902] 2 Ch. 523; 71 L. J. Ch. 652, 50 W. R. 580; 87 L. T. 191—C. A.

**76. Provisions which should be embodied in Covenants in the Conveyance.** — Provisions in a contract for the sale of land stipulating for something to be done by vendor or purchaser after completion (e.g., the erection of fences), should be embodied in the conveyance as covenants.

*IN RE COOPER AND CRONDAGE'S CONTRACT*, [1904] 52 W. R. 441, 90 L. T. 258 — Kekewich, J.

**77. Referring to a Principal Agreement and Plan—“Estate, Term and Interest”—Mistake—Rectification—Conveyancing and Law of Property Act, 1881** (44 & 45 Vict. c. 41), s. 7, sub-s. 1 (a). — A conveyance first referred to a principal agreement, under which the defendant held, and then the defendant conveyed as beneficial owner all

*Conveyance—Continued.*

his "estate, term and interest" under and by virtue of the principal agreement in the piece of land coloured red on the plan annexed to the principal agreement. The vendor could not make a title to a small portion of the land coloured red. An action was brought by the purchaser for damages for breach of the implied covenants.

**HELD**—that there were two things to consider—namely, the quantum of the estate of the assignor, and the limits of the property to which that estate applied; that the quantum of the estate was limited to the estate which the defendant had under the principal agreement, and the limits of the property were defined by the part of the plan coloured red; and that the defendant covenanted that he had the interest given to him by the principal agreement in the land coloured red.

*Dolmer v. M'Cube* ((1863) 14 Ir. C. L. Rep. 377) explained.

**HELD**, also, that parol evidence could not be admitted to rectify the conveyance which was made in accordance with the written contract, without first rectifying the contract and enforcing it as rectified.

*Page v. Midland Ry Co.* ([1894] 1 Ch. 11; 63 L. J. Ch. 126; 42 W. R. 116; 70 L. T. 14—C. A.) follows.

**HELD**, further, that in the absence of fraud vendors or purchasers of land cannot be put to their election to rescind or accept rectification on the ground of unilateral mistake.

\* *MAY v. PLATT*, [1900] 1 Ch. 616, 69 L. J. Ch. 357; 48 W. R. 617; 88 L. T. 123—Farwell, J.

**78 Right of Way omitted to be Mentioned—Implied Covenant for Title—Breach of the Covenant—Measure of Damages—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7.**—The defendant sold and, on December 9th, 1898, as beneficial owner conveyed to the plaintiff certain lands, and as to a certain strip of land—a piece of road—subject to the rights of way thereover specified in a schedule to the conveyance. By an accident a certain right of way granted to the Countess of M. was omitted to be mentioned in the conveyance to the plaintiff, although no fraud or deceit on the part of the defendant was alleged or suggested.

**HELD**—that there was a breach of the covenant for title implied under sect. 7 of the Conveyancing and Law of Property Act, 1881, complete on the execution of the conveyance, and that the proper measure of damages was the difference between the purchase-money or price paid upon the purchase of December 9th, 1898, and the value of the premises as conveyed, such difference being caused by the defect in the title to the strip of road in question, or, in other words, to the existence of the Countess of M.'s right of way over that strip—that is to say, the difference between the value of the property as purported to be conveyed, and that which the vendor had power to convey.

*TURNER v. MOON*, [1901] 2 Ch. 825, 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237—Joyce, J.

## VI. LEASEHOLDS.

**79 Assignment of Lease—Covenant by Assignee to observe and perform the Covenants in Lease—Covenant in Lease not to make any alteration in the Premises—Right of Lessee to enforce Covenant by Injunction**—The lessee covenanted in a lease not to make any alteration or addition to the premises except with the consent of the lessor. The lessee assigned the lease, the assignee covenanting to observe and perform the covenants and conditions in the lease and to keep the lessee indemnified against all claims on account thereof. The assignee made certain alterations in the premises without the consent of the lessor, but the lessor did not see the lessee or assignee in respect thereof. The lessee brought an action against the assignee claiming a mandatory injunction to remove the alterations.

**HELD**—that the covenant by the assignee must be construed merely as a covenant to indemnify the lessee against breaches of covenant in the original lease, and that the lessee was not entitled of right to enforce the negative covenant in the lease, though he would be entitled to indemnity if the lessor sued him for damages for the breach thereof.

*In re Poole and Clarke's Contract* (No. 73, *supra*) applied.

*HARRIS v. BOOTS CASH CHEMISTS (SOUTHERN)*, [LD., [1904] 2 Ch. 376, 73 L. J. Ch. 708; 52 W. R. 668; 20 T. L. R. 623—Warrington, J.

**79a. Condition—"Vendor's Title is Accepted by the Purchasers"—Non-Disclosure of Onerous and Unusual Covenants—Objections**—It is well established that, whether a sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases. A condition of sale stipulating that "the vendor's title is accepted by the purchasers" does not preclude them from showing that a good title has not been shown. The purchaser has a right to assume when such a stipulation is made that the vendor has disclosed what it is his duty to disclose, and that the condition can only be read as precluding objection on that footing.

*IN RE HAEDICKE AND LIPSKI'S CONTRACT*, [1901] 2 Ch. 666; 70 L. J. Ch. 811; 50 W. R. 20; 85 L. T. 402; 17 T. L. R. 772—Byrne, J.

**80. Sale of Lease—Right to Light—Adjoining Land owned by Vendor—Derogation from Grant**—In 1896 M., the chief shareholder and managing director of the plaintiff company, entered into an agreement with some landowners, whereby he was to erect certain premises, and upon completion would have a right to call for a lease thereof. In 1896 he bought for £10,000 some adjacent land, the owners of which complained of his building operations. In 1897 he sold to the plaintiffs his right to call for a lease of the premises being built by him, and such lease was duly granted. Subsequently he sold some of the adjacent land purchased by him to

**Leaseholds—Continued.**

the defendants, who were now building thereon in such a way as to darken the plaintiff's premises.

**HELD**—that, though at the date of the 1896 agreement M intended that the plaintiffs should take over and occupy the buildings to be erected by him, he was not acting as their agent then, or in 1897; that there was no evidence that he meant to sacrifice the land for which he gave £10,000, and that no contract by him to keep such land free of buildings could be implied, and that therefore the plaintiffs had no right of action against the defendants.

**FINANCIAL TIMES, LD. v. BELL, (1903) 19 [T. L. R. 433—Byrne, J.]**

**81 Sale of Leasehold Property — Unusual and Onerous Covenants in Lease — Duty of Vendor to give Notice of Such—Constructive Notice.**—Upon a sale of leasehold property, it is the duty of the vendor to disclose to an intending purchaser the existence of unusual or onerous covenants.

In default of express notice, the vendor can only affect the purchaser with constructive notice if he gives him an opportunity of discovering the contents of the lease under such circumstances that he ought reasonably to have discovered the existence of the covenants.

In such cases it is a question of fact whether or not there has been an absence of reasonable care on the part of the purchaser or those acting for him.

**In re Haedicke & Lipski's Contract ([1901] 2 Ch. 666, 70 L. J. Ch. 811, 50 W. R. 20; 85 L. T. 402—Byrne, J., No 79a, *supra*) approved.**

**MOLYNEUX v. HAWTREY, [1903] 2 K. B. 487; [72 L. J. K. B. 873, 52 W. R. 23, 89 L. T. 350—C. A.]**

**82. Sale of Improved Ground Rent — Contract — Underlease — Outstanding Day — Declaration of Trust.**—In 1865 a lease was granted for a term of 99 years at a rent of £3 16s 4d. This lease became vested in H, who, on August 6th, 1885, granted S an underlease for the whole term less 11 days at a rent of £12. H mortgaged for the whole term less one day, of which there was a declaration of trust. On September 29th, 1896, the mortgagees sold to W. The legal personal representatives of W. were the vendors, and the purchaser had entered into a contract to buy "an improved leasehold ground rent of £8 3s 8d. out of a ground rent for £12, amply secured on property held on lease subject to an original ground rent of £3 16s 4d." The conditions provided that the title should commence with an indenture dated August 6th, 1885.

**HELD**—that what was sold was an improved leasehold ground rent for the whole term during which it was payable—*i.e.*, the residue of the term during which the ground rent of £12 per annum was payable, that it was not too late to raise the point as to the purchaser being out of time, because the point was one of conveyance

and not of title, that the outstanding day must be conveyed as the purchaser directed; that the abstract showed a good equitable title in the vendors; and the purchaser could have an assignment of the whole of the original term less one day, with the equitable interest in the outstanding day.

**RE SCOTT AND EAVE'S CONTRACT, [1902] 86 [L. T. 617—Eady, J.]**

**83. Sale subject to Consent of Lessor — Vendor's Duty to do his Best to obtain Consent — Vendor inducing Refusal — Measure of Damages.**—When a lessee, whose lease prohibits assignment without the written consent of the lessor, enters into an agreement, expressed to be subject to the lessor's consent, to sell the property, he is bound to do his best to obtain such consent. If the vendor does not perform that duty, and still more if he actually induces the lessor to refuse, the purchaser may recover not only his deposit, with interest and costs, but also damages for the loss which he has sustained owing to the vendor's omission to obtain the required consent.

**Bain v Fothergill ((1874) L. R. 7 H. L. 158; 43 L. J. Ex. 243; 23 W. R. 261, 31 L. T. (N.S.) 387) considered.**

In such a case if it appears that the vendor has made no effort to obtain the lessor's consent, it will be presumed against him that he could have procured it; and it is then for him to prove that he could not have induced the lessor to accept the purchaser as tenant.

Decision of Romer, J., reversed.

**DAY v. SINGLETON, [1899] 2 Ch. 320; 68 L. J. [Ch. 593, 48 W. R. 18, 81 L. T. 306—C. A.]**

**VII MISCELLANEOUS.**

**84 Completion Delayed Unavoidably—Vendor remaining in Possession—Receiving Rents—Arrears of Rent previously due—Right to appropriate.**—The completion of a purchase was delayed through no default of the purchaser, and the vendor remained in possession. After the date fixed for completion he received rents, and in rendering his apportionment account he claimed to appropriate some of the money received to wipe out certain outstanding arrears of rent.

**HELD**—that he had received the money on behalf of the purchaser, and was not entitled to appropriate it to a debt due to himself.

**PLEWS v. SAMUEL, [1904] 1 Ch. 464, 73 L. J. [Ch. 279; 52 W. R. 410; 90 L. T. 533—Kekewich, J.]**

**85 Evidence—Scottish Document Registered in Scotland—Production not Possible—Secondary Evidence.**—Where an original document is registered in Scotland as a document of record and cannot be produced in England, a vendor does all that is necessary if he furnishes sufficient secondary evidence of its contents.

**HALKETT v. EARL OF DUDLEY, [1907] 1 Ch. [590; 76 L. J. Ch. 330; 96 L. T. 539—Parker, J.]**

**Miscellaneous—Continued.**

**86. Public House—Licence—Non-disclosure of Conviction recorded on Licence—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 31**—On a sale of a public house with a licence attached, the non-disclosure by the vendor of the fact that one conviction has been indorsed on the licence is not a material omission which entitles the purchaser to refuse to complete the sale.

**IN RE WARD AND JORDAN'S CONTRACT, [1902]**  
[1 Ir. R. 73—M.R.]

**87. Rescission—Reasonable Ground for—Purchaser Insisting on Discharge of very Small Contingent Incumbrance—Refusal of Indemnity in Lieu of Discharge—Notice of Rescission "Without Prejudice."**—The fact that a purchaser refuses to accept an indemnity against a very small contingent incumbrance, *e.g.*, a possible liability for succession duty not exceeding 20s in all, is not in itself a "reasonable ground" for rescinding the contract. However small the amount may be, and however remote the contingency, a purchaser is entitled to have it discharged.

A notice of rescission given "without prejudice" is ineffective.

**IN RE WESTON AND THOMAS'S CONTRACT, [1907]** 1 Ch. 244, 76 L. J. Ch. 179; 96 L. T. 324—Eady, J.

**88. Stamp—Sale of Property subject to Tenancies, and with Condition for Apportionment of Outgoings—Unstamped Agreement for Yearly Tenancy—Obligation of Vendor to Stamp it**—An agreement for the sale of freehold property provided that the property was sold subject to all tenancies, and also for apportionment of outgoings. Upon investigation of the title the purchaser discovered that an agreement with a yearly tenant of part of the property was unstamped and required the vendor to stamp it before completion of the purchase. The vendor refused, and commenced proceedings for specific performance against the purchaser.

**Held**—that the purchaser was entitled to have the agreement stamped at the vendor's expense.

**COLLIMAN v. COLLIMAN (1898)** 79 L. T. 66—North J.

**89. Streets—Private Street Works—Expenses—Charge on Premises at Date of Completion of Works—Final Apportionment—Vendor and Purchaser—Outgoings—Private Street Works Act 1892 (55 & 56 Vict. c. 57), ss. 1, 12, 13**—The apportioned expenses of private street works executed under the Private Street Works Act, 1892 become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor.

Decision of Kekewich, J. ([1899] 2 Ch. 496; 68 L. J. Ch. 612; 63 J. P. 647; 48 W. R. 6, 81 L. T. 80) affirmed.

**STOCK v. MEAKIN, [1900]** 1 Ch. 683; 69 L. J. [Ch. 401, 48 W. R. 420; 82 L. T. 248, 16 T. L. R. 284—C.A.]

**VIII. PARCELS.**

**90. Conveyance agreeing with Contract—Oral Evidence to Prove Common Error in both—Not Admissible—Rectification**—Where a conveyance has been executed in conformity with a previous agreement in writing between the parties, the Court will not grant rectification upon oral evidence of common mistake in the parcels named in the agreement and conveyance.

**Darves v. Fitton (1842)** 2 Dr. & War. 225 and **May v. Platt ([1900]** 1 Ch. 616; 69 L. J. Ch. 357; 83 L. T. 123, 48 W. R. 616—Farwell, J.) followed.

**THOMPSON v. HICKMAN, [1907]** 1 Ch. 550, 76 [L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311—Neville, J.]

**91. Corner Plot—Rounded Corner—Length of Frontage—Method of Measurement**—A contract described land as "situate in and fronting 133 feet upon W. road," having "a depth next H. road of 124 feet," more particularly delineated together with the abutments, boundaries and dimensions thereof (be the last-named little more or less) upon the annexed plan. The plan showed a piece of land at the junction of W. road and H. road with a rounded corner.

**Held**—that the purchaser was entitled to a conveyance of land having a total frontage of 257 feet, and that the measurement must be taken on the actual curve, and not on the imaginary lines of frontage as they would have existed if the corner had not been rounded off.

**IN RE WELLINGS AND PARSON'S CONTRACT, [1907]** 97 L. T. 165—Kekewich, J.

**92. Frontages of 30 Feet each—Lots as shown on Plan—Lots shown as of Equal Width—Vendor not to Account for Discrepancies in Quantities—Lots not Marked Out—Total Frontage more than 30 Feet to a Lot—Right to Claim Due Proportion of Total Frontage**—Particulars of the sale of a field in lots comprised eight lots as shown on plan, all having frontages of 30 feet to P. road. T. bought seven lots. None of the lots had then been marked out, but the plan showed a field having a frontage to P. road and divided by parallel lines into eight substantially equal lots. Each lot on the plan bore its number, and the words "30 ft." and there was a note that the plan was for the purpose of delineation only. One of the conditions provided that the vendor should not be required to account for any discrepancies in quantity. The frontage of the field proved to be about 250 feet.

**Held**—that, having regard to the condition referred to, the purchaser might claim and



**Parcels—Continued**

having as frontage seven-eighths of 250 feet, and not merely 210 feet.

IN RE FREEMAN AND TAYLOR'S CONTRACT,  
[1907] 97 L. T. 39—Kekewich, J.

**93. Grant of Land by Crown—Acts of User before Grant—Evidence to identify Subject-matter of Grant—Admissibility**—An Act of Parliament authorised the grant by the Crown of tracts of land in Van Diemen's Land to a company which had already been formed under a charter for the purpose of cultivating waste lands in the colony. A grant of lands by the Crown to the company was subsequently made, both the Act and the grant reciting that the company had taken possession of the lands intended to be granted, and had incurred expense in the improvement thereof.

At the trial of an action by the company claiming a piece of land as included in the lands granted, the grant neither expressly including nor expressly excluding the piece of land in question, evidence was tendered and rejected of acts of user by the company over the piece of land in question antecedent to the grant.

HELD—that the acts of user were evidence to identify the land intended to be included in the grant, and the evidence was therefore inadmissible.

THE VAN DIEMEN'S LAND CO. v. THE MARINE  
[BOARD OF TABLE CAPE, (1905) 22 T. L. R.  
114—P. C.

**94. Land inclosed by Purchaser in Excess of Parcels—Expenditure thereon—Bonâ fide Mistake—Declaration of Title—Costs**—The defendant purchased certain land of the plaintiffs. The plaintiffs conveyed certain land described as so many acres, "be the same more or less," to the defendant in fee. The defendant took possession of and inclosed a quantity of land in excess of that purported to be conveyed to him, and such excess was so substantial as not to be covered by even a liberal interpretation of the words "be the same more or less." The defendant had been warned that he must occupy at his own risk.

HELD—that the defendant was bound to give up so much of the land which he had inclosed as did not pass by his conveyance, that the defendant ought not to be compensated for having expended money on the land so inclosed, and that as the vendors had not stumped out this particular plot as they should have done there must be no order as to costs.

MARRIOTT v. REID, (1900) 82 L. T. 369—  
[Kekewich, J.]

**95. Parcels Erroneously Described in Conveyance—Common Mistake—Laches—Rectification.**—The Court will grant rectification at a vendor's suit, even after six years, if he has not been guilty of laches, if it is satisfied that by a common mistake the parcels specified in the written contract have been erroneously described in the conveyance.

*Bloomer v. Spittle* ((1872) L. R. 13 Eq. 427; 41 L. J. Ch. 369, 26 L. T. 272; 20 W. R. 135) questioned.

BEALE v. KYTE, [1907] 1 Ch. 564; 76 L. J. Ch. 294; 96 L. T. 390—Neville, J.

**96. River—Bed ad medium filum—Presumption**—Where there is a conveyance of land adjoining a river the presumption that it passes the bed *ad medium filum* without special mention, does not apply unless the bed is in the disposition of the grantor so that it would pass if expressly mentioned.

ECROYD v. COULTHARD, [1898] 2 Ch. 358; 67 L. J. Ch. 458; 78 L. T. 702; 14 T. L. R. 462—  
C. A.

**IX. PARTIES.**

**97. Married Woman—Mortgagee—Trustee—Conveyance to Purchaser—Concurrence of Husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1)—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 16.**—In 1895 real property was conveyed by way of mortgage to a married woman to secure money advanced by her, which money formed part of her separate estate. On a sale by the mortgagor of the property, which was still subject to the mortgage, the purchaser required, in addition to the concurrence of the married woman the concurrence of her husband, and an acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act.

HELD—that the married woman was not a trustee for the mortgagor within the meaning of *In re Hirkness and Allsopp's Contract* ([1896] 2 Ch. 358), and that she could convey to the purchaser without the concurrence of her husband and by deed unacknowledged.

IN RE BROOKE AND FREMLIN'S CONTRACT,  
[1898] 1 Ch. 647, 67 L. J. Ch. 272; 78 L. T. 416; 14 T. L. R. 324; 46 W. R. 412—Kekewich, J.

**98. Sale by Executors—Executor named but not proving—Disclaimer—Concurrence—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1; s. 2, sub-s. 2; s. 24, sub-s. 2.**—Real estate under sect. 1, sub-sect. 1, of the Land Transfer Act, 1897, devolves to and becomes vested in all the executors named in the will who survive the testator, and in order that the legal estate may pass on a conveyance by the executors who have obtained probate, it is necessary for those executors to whom power to prove the will has been reserved to expressly disclaim or to concur in such conveyance.

IN RE PAWLEY AND LONDON AND PROVINCIAL  
[BANK, [1900] 1 Ch. 58, 69 L. J. Ch. 6, 48  
W. R. 107; 81 L. T. 507—Kekewich, J.]

**99. Specific Performance—Defect in Title—Concurrence of Third Person necessary, and not compellable—In Fact obtainable—Right of Purchaser to repudiate—Delay—Interest on Purchase Money.**—Where a defect is disclosed in a vendor's title which cannot be removed

**Parties—Continued**

unless a third party, not bound to concur, is willing to do so, the purchaser can repudiate his contract without waiting to see whether such third party will concur; such right to repudiate is an equitable one, arising from want of mutuality, and may be an answer to a suit for specific performance.

Such a right must be exercised as soon as the defect is discovered; and, when once a decree for specific performance has been made, a purchaser cannot repudiate without leave of the Court.

When an order is made for specific performance, interest on the purchase money runs from the time when the Master certifies that a good title is shown.

**HARKETT v. EARL OF DUDLEY**, [1907] 1 Ch. 590; 76 L. J. Ch. 330; 96 L. T. 539—Parker, J.

**100. Vendor selling as Trustee—Tenant for Life to join in Conveyance—Legal Estate in Fact in Vendor, but no Power of Sale—Written Bequest from all Beneficiaries to sell.**—A contract for the sale of freeholds provided that "the vendor, who is the trustee under the will of . . . is selling . . . under the trusts and powers vested in him therewith. . . The tenant for life . . . will join in the conveyance to the purchaser for the purpose of releasing her life interest."

It subsequently appeared that, though the vendor had the entire legal estate as trustee of the will, yet there was no power of or trust for sale. The vendor, had, however, entered into the contract at the written request of all beneficiaries.

**HELD**—that as he could therefore compel them to join in conveying, he had shown a good title in accordance with the contract.

*In re Bryant and Birmingham's Contract* (1890) 11 Ch. D. 218; 59 L. J. Ch. 636; 63 L. T. 20; 38 W. R. 169—C. A.) and *In re Head's Trusts and Macdonald* (1890) 45 Ch. D. 310; 59 L. J. Ch. 604; 63 L. T. 21; 38 W. R. 657—C. A.) distinguished.

**IN RE BAKER AND SALMON'S CONTRACT**, [1907] 1 Ch. 235; 76 L. J. Ch. 235; 96 L. T. 110—Eady, J.

**A. PRACTICE.**

**101. Costs—Leasehold—Declaring Title—Single Document—Lease—Solicitor and Client—Scale Charges—Taxation—Solicitors' Remuneration Act, 1881 (11 & 15 Vict. c. 41), General Order Sched. L, Part I—Vendor and Purchaser Act 1871 (37 & 38 Vict. c. 78).**—On the sale of leasehold, the vendors' title consisted simply of one document, namely the original lease. There had been no dealings by them since the vendors obtained the lease, and it was a case where under the contract of sale the title of the lessor could not be investigated.

**HELD**—that in these circumstances there had not been such a deduction of title as to entitle the vendors' solicitors to make a scale charge

under the schedule to the General Order under the Solicitors' Remuneration Act, 1881, and that such a question should be raised on taxation.

*Wellby v. Still* ([1894] 3 Ch. 641; 8 R. 658; 63 L. J. Ch. 931; 43 W. R. 73; 71 L. T. 426—Kekewich, J.) followed.

**IN RE WEBSTER AND JONES' CONTRACT**, [1902] 2 Ch. 551; 71 L. J. Ch. 749; 87 L. T. 213—C. A.

**102. Decree against Purchaser in Default of Appearance—Order to rescind Contract—Form of Order.**—An action was brought by a vendor for specific performance of a contract to purchase land. The vendor obtained judgment, in default of defendant's appearance, that the contract was binding, and ought to be specifically performed, and directing the usual reference as to title. The vendor afterwards discovered that the defendant had no means and could not complete the contract, and moved the Court for rescission of contract and stay of proceedings.

**HELD**—that the only order that could be made was that the contract should be rescinded, all further proceedings stayed, and the costs of the application paid by the defendant.

*Henty v. Schröder* (1879) 12 Ch. D. 666; 48 L. J. Ch. 792; 27 W. R. 833—M. R.) followed.

**JARRELL v. STUART**, (1899) 80 L. T. 17—North, J.

**103. Decree against Purchaser for Specific Performance—Failure to comply with—Forfeiture of Deposit—Form of Order.**—A purchaser failed to comply with a decree ordering him to carry out a contract for the purchase of land, which contained a clause enabling the vendor to forfeit the deposit and to proceed to a fresh sale.

**HELD**—that the vendor was entitled to an order declaring the deposit forfeited, and directing payment of any deficiency on a fresh sale and costs, but not the costs of an earlier motion as to which an order had been made at the time.

Form of order settled.

**GRIFFITHS v. VEZLY**, [1906] 1 Ch. 796; 75 L. J. Ch. 162; 54 W. R. 490; 91 L. T. 571—Eady, J.

**104. Defect appearing on Conveyance and known to Purchasers—Indemnity—Costs of Arbitration and Litigation—How far recoverable—Solicitor and Client Costs—Conveyancing and Law of Property Act, 1881 (11 & 45 Vict. c. 41), s. 7.**—The defendant sold land as beneficial owner in fee to the plaintiffs; the conveyance contained no express covenants for title and no qualification of the implied covenants. The plaintiffs had notice both on the face of the conveyance and *alunde* that J. and other persons had an easement over the land, but, as between themselves and the defendant, they were to take the land discharged from such rights.

J. claimed £5,000 for loss of his easement; the plaintiffs gave notice of the claim to the

**Practice—Continued.**

defendant, and under protest went to arbitration. J. was awarded £510. The plaintiffs disputing his right to recover, he established it by an action, decided on a special case. The plaintiffs now sued the defendant.

**HELD**—that they were entitled to damages for breach of his implied covenants for title.

*Turner v. Moon* ([1901] 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90—Joyce, J.) followed.

That they could recover,  
(1) the £510 and interest and costs paid to J.  
(2) subsequent interest on £510.  
(3) their own costs of the arbitration, to be taxed as between solicitor and client.

*Barnett v. Eccles Corporation* ([1900] 2 Q. B. 423, 69 L. J. Q. B. 834, 64 J. P. 692; 83 L. T. 66—C. A., see PUBLIC HEALTH, No. 36) distinguished.

(4) but not the costs of the action, which they ought not to have defended.

*GREAT WESTERN RY. CO. v. FISHER*, [1905] 1 Ch. 816; 74 L. J. Ch. 241; 53 W. R. 279; 92 L. T. 104—Buckley, J.

**105** *Lis pendens—Dismissal of Action for Specific Performance—Order vacating Registration—Lis Pendens Act, 1867* (30 & 31 Vict. c. 47), s. 2.]—Upon the dismissal of an action for specific performance, which has been registered as a *lis pendens*, the successful party may, in addition to the usual judgment, have an order to the effect that the registration shall be vacated unless an appeal is set down within a certain specified time.

*BAXTER v. MIDDLETON*, [1898] 1 Ch. 313, 67 [L. J. Ch. 200; 46 W. R. 350—Kekewich, J.

**106** *Purchaser's Summons for Costs—Order for Lien.*—Where a contract had been entered into for the sale of certain freehold property with a right of way, the vendor was unable to make out a title to the right of way. He repaid the deposit, but did not pay costs. On a summons under the Vendor and Purchaser Act, 1874, the purchaser sought a declaration that he was entitled to costs and expenses, and that such costs might be (until payment) a charge upon the hereditaments. The vendor did not appear on the summons.

**HELD**—that even in the absence of the vendor and without argument, the Court might, on the authority of *Turner v. Marriott* [1862] L. R. 3 Eq. 744, make the declaration as to the lien.

*IN RE AIRD AND FURNEAUX'S CONTRACT*, [1906] W. N. 215—Kekewich, J.

**107. Specific Performance—Adverse Claim by Stranger against Vendor's Title.—Where a *bona fide* claim affecting the vendor's title has been set up by a stranger the Court will direct the vendor's action against the purchaser for specific performance to stand over for a reasonable time to see whether such stranger will commence proceedings to enforce his claim.**

**HELD**—that this course should be followed where a vendor had sold house property on the footing that the rates were payable by the tenant, whereas the latter claimed that the landlord was bound to pay them.

*GEORGE v. THOMAS*, (1904) 52 W. R. 416; 90 [L. T. 505—Eady, J.

**108. Specific Performance—Certificate against Title—Lien for Costs of Investigating Title.—In a vendor's action for specific performance, the inquiry as to title resulted in a certificate against the title. The defendant claimed a lien for his deposit with interest and costs and the costs of investigating the title.**

**HELD**—that the defendant was entitled to the full lien, including a lien for the costs of investigating the title.

*KITTON v. HEWETT*, [1904] W. N. 21 — [Kekewich, J.

**109. Specific Performance—Costs—Set-off—Debt en autie Droit.—A purchaser obtained judgment for specific performance of a contract of sale of leasehold property against his vendor with costs. The vendor was entitled as administratrix, and also beneficially as next of kin of the intestate, to a portion of the proceeds of sale subject to a mortgage and to a charge created by her subsequently to the contract. The judgment not having been passed and entered, the plaintiff claimed to have provision made for the application of what would otherwise have been payable in the administration of the intestate's estate in respect of her beneficial interest, or so much thereof as was necessary in or towards satisfaction of the costs ordered to be paid by her.**

**HELD**—that without some form of administration order, which the Court had no power to make in the action, it would be impossible to ascertain what the amount representing the beneficial interest of the defendant was, so as to bind other persons interested in the intestate's estate; that, if any right was to be established against the beneficial share of the defendant in the estate, it must be by due process of execution, the two debts, the costs, and the purchase-money not being capable of being set off or brought into account against one another; and that the application must be dismissed with costs.

*Green v. Sevin* ((1879) 13 Ch. D. 589—Fry, J.) distinguished.

*PHILLIPS v. HOWELL*, [1901] 2 Ch. 773; 50 [W. R. 73; 71 L. J. Ch. 13; 85 L. T. 777—Byrne, J.

**110. Specific Performance—Purchase of Leaseholds—Undertaking not to Defend—Invalidity of Lease Discovered—Leave to Defend on Ground of Invalidity—Jurisdiction.—The defendant in an action for specific performance of an agreement to purchase certain leasehold houses gave an undertaking by his solicitor to the plaintiff's solicitor not to deliver any defence in the event of the plaintiff's solicitor undertaking not to**

**Practice—Continued.**

move for judgment in default of defence until a certain day. The defendant then found out that the lease contained a reservation of minerals, and was bad on the ground of its having been granted by a tenant for life

**HELD**—that, as the action was for specific performance, and there being no judgment pronounced, the Court down to the very last moment had jurisdiction to say upon terms that the agreement should not be specifically enforced, and in exercise of that discretion to allow the defendant to defend to the extent of pleading that the lease was bad on the ground that, being granted by a tenant for life, it contained a reservation of minerals.

**SCOTT v. MOXON**, (1900) 81 L. T. 774—  
[Kekewich, J.]

**111 Vendor and Purchaser—Summonses—Scope of.**—Scope of summonses under Vendor and Purchaser Act, 1874, discussed.

**RE CALCOTT'S and ELVIN'S CONTRACT**, [1898]  
[2 Ch. 160, 67 L. J. Ch. 553, 78 L. T. 526,  
5 Mans. 208, 16 W. R. 673—C. A.]

**XI RESTRICTIVE COVENANTS.**

*And see Nos. 6, 9–16, supra.*

**112. Absence of Provision for Compensation—Open Contract—Undisclosed Restrictive Covenants—Innocent Vendor—Purchaser aware of Vendor's Ignorance—Impossibility of assessing Compensation.**—There was an open contract between the plaintiff and the defendant whereby the defendant agreed to sell four houses and land. There was no representation as to the title the defendant could make to the property, nor as to the nature of her interest, nor any provision for compensation for defects. On the investigation of the title it appeared that the property was subject to restrictive covenants as to building and user. The plaintiff was aware of the defendant's ignorance as to her own title. The plaintiff brought an action for specific performance with compensation on the ground of the undisclosed restrictive covenants.

**HELD**—that the action must be dismissed with costs on the ground that to grant specific performance in this case would be to decree specific performance not of the contract made by the parties but of a new contract made for them by the Court; that the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation rests on the equitable estoppel that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety, but the defendant had made no direct representation of that kind and that it was almost impossible to assess compensation where there are restrictive covenants as to building and user.

**Mortlock v. Buller** ((1801) 10 Ves. 292; 7 R. R. 417) and **Castle v. Wilkinson** ((1870) L. R.

5 Ch. 534, 39 L. J. Ch. 843, 18 W. R. 586) applied.

Dictum of Jessel, M.R., in **Cato v. Thompson** ((1882) 9 Q. B. D. 616, 618, 47 L. T. 491) followed.

**RUDD v. LASCELLES**, [1900] 1 Ch. 815, 69 [L. J. Ch. 396, 48 W. R. 586, 82 L. T. 256,  
16 T. L. R. 278—Farwell, J.]

**113. Covenant not to build more than one House on a Plot—One "House" Superposed on another.**—It is possible to build "houses," as distinct from "flats," superposed one upon the top of another.

A conveyance to the defendant of certain plots of land contained a covenant by him not to erect more than one house on any plot. He erected a building which consisted of two floors, each floor forming a complete tenement, and having a separate external door, and no internal communication with the other.

**HELD**—that the building constituted two separate houses, and that the defendant had committed a breach of his covenant.

**KIMBER v. ADAMS**, [1900] 1 Ch. 112, 69 [L. J. Ch. 296, 48 W. R. 322, 82 L. T. 1, 136—C. A., No. 13 *supra*] and **ROGERS v. HOSEWOOD**, [1900] 2 Ch. 388, 69 L. J. Ch. 672, 48 W. R. 659, 83 L. T. 186—C. A., No. 12, *supra*] considered.

**ILFORD PARK LATHS LD. v. JACOBS**, [1903] 2 Ch. 522, 72 L. J. Ch. 699, 89 L. T. 295,  
19 F. L. R. 571—Lady, J.]

**114. Covenant not to use House for other Purpose than Private Residence—Home for Governesses and Pupils—Breach.**—The conveyance of a house contained a covenant on the part of the purchaser not to use or occupy the same for the purpose of any trade or manufacture or for any other purpose than a private residence. The assignee of the purchaser, who carried on a day-school for girls on premises about half a mile distant from the house, proposed to use the house as a residence for herself and certain relatives and that four of the governesses and such of the pupils as might be sent to stay with her with the object of their attending the school should also live there.

**HELD**—that the proposed user of the house would be a breach of the covenant.

**HOBSON v. FITZLOCH**, [1898] 1 Ch. 421, 67 [L. J. Ch. 205, 78 L. T. 224, 14 T. L. R. 211, 16 W. R. 331—Romer, J.]

**115. Unagreeable Noise or Nuisance—School—Misrepresentation of Vendor's Agent as to a Fact—Rescission of Contract.**—W entered into negotiations with the defendant's agent for the purchase of a house for the purpose of carrying on a boys' school and was induced to enter into a contract to purchase the house by his representing that there was no covenant which would interfere with W's carrying on his school there. W subsequently discovered that the house was subject to a covenant which, after specially restraining certain trades or businesses from being carried on, provided that

**Restrictive Covenants—Continued.**

there should not be carried on upon the premises any trade or business or occupation whereby (*inter alia*) any injurious or offensive or disagreeable noise or nuisance should or might be occasioned, caused, or made. He thereupon brought an action for rescission of the contract, and return of the deposit made by him, with interest.

**HELD**—that the covenant was not limited to trades or businesses *ejusdem generis* as those specifically mentioned; that the carrying on of a boys' school would come within the prohibition of the covenant; that the agent's representation was as to a fact, and not a mere statement of law; and, therefore, that the plaintiff was entitled to succeed in his action.

*Todd-Heatly v. Benham* ((1888) 40 Ch. D. 80; 58 L. J. Ch. 83, 37 W. R. 38; 60 L. T. 241—C. A.) followed.

*WATTON v. COPPARD*, [1899] 1 Ch. 92; 68 [L. J. Ch. 8, 47 W. R. 72, 79 L. T. 467—Romer, J.

**116. Long Course of Usage inconsistent with the continuance of Covenant—Inference that Usage is lawful—Release**—A house was conveyed in 1874 by a conveyance which contained a covenant that "no shop or other building to be erected on the said plot of land, or any part thereof, shall at any time hereafter be used as an inn, tavern, or beerhouse, nor for any other purpose than as a dwelling-house or shop as aforesaid, nor shall any wine, beer, or other intoxicating liquors be sold on the said plot of land or in any shop or other building thereon."

Very shortly after the conveyance beer and, after a short interval, spirits were sold openly with the licence appearing in large letters over the door for upwards of twenty-four years.

**HELD**—that the shop was in fact not now bound by the restrictive covenant. In such a case the Court infers some legal proceedings which has put an end to the covenant, in order to show that the usage has been and is now lawful and not wrongful.

*Gibson v. Doeg* ((1857) 2 H. & N. 615, 27 L. J. Ex. 37, 6 W. R. 107; 30 L. T. (O.S.) 156) followed.

*HEPWORTH v. PICKLES*, [1900] 1 Ch. 408; 69 [L. J. Ch. 55; 48 W. R. 184; 81 L. T. 818—Farwell, J.

**117. No Land Retained by Vendor—Breach after Vendor's Death—Action by his Executors—Injunction Refused**—The doctrine of *Tulk v. Moxhay* ((1848) 2 Ph. 774) does not apply where a vendor sells his whole estate. A negative or restrictive covenant imposed upon the user of land will not, if it be a covenant in gross, be enforced by injunction against an owner, who was not a party to the deed containing the covenant.

In 1808 F. sold to a company all his land at a certain place, and the company covenanted for themselves, their successors and assigns, with F., his heirs, executors and administrators, not to

build a beerhouse or shop on a particular portion of the land.

After F.'s death the company sold to B this particular portion with notice of the covenant; but B. nevertheless began to erect a shop. Thereupon the plaintiff, the sole devisee under F.'s will, and his personal representative, claimed an injunction to restrain him from so building.

**HELD**—that her remedy was by an action for damages, which (*semble*) would be only nominal; and that an injunction could not be granted.

*Semhle*, also, "beerhouse or shop or hotel" mean "beerhouse or beershop," &c.

*FORMBY v. BARKER*, [1903] 2 Ch. 539; 72 [L. J. Ch. 716; 51 W. R. 646; 89 L. T. 249—C. A.

**118. Object of—When Breach will not be Restrained—Acquiescence in Former Breaches—Alteration in Character of Neighbourhood**—Restrictive covenants are as a rule for the benefit of either (1) the vendor alone; (2) the vendor as the owner of some other particular property; or (3) other purchasers and the vendor if he reserves some of the property unsold. In the case of (1), mere alteration in the character of the neighbourhood is no ground for refusing to restrain an intended breach.

B brought from O. a plot of ground and covenanted that the houses built thereon should be used only as private residences. There had been no sale by auction, and no plan was shown to B. indicating the plots affected by the restrictions; but a printed form of agreement was used, reserving, however, power to O. to vary the restrictions as to plots sold in the future. O. subsequently allowed shops to be built on some of the adjoining plots, and acquiesced in some slight breaches of covenant by B.

The defendant, who had purchased from B. with notice of the restrictions, began to alter two houses into shops.

**HELD**—that no "building scheme" had been proved to exist, that the covenants must be regarded as for the benefit of O. personally, and not of his property, and that therefore the change in the character of the neighbourhood, though due to his own act, did not disentitle him to an injunction; and, further, that acquiescence in slight breaches of covenant did not prejudice his right.

*OSBORNE v. BRADLEY*, [1903] 2 Ch. 446; 89 [L. T. 11; 73 L. J. Ch. 49—Farwell, J.

**119. Possessory Title—Purchaser accepting less than usual Title—Purchaser for Value without Notice—Title under Statute of Limitations—Conveyancing Act, 1882 (45 & 46 Vict. c. 39). s. 3 (1)—Real Property Limitation Act, 1833 (3 & 4 Will 4, c. 27), s. 34.**—The owner of certain land, which he had purchased in 1901, agreed in 1903 to sell it, the title to commence with a conveyance of August, 1890, in which it was stated that the then vendor and his father had at that date been in possession of the land for thirteen years and upwards. It was admitted that in 1890 the then vendor had acquired a possessory title; that there was in existence a deed of 1872 containing

**Restrictive Covenants—Continued.**

a restrictive covenant which affected the land, and that neither the present vendor, when he purchased in 1901, nor the purchaser in 1890, made any inquiry into the title prior to 1878. The vendor contended that the land was not subject to the restrictive covenant in his hands.

**Held**—that the restrictive covenant was an equitable burden attaching to the land and binding on any subsequent owner not being a *bonâ fide* purchaser of the legal estate for value without notice; that the vendor of 1890, having only a title under the Real Property Limitation Acts, could not set up that he was a purchaser for value without notice; that sect. 34 of the Real Property Limitation Act, 1833, did not give him a title freed from the burden attaching to the former owner's estate, and that both the purchaser in 1890 and the present vendor when he purchased in 1901, having accepted a title which they could not have been compelled to accept, or having waived their right to the production of a full forty years' title, which would have disclosed the covenant, were not purchasers for value without notice.

Decision of Farwell, J. ([1905] 1 Ch. 391; 74 L. J. Ch. 310; 53 W. R. 297; 92 L. T. 148; 21 T. L. R. 261) affirmed.

**IN RE NISBLE AND POTTS' CONTRACT**, [1906] 1 Ch. 386; 75 L. J. Ch. 238; 54 W. R. 286; 91 L. T. 247; 22 T. L. R. 234—C. A.

**120 Undisclosed in Contracts—Form of Conveyance—Vendor and Purchaser Act, 1871 (37 & 38 Vict. c. 78) s. 9**—A vendor is not entitled to insert in the conveyance to the purchaser restrictive covenants or stipulations not expressly provided for in the contract. In determining such a question upon a summons under sect. 9 of the Vendor and Purchaser Act, 1871, it is not within the intention of that section that the Court should be influenced by extraneous considerations, such for instance as the mistake, or the fact that in omitting such restrictive covenants from his conveyance the vendor will be committing a breach of some other contract. The true intention of that section is to provide that distinct and isolated questions between the vendor and purchaser on the matters therein mentioned may be raised and determined in a summary way as and when they arise and not to enable a general declaration as to title to be made.

**IN RE WALLIS AND BARNARD'S CONTRACT**, [1899] 2 Ch. 515; 68 L. J. Ch. 753; 48 W. R. 57; 81 L. T. 382—Kekewich J.

**121 Windows Overlooking—Buildings Adjoining—Damages—Mandatory Injunction**—Vendors sold and conveyed land, retaining adjacent land. The purchaser covenanted, "in the erection of buildings adjoining the hereditaments of the vendors, not to insert windows overlooking their land. He nevertheless built twenty houses with windows which were from 20 feet to 25 feet from the fence separating the vendors' and purchaser's properties. Between the houses and the land of the vendors were

gardens belonging to the purchaser, several yards long.

**Held**—that the houses, though near to, did not "adjoin" the land of the vendors within the meaning of the covenant.

Decision of Buckley, J. ([1900] 81 L. T. 779) reversed.

**IND, COOPE & Co., LD. v. HAMBLIN**, (1901) 84 [L. T. 168—C. A.]

**XII. TITLE.**

*And see* **BANKRUPTCY**, Nos. 239, 240

**122. Condition—Subsequent or Shifting Use—Rule against Perpetuities—Danger of Litigation—Title not Forceable on Purchaser**.—A proviso that lands shall revert to the right heirs of the grantor for condition broken, following on a grant to uses, is a common law condition subsequent, and not a shifting use.

The rule against perpetuities applies to a common law condition for re-entry.

*In re Mackleay* ((1875) L. R. 20 Eq. 186; 44 L. J. Ch. 441; 23 W. R. 718; 32 L. T. (N.S.) 682—Jessel, M.R.); and *Dunn v. Flood* ((1883) 25 Ch. D. 629; 53 L. J. Ch. 537; 32 W. R. 197; 49 L. T. 670—North, J.) followed.

A title which for its validity depended on the application of the rule against perpetuities to a common law condition for re-entry was not forced on a purchaser, the point not formerly having been the subject of a judicial decision, and there being danger of litigation.

*In re Thackeray and Young's Contract* ((1888) 40 Ch. D. 31; 58 L. J. Ch. 72; 37 W. R. 74; 59 L. T. 815—Chitty, J.) followed.

**IN RE HOLLES HOSPITAL (TRUSTEES OF) AND HAGUE'S CONTRACT** [1899] 2 Ch. 510; 68 L. J. Ch. 673; 48 W. R. 691; 81 L. T. 90—Byrne J.

**123 Constructive Notice of Adverse Title—Tenant's Rights—Lessor's Rights—Purchaser's Knowledge as to whom Rents are paid—Conveyancing Act, 1882 (45 & 46 Vict. c. 39) s. 3**—The rule that a tenant's occupation is notice of all that tenant's right, but not of his lessor's title or right means that, if a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are, and if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession.

Dictum of Jessel M.R. in *Mumford v. Stokwasser* ((1871) L. R. 18 Eq. 556; 40 L. J. Ch. 694; 697; 22 W. R. 833; 30 L. T. (N.S.) 859) disapproved.

*Barnhart v. Greenshield*, ((1853) 9 Moo. P. C. 18) followed.

There is not, for the purpose of ascertaining the title of the vendor or mortgagor, any obligation on the purchaser or mortgagee to make inquiries of the tenant in reference to anything

**Title—Continued.**

but protection against the rights of the tenant. No inquiry ought reasonably to be made which is not advised in any of the standard text-books, and which would be inconsistent with the decisions prior to the Conveyancing Act, 1882, and has not received countenance from any decision subsequent to that Act. If inquiries are made and information got then the purchaser or mortgagee is affected by notice, but not otherwise.

Decision of Farwell, J. ([1901] 1 Ch. 45, 70 L. J. Ch. 30; 49 W. R. 155; 83 L. T. 479; 17 T. L. R. 3) affirmed.

HUNT v. LUCK, [1902] 1 Ch. 428; 71 L. J. Ch. [239; 50 W. R. 291. 86 L. T. 68; 18 T. L. R. 265—C. A.]

**124 Defect in Title—Contract for Sale of Freeholds—Undisclosed Easement—Underground Gout or Water-course—Constructive Notice—Rescission of Contract—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78)**—Where a contract for the sale of freehold land contains a provision that the land is sold subject to the conditions contained in or referred to by a specified deed and reference to that deed would have disclosed the fact that the land was subject to certain restrictions contained in a second deed, a purchaser, who before executing the contract has not inspected either the first or the second deed, will not be granted relief on the ground that he had no notice, at the time when he entered into the contract, of the restrictions contained in the second deed.

IN RE CHILDE AND HODGSON'S CONTRACT, (1906) [54 W. R. 234—Warrington, J.]

**125. Defect in Title—Notice to Rescind—Validity of—Rescission.**—A contract was entered into at an auction on December 7th, 1896, subject to particulars and conditions of sale.

The property passed under the will of M. A. R. in 1856 to J. J. W. and another, as tenants in common, in equal moieties, and the difficulty arose as to the moiety which passed to J. J. W. He by his will gave his property to trustees upon trust for sale and payment of debts, &c., and then to lay aside £12,000, which was to be invested for the benefit of his daughters and their children, and subject thereto to hold the residue for his son.

J. J. W. died in 1876, and in 1880 two deeds were executed by which part of the property was mortgaged to the amount of £12,000 to two persons who were not trustees of the will. Later, one of these persons was appointed a trustee of the will. These two persons purported to sell the property. Objection was taken on the requisitions that they could not give a good title, and notice to rescind was given.

On a summons taken out by the purchaser claiming rescission:—

**HELD**—that the defect could only be removed (1) by procuring the trustees of the will to be parties; (2) by obtaining the sanction of the Court; and (3) by showing that the £12,000 had been properly invested, that, as to (1) and (2), neither on the day of the notice to rescind,

nor on that fixed for completion, were the vendors in a position to remove the defect, that, as to (3), there was no evidence that the £12,000 could be so invested; and that, in the absence of any such evidence, the notice to rescind must be deemed effectual.

RE COOKE AND HOLLAND'S CONTRACT, (1898) [78 L. T. 106—Stirling, J.]

**126 Defect in Title—Open Contract for Sale of London House—Party-wall Notice and Award—Non-disclosure—Material Facts—Rescission—Return of Deposit—Cost of Investigating Title—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), ss. 90, 91, 98, 99.**—In selling a house in London under an open contract, the facts that a party-wall notice has been served under the London Building Act, and the usual award made thereunder, are "material facts" and ought to be disclosed to an intending purchaser. Innocent non-disclosure is a good ground for rescission and for recovery of deposit with interest, and for recovery of the cost of investigating the title.

STERIENS v. ADAMSON ((1818) 2 Stark. 422) followed.

CARLISH v. SALT, [1906] 1 Ch. 335, 75 L. J. Ch. [175; 54 W. R. 244; 94 L. T. 58—Joyce, J.]

**127. Defects in Title—Restrictive Stipulation as to Light—Sewer—Vested in Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 13, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.**—The defendant sold one of three newly-built houses to B. and defendant and B. mutually covenanted not to do anything to prejudice the right of light to the windows of their respective houses.

The plaintiffs agreed to buy the other two houses "subject to the right of light with owner of adjoining property being guaranteed."

**HELD**—that the restrictive covenants between B. and the defendant constituted a defect in the title.

Under part of the two houses ran a drain with which two other houses connected.

**HELD**—that this drain, although a "single private drain" for the purposes of the Public Health Acts Amendment Act, 1890, s. 19, was a "sewer" vested in the local authority, and that the defendant could not therefore convey all that he had contracted to convey, and could not make a good title.

PEMSEL AND WILSON v. TUCKER, [1907] 2 Ch. [191; 76 L. J. Ch. 621; 71 J. P. 547; 97 L. T. 86—Warrington, J.]

**128 Latent Defect—Land Sold for Building Purposes—Underground Culvert for Water Unknown to Both Parties—Inspection of Property by Purchaser—Substantial Defect in Title.**—The purchaser was a contractor. It was known to both vendors—trustees—and purchasers that the latter was buying the property with the view of developing it for building. The particulars represented the property as having a "valuable prospective building

**Title—Continued.**

element," and a letter of the vendors' agents stated that the property was "suitable for development," and "there are no restrictions as to the houses to be erected." The plans gave no fair indication of an underground culvert, for the passage of water—about which the vendors knew nothing—running across the property, and the purchaser, after carefully going over the property with the vendors' agent, did not discover the existence of this culvert. There was evidence that it would cost £500 to deal with the culvert in such a way as to make it possible to use the land for such building as was contemplated by both parties. The material condition was that the property "being open to inspection the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

**HELD**—that it was contemplated by the parties, and they were dealing on the basis, that the land was reasonably capable of being made fit for building purposes, that the purchaser could not by reasonable inquiry and inspection have ascertained the existence of the culvert, which was in a very essential way a drawback to the use of the property for building purposes, that the culvert was such a substantial defect as would alter the nature of the thing which the purchaser intended to buy, and he was not obliged to take a thing essentially different from that which he agreed to take, and that the vendors had not shown a good title to the property in accordance with the contract.

*Flight v Booth* ((1834) 1 Bing N. C. 370; 1 Sc. 190; 41 R. R. 599, 1 L. J. (N. S.) C. P. 66) applied.

*In re Brewer and Hankin's Contract* ((1899) 80 L. T. 127—C. A., No. 135, *infra*) distinguished.  
**IN RE PUCKETT AND SMITH'S CONTRACT**, [1902] 2 Ch. 258, 71 L. J. Ch. 666, 50 W. R. 532; 87 L. T. 189—C. A.

**129. Lease by Tenant for Life—Rent less than "Best Rent"—Purchaser for Value without Notice—Void or Voidable—Doubtful Question of Fact—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7, sub-s. 2; s. 54**—A title, the validity or invalidity of which depends on the question of fact whether a particular person had or had not notice, ought not to be forced on a purchaser.

G. H., a tenant for life professing to act under the powers of the Settled Land Act, 1882, granted in 1891 to W. M. a building lease for 99 years at a rent of £4, which was less than the best rent that could reasonably be obtained, and this was done with the knowledge both of the tenant for life and of the lessee. The lessee covenanted for the erection of a house at the cost of £200, and he did not erect the house, but after a few years became bankrupt. His trustee in bankruptcy sold the lease, and the present vendor, Handman, purchased at the price of £150. In July, 1900, Handman

agreed to sell the property to Wilcox for £195. The reduced rent of £4 was taken in consideration of the waiver by W. N. of a claim for damages against G. H. Handman was not aware of this arrangement.

**HELD**—that the lease was either void or voidable as against the parties entitled under the settlement other than the lessor; that if the lease was void, then the title of the vendor was bad; that if the lease was voidable only, then the title might be supported on the ground that the vendor was a purchaser for value without notice, and as want of notice was a doubtful question of fact it could not be forced on the purchaser.

*Freer v Hesse* ((1853) 4 D. M. & G. 495; 22 L. J. Ch. 597, 2 Eq. R. 13) followed.

**IN RE HANDMAN AND WILCOX'S CONTRACT**, [1902] 1 Ch. 599, 71 L. J. Ch. 263; 86 L. T. 246—C. A.

**130. Leaseholds—Sale by Executor—Non-existence of Debts**—An executor can sell leasehold property, either for the purpose of paying debts (even after 20 years from the testator's death) or for the purpose of defraying other expenses of administering the testator's estate; but where an executor-vendor gives the purchaser notice that there are no debts, and does not assert that the sale is made for the purpose of defraying other expenses of administration, he cannot make out such a title as can be forced upon a purchaser.

*In re Whistler* ((1887) 35 Ch. D. 561, 56 L. J. Ch. 827, 51 J. P. 820, 35 W. R. 662, 57 L. T. 77—Kay, J.), and *In re Venn and Furze's Contract* ([1894] 2 Ch. 101, 63 L. J. Ch. 303; 42 W. R. 440; 70 L. T. 16, 1 Manson, 136—C. A.) distinguished.

**IN RE VERRELL'S CONTRACT**, (1902) 51 W. R. [73; [1903] 1 Ch. 65, 72 L. J. Ch. 41; 87 L. T. 521—Kekewich, J.

**131. Mortgage—Power of Sale—Specific Performance of Contract to Sell—Objection to Title—Evidence—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 19, 20, 21.**—In an action by vendors for specific performance they claimed to be mortgagees selling under a power of sale. The defendants pleaded that at the date fixed for completion there was no title to sell. There was no such title under the deed, but the plaintiffs relied on the power which arose under the Conveyancing Act. The defendants called the managing clerk of the plaintiffs' solicitor, who happened himself to have been the original mortgagee, and he was asked this question which was objected to, Did you give any notice to the mortgagor demanding payment under the mortgage? the object being to show that there was no title. The answer was that there was such a title, and that, having regard to the conditions, the purchaser was too late to take the objection.

**HELD**—(1) that the true construction of sects 19, 20, and 21 of the Conveyancing Act was that they conferred protection on and were



**Title—Continued**

exercisable only in the events there mentioned by the purchaser, who had obtained a conveyance without knowledge of any irregularity. That accordingly the vendor was bound to show at the request of the purchaser that his power of sale was exercisable, and that, if the purchaser had at the proper date made a requisition to that effect the vendor would have been bound to answer it.

(2) That the answer to the second point was that the purchaser took on himself the burden of proving the allegation in the defence.

That the question, therefore, was admissible and relevant, and ought to be answered.

**LIFE INTEREST AND REVERSIONARY SECURITIES CORPORATION v. HAND-IN-HAND FIRE AND LIFE INSURANCE SOCIETY**, [1898] 2 Ch. 230, 67 L. J. Ch. 548; 78 L. T. 708; 46 W. R. 668—Stirling, J.

**132 Mortgagees disclosed to be Trustees—Devolution of Title of Trustees—Discharge for Payment of Mortgage Money.**—On a sale of freeholds a mortgage debt thereon was to be paid off. It was inadvertently disclosed that the mortgage money belonged to the mortgagees as trustees of a settlement, and that they were not the original trustees thereof on a vendor and purchaser summons.

**HELD**—that the vendor must trace the devolution of the title of the trustees from the date of the settlement in order to enable the purchaser to get a good discharge for the payment of the mortgage money.

*In re Harman and Uxbridge and Richmansworth Ry Co* (1883) 24 Ch. D. 720; 52 L. J. Ch. 808; 31 W. R. 857; 49 L. T. 130—Pearson, J.) distinguished.

**IN RE BLAIBERG AND ABRAHAMS**, [1899] 2 Ch. [340; 68 L. J. Ch. 578; 47 W. R. 634; 81 L. T. 75—Kekewich, J.

**133. Notice of Incumbrance—Sale by Mortgagor—Forged Signature to Receipt—Notice—Two Innocent Parties—Legal Estate and Possession of Title—Deeds—Priority.**—On a sale of leaseholds by a mortgagor, the abstract of title was delivered to the defendant, the purchaser, without disclosing an equitable mortgage of January, 1897, to the plaintiffs, but on searching the file in bankruptcy to satisfy themselves that a receiving order had been discharged, the purchaser's solicitors discovered the existence of the equitable mortgage and required the same to be discharged. On completion the memorandum of deposit, with what purported to be a receipt signed by the plaintiff, for all moneys due on the security, was handed over to the defendant's solicitor, together with the assignment and all the title-deeds to the property. As a fact, this receipt was a forgery, of which the plaintiff knew nothing. No reasonable precaution was neglected by the purchaser, and the plaintiff was not guilty of any negligence or misconduct.

**HELD**—that the plaintiff, as equitable mortgagee, could uphold his security and enforce it

against the purchaser who had the legal estate and possession of the title-deeds. The latter, having notice of an existing charge, should have himself taken care to see that such charge was satisfied, and was not justified in relying upon the assurance of the vendor's solicitor on the point.

**Decision of Byrne, J.** ([1902] 2 Ch. 399; 71 L. J. Ch. 752, 50 W. R. 611; 86 L. T. 887) affirmed.

**JARED v. CLEMENTS**, [1903] 1 Ch. 428; 72 L. J. [Ch. 291; 51 W. R. 401, 88 L. T. 97, 19 T. L. R. 219—C. A.

**134 Objections to Title—Open Contract—Forty Years' Title not shown—Alleged Waiver—Restrictive Covenants—Notice**]

**HELD**, upon the facts—that purchasers had not agreed to accept a title of less than 40 years, that a particular letter did not amount to a waiver of their right to insist upon such a title, and that they had had no notice of certain restrictive covenants which were valid objections to the title.

**RE JUDGE AND SHERIDAN'S CONTRACT**, (1907) [96 L. T. 451—Joyce, J.

**135 Public Sewer with Manhole under Property—Error or Omission in Particulars discovered on investigating Title—Refusal to Complete—Compensation.**—A villa, with a garden at the back, was offered for sale and was contracted to be bought by the respondent Hankin. In the course of the investigation of the title it was discovered that a public sewer vested in the corporation of Bristol passed through the garden, to which access was obtained by means of a manhole. The vendor was not aware of what the true state of matters was. The purchaser declined to complete, even with compensation.

**HELD**—that the vendor had failed to make a title to a portion of the property, that the case was very near the border line, but that there was not sufficient to justify the Court in releasing the purchaser from his bargain, as none of the objections raised were of such a serious nature as to render it just that he should be let off his bargain. The purchaser was, however, entitled to compensation.

Judgment of Stirling, J., affirmed.

**IN RE BREWER AND HANKIN'S CONTRACT**, (1899) [80 L. T. 127—C. A.

**136 Recitals in Deeds twenty years old—Forty years' Title—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), ss. 1, 2.**—A vendor under an open contract supplied an abstract commencing with a conveyance from a mortgagor and mortgagee jointly in 1882. This conveyance recited the mortgage in 1878 from the mortgagor in question to the mortgagee in question.

**HELD**—that the vendor, notwithstanding this recital in a deed more than 20 years old, must deduce a 40 years' title on the ground

(1) That *Bolton v. London School Board* ((1878)

**Title—Continued.**

7 Ch. D. 766; 47 L. J. Ch. 461; 26 W. R. 549; 38 L. T. 277—*Malins, V.-C.*) is not to be followed; and

(2) That, in any event, the present case could be distinguished from it, because the deed of 1882 disclosed deeds relating to the property subsequent to that of 1878, which the purchaser was entitled to see.

**IN RE WALLIS AND GROUT'S CONTRACT, [1906]**

[2 Ch. 206; 75 L. J. Ch. 519; 54 W. R. 534; 94 L. T. 814; 22 T. L. R. 540—*Eady, J.*

**138. Re-conveyance of Mortgaged Premises—***Habendum "In Fee"—Word "Simple" omitted—Supplying omitted Word from Context—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51.*—A vendor entered into an open contract for the sale of certain freehold properties. On the title being investigated it was found that upon the payment off of a mortgage on the property in the year 1895 the re-conveyance was by a conveyance to the mortgagor, a former owner, *habendum* "unto and to the use of" the mortgagor "in fee," freed and discharged from the mortgage. The purchasers took the objection that the effect of the re-conveyance was to pass only an estate for life to the mortgagor, and to leave the legal estate outstanding in the mortgagees.

**HELD**—that to supply the word "simple" by construction from a consideration of the obvious intention, as expressed in other parts of the instrument itself, would not be a compliance with sect. 51 of the Conveyancing Act, 1881, and that the purchasers were entitled to succeed upon their summons under the Vendor and Purchaser Act, 1874, that a good title had not been shown; but that the re-conveyance might have been rectified or a vesting order obtained.

**IN RE ETHEL AND MITCHELL'S AND BUTLER'S [CONTRACT, [1901] 1 Ch. 945, 70 L. J. Ch. 498; 84 L. T. 459; 17 T. L. R. 392—Joyce, J**

**139. Requisitions—Threatened Litigation—Fraud—Jurisdiction**—A purchaser inquired whether the vendor or her solicitor knew of any proceedings to set aside a deed in the chain of title, and was told that no such proceedings had been taken or threatened.

It appeared that in a probate action by a third person against the vendor to establish an alleged will of the person who granted the property under the deed in question, the vendor filed an affidavit calling in question the grantor's capacity to make a will. The action was stayed as the plaintiff failed to give security for costs when ordered to do so. The same person now took the purchaser that he intended to impeach the deed on the ground of fraud.

**HELD**—that the requisition had been sufficiently answered and a good title shown.

Questions of fraud cannot be entertained on a vendor and purchaser summons.

**IN RE DELANY AND DEIGAN'S CONTRACT, [1905] 1 Ir. R. 602—M.R.**

**140. Sale of Yearly Tenancy—Will—Interpretation—Gift of Chattels Real to J. for Life, and at his Decease "to his Eldest Son or Heir-at-Law."**—A testator devised and bequeathed his lands at A. (held from year to year) to his son J. for life, and at his decease to his eldest son or heir-at-law. J, who had gone into possession of the lands on his father's death, and had an eldest son living, agreed to sell the lands to B. B. objected to the title on the ground that J. took a life interest only under the will.

**HELD**—that J. took only a life estate in the lands, with remainder to his eldest son or heir-at-law as *persona designata*, and that therefore the vendor could not make title.

*Smith v. Butcher* ((1878) 10 Ch. D. 113; 48 L. J. Ch. 136; 27 W. R. 281—*M.R.*) followed.

**IN RE BISHOP AND RICHARDSON'S CONTRACT, [1899] 1 Ir. R. 71—M.R.**

**141. Sale under Order of Court—Purchaser for Value without Notice of Superior Title—Protection of Purchaser—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 70, sub-s. 1.**—An order of the Court under the Conveyancing Act, 1881, s. 70, sub-s. 1, which purports to deal with property belonging to the vendor, which turns out not to be his, does not confer a good title on the purchaser.

*Decision of Romer, J.* ([1899] 1 Ch. 611; 68 L. J. Ch. 244; 47 W. R. 493; 80 L. T. 408) affirmed.

**JONES v. BARNETT, [1900] 1 Ch. 370; 69 L. J. Ch. 242; 48 W. R. 278; 82 L. T. 37; 16 T. L. R. 178—C. A.**

**142. Words of Limitation—Habendum to Grantee—Supplying Omission by Interpretation Clause in Deed—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51.**—In a conveyance of 1892 freehold land was conveyed "unto the grantee . . . unto and to the use of the grantee for ever." The description of the parties at the head of the deed provided that the word "grantee" should, unless a contrary intention appeared, be read as "the grantee, his heirs and assigns."

**HELD**—that (apart from any question of rectification or specific performance) the words of limitation could not be read into the *habendum*, and that the legal estate did not pass.

**IN RE FORD AND FERGUSON'S CONTRACT, [1906] 1 Ir. 607—M.R.****XIII. TITLE DEEDS.**

**143. Documents not in Possession of Vendor—Obligation of Vendor to hand over on Completion—Expense of obtaining Deeds—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 6.**—J. agreed to purchase a freehold on the terms of accepting the best title the vendors could give. A mortgage had been previously created on the property, and certain of the title deeds deposited with the mortgagees, who, though the debt had been paid off, refused

**Title Deeds—Continued.**

to hand over the deeds. J. refused to complete unless these deeds were handed over to him.

On a summons by the vendors, under the Vendor and Purchaser Act, 1874, to have it declared that a good title to the property had been shown in accordance with the contract for sale —

**HELD**—that the vendors were bound to fulfil their ordinary obligation of handing over on completion all title deeds in their possession or power, that sub-sect. 6 of sect. 3 of the Conveyancing and Law of Property Act, 1881, had no application; that the provision in the contract could not take away the purchaser's right, as no question of title was involved; that the mere fact that obtaining the deeds might cause the vendors trouble and expense was no answer to the purchaser; and that the summons must be dismissed with costs.

**RE DUTHY AND JESSON'S CONTRACT**, [1898] 1 [Ch. 419; 67 L. J. Ch. 218; 78 L. T. 223; 46 300—Romer, J.]

**144. Extinguished Right of Way over Land retained by Vendor**—“*Deeds relating to Land*”—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2.—An owner of land subject to a right of way bought the dominant tenement, thus extinguishing the easement by merger. He then sold the old dominant tenement without a right of way over his original estate, which he retained.

**HELD**—that the title deeds of the tenement sold by him were deeds which related also to the property retained by him within the meaning of sect. 2 (5) of the Vendor and Purchaser Act, 1874.

**IN RE LEHMANN AND WALKER'S CONTRACT**, [1906] 2 Ch. 640; 75 L. J. Ch. 768, 95 L. T. 259; W. N. 171—Eady, J.]

**145. Retention of by Vendor — Documents affecting his Title**—Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2 (5).—The owner of a piece of land purchased an adjoining house and premises named Bedford Lodge, together with a right of way over the first piece of land. In the result the easement was extinguished. He then contracted to sell Bedford Lodge, and claimed to retain the two conveyances of Bedford Lodge, together with the easement, on the ground that they were documents of title within the meaning of the Vendor and Purchaser Act, 1874, s. 2 (5).

**HELD**—that the vendor was entitled to retain the deeds as relating to the land retained by him, inasmuch as they were evidence of the extinguishment of the easement over it.

**IN RE WALKER AND LEHMANN'S CONTRACT**, [1906] W. N. 171—Eady, J.]

**146. Title Deed Lost—Satisfactory Secondary Evidence—Time for Completion.**—Where a deed forming part of the vendor's title to land is lost, the purchaser can nevertheless be compelled to complete if he is furnished in proper time with

satisfactory secondary evidence of its contents and of its due execution.

*Bryant v. Bush* ((1827) 4 Russ. 1) and *Moulton v. Edmonds* ((1860) 1 De G. F. & J. 246; 29 L. J. Ch. 181; 8 W. R. 153; 6 Jur. (N.S.) 305; 1 L. T. (N.S.) 391) followed.

But evidence not produced till after the time for completion has expired, and the purchaser has properly issued a summons claiming a declaration that the vendor has not shown a good title, is too late, and evidence, in other respects satisfactory, which fails to prove the execution of one material deed by one necessary party is insufficient.

Decision of Stirling, J., affirmed.

**IN RE HALIFAX COMMERCIAL BANK AND [WOOD]**, (1899) 47 W. R. 194; 79 L. T. 536; 15 T. L. R. 106—C. A.]

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## **SALFORD HUNDRED COURT.**

See COURTS.

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## **SALMON.**

See FISHERIES.

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## **SALVAGE.**

See ADMIRALTY; SHIPPING AND NAVIGATION.

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## **SAMPLES.**

See FOOD AND DRUGS: SALE OF GOODS.

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## **SANITATION.**

See METROPOLIS; PUBLIC HEALTH.

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## **SATISFACTION AND DISCHARGE.**

See CONTRACT.

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## **SATISFACTION IN EQUITY.**

See WILLS.

**SAVINGS BANKS.**

See BANKS AND BANKING.

**SCHOOLS AND SCHOOL-MASTERS.**

See CHARITIES; EDUCATION.

**SCIENTER.**

See ANIMALS, Nos. 17, 19.

**SCIENTIFIC AND LITERARY SOCIETIES.**

And see RATES (EXEMPTIONS).

1. *Literary Society—Division of Property amongst Members*—“*In the nature of a Joint Stock Company*”—*Literary and Scientific Institutions Act, 1854* (17 & 18 Vict. c. 112), ss. 30, 33.]—The Russell Literary and Scientific Institution was founded in 1808, for the purpose of establishing and maintaining a library and reading-room, and providing lectures. The original capital was provided by the subscription of shares of twenty-five guineas each. The capital was in part expended in the purchase of a leasehold building and of books, and in part invested. The original rules provided that the property of the institution should be held in trust for the proprietors, and that the income derived from investments and annual subscriptions should be applied in maintaining the institution, and the surplus in certain events divided amongst the proprietors. The institution continued until 1897, when the lease expired; the property was then realised, all the liabilities paid, and a surplus of £1,600 was left in the hands of the trustees.

HELD, on a summons taken out by the trustees—that the Literary and Scientific Institutions Act, 1854, applied to this institution, though it was neither public nor charitable, but that it was of the nature of a joint stock company within the exception in sect. 30 of that Act, and therefore the surplus was divisible among the proprietors.

The dicta of Kay, J. in *In re the Bristol Athenæum* (43 Ch. D. 236, 59 L. J. Ch. 116; 61 L. T. 795) discussed and dissented from.

IN RE RUSSELL LITERARY AND SCIENTIFIC INSTITUTION, *FIGGINS v. BAGHINO*, [1898] 2 Ch. 72; 67 L. J. Ch. 411; 78 L. T. 688; 14 T. L. R. 406—North, J.

2. *Scientific Society—Dissolution—Distribution of Proceeds of Sale among Members*—

“*Shareholders*”—“*Joint Stock Company*,” *Elements of*—*Institution “in the nature of a Joint Stock Company”*—*Literary and Scientific Institutions Act, 1854* (17 & 18 Vict. c. 112), ss. 29, 30, and 33—*Companies Act, 1862* (25 & 26 Vict. c. 89), ss. 4, 21, and 199—*Companies Act, 1867* (30 & 31 Vict. c. 131), s. 23.]—The elements of a joint stock company contemplated by the Literary and Scientific Institutions Act, 1854, are—(1) the existence of common property; (2) the contributions of members as the source of that property; and (3) the holding of that property by numerous persons in transferable shares.

A society formed in 1844 for the cultivation of the science of horticulture, with a view to the instruction and recreation of the members of the society and their families, by a deed of constitution, provided for a fixed sum to be paid in order to qualify for a membership, and for the holding of one share which was to be transferable; that each member should pay an annual subscription of fixed amount to entitle such member and his family to admission to the gardens of the society; that no members should be entitled to any dividends or bonus, but that, in the event of a dissolution of the society, the members then constituting the society should be entitled to the property of the society according to their respective shares therein as personal estate after payment of all debts and liabilities of the society, for the sale of season tickets and division of the proceeds of such sales among the holders of more than one share in the society, and also for the sale of spare plants and flowers; and that the annual subscriptions and all other moneys payable to the society should be applied in payment of the expenses of the society. In 1897 a resolution was passed for the dissolution of the society and for the distribution of the proceeds of the sale of the society's property among the shareholders at the nominal value of each share.

HELD—that the society was exempt from the operation of sect. 30 of the Literary and Scientific Institutions Act, 1854, as being an institution established “in the nature of a joint stock company.”

*Re Bristol Athenæum* (43 Ch. D. 236; 59 L. J. Ch. 116; 61 L. T. 795) discussed.

The deed of constitution contained a clause that notice of every meeting should be advertised in every Sheffield newspaper. The meeting at which the resolution for dissolution was passed was not advertised in a certain evening newspaper.

HELD—that a fresh meeting must be duly convened.

RE JONES, CLEGG v. ELLISON, (1898) 67 [L. J. Ch. 504; 78 L. T. 639; 14 T. L. R. 412; 46 W. R. 577—Stirling, J.]

3. *Mortgage—Power to Borrow Money—Enlargement of Billiard Room—Necessary Repairs to Building—Literary and Scientific Institutions Act, 1854* (17 & 18 Vict. c. 112), ss. 18, 19, 33.]—An institution established under and governed by the Literary and Scientific

Institutions Act, 1854, has no power to borrow money for the enlargement and improvement of a billiard room.

It has power to borrow money by a mortgage of the premises of the institution for the purpose of effecting the necessary repairs of the buildings under sect. 19, but it has no implied or general power of mortgaging and borrowing money.

The erection of a billiard room at all is really something not contemplated by the statute, being distinct from the literary, scientific, and instructional purposes specified in sect. 33.

IN RE BADGER, MANSELL v. VISCOUNT COBHAM  
[AND OTHERS, [1905] 1 Ch. 568; 74 L. J. Ch.  
327; 92 L. T. 230; 21 T. L. R. 280—  
Buckley, J]

## SCOTTISH LAW.

See also under the various headings for cases decided in Scotland or involving Scottish law.

1. *Bond of Servitude—Covenant not to Erect Building of an "Unseemly Description"—Two Vague.*—A condition in a bond of servitude not to erect "any building of an unseemly description" is too vague and indefinite for the Courts to recognise.

MURRAY v. DUNN, [1907] A. C. 283; 97 L. T. [112—H. L. (Sc.).

2. *Dissenting Churches—Trust Property—Union of Two Churches—Dissentient Minority in One Church—Principle of Establishment—Abandonment of—Breach of Trust.*—The union effected in 1900 between the Free Church of Scotland and the United Presbyterian Church whereby they were constituted into one body, styled the United Free Church, was *ultra vires*, that is to say, the use for the maintenance and support of the new United Church of property originally vested in the Free Church for its support was a breach of trust, and must be restrained at the instance of those members of it who declined to assent to the union.

The religious views of the uniting bodies were essentially different, and the differences could not be glossed over by their adopting an elastic formula and agreeing to say nothing about them.

GENERAL ASSEMBLY OF THE FREE CHURCH OF [SCOTLAND AND OTHERS v. LORD OVERTOUN AND OTHERS; MCALISTER AND OTHERS v. YOUNG AND OTHERS, [1904] A. C. 515; 91 L. T. 395, 20 T. L. R. 730—H. L. (Sc.).

3. *Divorce—Effect on Marriage Settlement—Termination of "Offender's" Life Interest on Divorce—Subsequent Gift to Child not accelerated—Scotch Divorce Act, 1573.*—By the Scotch Divorce Act, 1573, the "partie offender" is to forfeit and lose "thair tocher et donaciones propter nuptias."

Money was settled upon a wife for her life,

and after her death upon her husband, her surviving, for his life, and, after the death of the survivor, upon the children of the marriage absolutely. The wife divorced her husband, who thereupon lost his life interest in the settled funds by the operation of the statute, the wife having subsequently died in the husband's lifetime.

HELD—that the interest of the only child was not accelerated, and that during the husband's life such child was not entitled to demand payment of the capital.

DAWSON AND OTHERS v. SMART AND OTHERS, [1903] A. C. 457; 89 L. T. 343; 19 T. L. R. 633—H. L. (Sc.).

4. *Licensing—Licensing Court—Refusal to renew Certificate—Discretion—Jurisdiction of the Court of Session.*—The Court of Session cannot, apart from corruption or refusal to hear the applicant as prescribed by statute, interfere with the exercise of discretion by the licensing court in refusing the renewal of a certificate unless it has exceeded its jurisdiction.

A licensing court may entertain an objection to the renewal of a certificate that the premises are insanitary without requiring the objection to be supported by evidence on oath.

The licensing court is entitled to rely on personal knowledge of the locality in forming an opinion that the number of licensed houses is in excess of the requirements of the inhabitants. The Court is entitled to form its own opinion, before the licensing court is held, that the number of licensed houses is excessive and to receive a deputation on the question.

Sect. 103 of the Licensing (Scotland) Act, 1903, being in Part 6 of the Act, only applies to decisions given under that part of the Act, namely, to decisions given on prosecutions and in other matters where the magistrates sit as such.

Decision of Ct. of Sess. (7 F. 1009, 42 Sc. L. R. 734) affirmed.

BOYLE (or WALSH) v. WILSON AND OTHERS, [1907] A. C. 45; 95 L. T. 763; 23 T. L. R. 124—H. L. (Sc.).

5. *Local Government—County of Lanark—Remuneration of Procurator Fiscal—Rogue Money Act, 1724 (11 Geo. I. c. 26), s. 12—County General Assessment Act, 1868 (31 & 32 Vict. c. 82), s. 3.*—A procurator fiscal in the county of Lanark is not entitled to remuneration, over and above his salary, in respect of cases as to which he makes inquiry, but which go no further.

It was not "in use" to pay any such extra remuneration in 1868, and therefore sect. 3 (2) of the County General Assessment Act of that year does not entitle a procurator to demand it; nor is it an "expense" within the meaning of sect. 3 (3).

Decision of Ct. of Sess. ((1902) 40 Sc. L. R. 117) reversed.

LANARK COUNTY COUNCIL v. HART, [1904] [A. C. 235—H. L. (Sc.).

6. *Mortgage—Heritable Security—Sale—Service of Sheriff's Citation—Service by Messenger-at-Arms—Irregularity—Effect of—Heritable Securities (Scotland) Act, 1894* (57 & 58 Vict. c. 44), ss. 8, 10.]—Although a messenger-at-arms is not an officer of the Sheriff's Court, service by him (instead of by such an officer) of a citation under sect. 8 of the Heritable Securities Act, 1894, amounts only to an "irregularity." Purchasers under the sheriff's decree made upon such citation are protected against the irregularity by sect. 10 of the statute.

Decision of Ct. of Sess. (4 F. 957) affirmed.  
SUTHERLAND v. THOMSON, [1906] A. C. 51—  
[H. L. (Sc.).]

7. *Reparation—Solatium—Parent and Child—Parent Abroad—Child Killed in Scotland—Right of Action.*—An Irishman, residing in Ireland, whose son had been killed in a tramcar accident in Scotland, claimed damages in the Scotch Courts against the tram company by way of *solatium* for the death of his son.

HELD—that though a claim to *solatium* is not known to the Irish law, yet the plaintiff had a good cause of action, his right depending solely on Scotch law, which was both *lex fori* and *lex loci delicti*.

CONVERY v. LANARKSHIRE TRAMWAYS CO.,  
[(1906) 8 F. 117—Ct. of Sess.]

8. *Succession—Will—Residue of Estate to Heir entitled to Succeed to Entail—Lands Disentailed—Intestacy.*—By his will M. directed his trustees to entail his estate of K. upon a series of heirs specified in a tailzied destination clause; he then gave certain beneficial interests in the residue of his estate "to the heir for the time being entitled to succeed under the said entail" upon his attaining the age of twenty-four. On attaining twenty-one the institute heir of entail, before any deed of entail had been executed, obtained from the Court under the Entail Amendment (Scotland) Act, 1848, s. 27, an order to have the K. estate conveyed to him in fee simple, and he evacuated the tailzied destination, thus destroying the entail; he afterwards died unmarried before attaining the age of twenty-four. The next of kin claimed that, in the circumstances of the entail, the residue had fallen into intestacy.

HELD—that the residue did not fall into intestacy, the will declared that the beneficial interest therein was to go to the heir for the time being under the tailzied destination, and it was not a condition of such heir succeeding to the said interest that he should be in the position of heir of entail under a deed of entail.

Decision of Ct. of Sess. (1907) S. C. 139) affirmed.

WESSELENYI v. JAMIESON, [1907] A. C. 440—  
[H. L. (Sc.).]

9. *Superior and Vassal—Entry of Singular Successor—Right of Superior to Casualty or Composition—Measure of—Rents, or Royalties from Minerals.*—The measure of the right of a

superior to a casualty, or composition, from a singular successor demanding an entry in that character is one year's rent.

Where coal or minerals are being worked the year's rent includes the rents or royalties paid in respect thereof; and no deduction can be made on the ground that the minerals are nearly worked out.

Duke of Hamilton v. Allan's Trustees ((1878) 5 R. 510) approved.

EARL OF HOME v. LORD BELHAVEN AND  
[STENTON, [1903] A. C. 327—H. L. (Sc.).]

10. *Trustee—Judicial Factor—Harbour Rates—Real or Heritable Security—Liability of Factor—Judicial Factors Act, 1849* (12 & 13 Vict. c. 51), ss. 4, 13—*Trusts (Scotland) Amendment Act, 1884* (47 & 48 Vict. c. 63), s. 3, sub-ss. 10, 12.]—A harbour bond which contains an assignment of "the rates, duties and other revenues" of the trust, and also a power to appoint a factor, in case the interest was not paid, to receive the dues and rates, but which did not assign the undertaking itself, is not a "real or heritable security" within the Trusts (Scotland) Amendment Act, 1884. Such an investment, moreover, is not a loan "secured on rates or taxes levied under the authority of an Act of Parliament by a municipal corporation."

It is not within the power of an accountant of the Court to approve investments improperly made, nor will a *curator bonis* be freed from liability by his (the accountant's) audit.

HUTTON v. ANNAN, [1898] A. C. 289; 67 L. J.  
[P. C. 49; 14 T. L. R. 255—H. L. (Sc.).]

## SEA AND SEASHORE,

See WATERS AND WATERCOURSES.

## SEAMEN.

See MASTER AND SERVANT; SHIPPING  
AND NAVIGATION.

## SECRET COMMISSIONS.

See AGENCY; COMPANIES, Nos. 122, 206.

## SECURITY FOR COSTS.

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**SELF-DEFENCE.**

See CRIMINAL LAW AND PROCEDURE

**SEPARATE PROPERTY OF MARRIED WOMEN.**

See HUSBAND AND WIFE.

**SEPARATION, JUDICIAL**

See HUSBAND AND WIFE.

**SEQUESTRATION.**

See PRACTICE AND PROCEDURE.

**SERVICE CONTRACTS.**

See INFANTS, MASTER AND SERVANT.

**SET-OFF AND COUNTER-CLAIM.**

And see ACTION, 9; ADMIRALTY, 13; AGENCY, 42; BANKERS, 41; BANKRUPTCY, 39, 42, 95, 272, 276; COMPANIES, 21; INDUSTRIAL SOCIETIES, 4; MORTGAGE, 3; PRACTICE AND PROCEDURE, 278.

1. *Action by Trustee—Counter-claim by Defendant in respect of Damages due to him from Cestui que trust*—When a person sues as trustee for a third person, and the defendant has a claim, either liquidated or unliquidated, against the *cestui que trust*, the defendant can plead his claim by way of set-off up to the amount of the plaintiff's claim

BANKES v. JARVIS, [1903] 1 K. B. 549; 72 L. J. [K. B. 267; 51 W. R. 412; 88 L. T. 20, 19 T. L. R. 190—Div. Ct

2. *Counter-claim—Adding a Party—"Question between Defendant and Plaintiff along with any other person"*—Ord. 21, r. 11—The defendant in an action counterclaimed in respect of a contract into which he jointly with another person had entered with the plaintiff, and he joined his co-contractor with the plaintiff as a co-defendant in the counter-claim.

HELD—that, as power to do this was not given by the Rules of the Supreme Court, the counter-claim must be struck out.

PENDER v. TADDEI, [1898] 1 Q. B. 798; 67 L. J. [Q. B. 703; 78 L. T. 581; 46 W. R. 452—C. A.

3. *Counter-claim—Joinder of Third Party—Libel Action—Counter-claim against Plaintiff's, and also their Agent—Admissibility—"Relief relating to or connected with the Original Subject of the Cause or Matter"*—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3)—R. S. C., Ord. 21, r. 11.—The plaintiff company, dealers in motor cars, and their managing directors, sued the defendant, who was managing director of a rival company, in respect of an alleged libel, published in trade journals, concerning the plaintiffs and their cars.

The defendant admitted publication in the course of a newspaper controversy as to the merits of the respective cars of the two companies. He then counterclaimed that the defendants, by their agent had published a libel as to his personal uprightness, and he added their agent as a defendant to such counter-claim.

HELD—that the counter-claim did not seek relief "relating to or connected with the original subject of the cause or matters," and must be struck out

EDGE, LD. v. WEIGEL, (1907) 97 L. T. 447—[C. A.]

4. *Counter-claim—Sovereign State Plaintiff—Jurisdiction.*—A sovereign State by bringing an action in an English court only submits to the jurisdiction to the extent of the subject-matter in the action. The Court has therefore no jurisdiction to entertain any counter-claim, except in mitigation of the relief claimed or for discovery.

SOUTH AFRICAN REPUBLIC v. LA COMPAGNIE [FRANCO-BELGE DU CHEMIN DE FER DU NORD (No 2), [1898] 1 Ch 190, 67 L. J. Ch. 92, 77 L. T. 555; 46 W. R. 151—North, J.]

5. *Set-off—Mutual Dealings—Debt becomes payable after Debtor's Death—Bankruptcy Act, 1883 (s. 125).*—The doctrine established in ordinary administration that a debt which did not become payable by the deceased in his lifetime cannot be set off against a debt which became payable to him during his life (see *Rees v. Watts*, 25 L. J. Ex. 30; 11 Ex. Div. 410; *Newell v. National Provincial Bank of England*, 45 L. J. C. P. 285; 1 C. P. D. 496, and *In re Gregson*, 57 L. J. Ch. 221, 36 Ch. D. 227) has no application in the case of an administration in bankruptcy. Where, therefore, there have been mutual dealings between a creditor and a debtor, the former may, in the administration of the insolvent debtor's estate, set off against his indebtedness a debt that became due to him by the debtor after his death.

WATKINS v. LINDSAY, (1898) 67 L. J. Q. B. 362; [5 Mans. 25—Wright, J.]

**SETTLEMENT AND REMOVAL.**

See POOR LAW.

## SETTLEMENTS.

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## 1. GENERAL.

1. *Compulsory Purchase of Lands—Payment out of Court.*—Certain lands were by a post nuptial settlement conveyed to trustees upon trust for the wife (without power of anticipation) and after the death of either her or her husband upon trust for the survivor of them for life, and after the death of the survivor upon trust for such child or children of the marriage as they should by deed jointly direct or appoint. The said settlement contained no power of sale, but it did contain a power of advancement. A portion of the settled lands had been taken by the Belfast Corporation under power of compulsory purchase vested in them. The husband and wife exercised their power of appointment in favour of their two children, and a joint application was made by the husband, wife, children, and trustees for payment out to the

trustees of the funds in Court, representing the amount paid in by the Corporation. The Court made an order appointing the trustees of the settlement trustees for the purposes of the Settled Land Acts, and directed that the funds should be paid out to them and held upon the trusts of the settlement.

IN RE BELFAST IMPROVEMENT ACTS, EX  
[PARTE REID, [1898] 1 Ir. R. 1—Porter, M.R.]

2 *Compulsory Purchase of Land under Land Clauses Consolidation Act, 1845—Money in Court under—Payment Out—Application of Money—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32.*—A part of certain land held by the Corporation of London for the purpose of a public park was bought by a local body under a local Improvement Act, with which was incorporated the Lands Clauses Consolidation Act 1845, and the purchase-money was paid into Court.

Held—that there was power under sect. 32 of the Settled Land Act, 1882, to order the money to be paid out to the Corporation of London to be applied to the permanent improvement of the park.

EX PARTE LONDON CORPORATION AND EX  
[PARTE WEST HAM CORPORATION, (1901)  
17 T. L. R. 232—Farwell, J.]

3. *Hotchpot Clause—Reversionary Interest.*—Where a testator directs by a hotchpot clause that a fund in which he himself has an interest is to be taken by a residuary legatee as part of his share of the residue under the will, the hotchpot clause operates as a gift to the legatee of the testator's interest in the fund.

A father on his son's marriage covenanted with the trustees of the marriage settlement that his executors should within six months after his death pay a sum to be held in trust for the son for life, with remainder to his wife for life, and after the death of the survivor for the issue of the marriage, and in default of issue in trust for himself absolutely. By his will he provided that all sums which he had given, or had covenanted to give, to a child on marriage should be taken in or towards satisfaction of that child's share under his will, and be brought into hotchpot accordingly. He left the residue of his estate to his son and daughter in equal shares. After his death the executors divided the residue equally, treating the sum settled as part of the son's share. The son died without issue.

Held—that subject to the widow's life interest the son's executors were entitled to the whole of the settled fund.

Decision of C. A. (*sub nom. Re Casier; Humphreys v. Gadsden*, [1897] 1 Ch. 325) affirmed.

WHEELER v. HUMPHREYS, [1898] A. C. 506;  
[67 L. J. Ch. 499; 78 L. T. 799; 47 W. R.  
17—H. L. (E.).]

4. *Pecuniary Legacy—Gift over in Event of Sale of Settled Land—Invalidity—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 51.*—The



**General—Continued**

widow of a settlor died in 1869, leaving a will bequeathing personal property to be held on trust for the person entitled to the ownership and enjoyment of the settled estate, with a gift over in the event of a sale of the settled real estate.

HELD—that the gift over was inoperative if a sale was made under the Settled Land Acts.

IN RE SMITH, GROSE-SMITH v. BRIDGER, [1899] 1 Ch. 331; 68 L. J. Ch. 198; 47 W. R. 357; 80 L. T. 218—North, J.

5. *Term of Years—Trust to raise Two Sums—Lapse of Time—Power of Appointment—Administration—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 8, 10—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.*—By a settlement made in 1838 a freehold estate was conveyed to trustees for a term of 500 years upon trust, to raise the sum of £2,000 as soon as conveniently might be after the decease of A. H., and a like sum of £2,000 as soon as conveniently might be after the decease of G. W., and to stand possessed of such sums upon trust as to the first £2,000 for such persons and generally in such manner as A. H. by deed or will should appoint, and in default of such appointment upon trust for her executors, administrators, and assigns absolutely; and as to the second £2,000, upon trust for all the children of G. W. and his wife who attained twenty-one, or being daughters were previously married.

A. H. died in 1886 without exercising her power of appointment. G. W. died in 1860. Neither of the sums was raised. An action was brought to raise both sums.

HELD—that the statute was a bar as regards the second £2,000, and that an action properly commenced in respect of the first £2,000 did not make the second £2,000 raisable.

HELD, also, that the first £2,000 was absolutely A. H.'s, and that having exercised a power of appointment by a general bequest, the property appointed was included in and passed by the bequest according to the terms of the will.

WILLIAMS v. WILLIAMS, IN RE HARTLEY, [WILLIAMS v. JONES, [1900] 1 Ch. 152; 69 L. J. Ch. 77 and 79; 48 W. R. 245; 81 L. T. 804—North, J.

6. *Portions—Infants—Contingent Interests—Maintenance* ]—Where portions are provided for children under a settlement by a father or other person standing *in loco parentis*, a reasonable rate of interest will be allowed on the portion by way of maintenance during the minority of the children, although the interests of the children are contingent and the settlement contains no provision for maintenance, and the term to secure the portions has already begun to run.

IN RE GREAVES' SETTLED ESTATES, JONES v. [GREAVES, [1900] 2 Ch. 683, 69 L. J. Ch. 596; 82 L. T. 799; 49 W. R. 236—Farwell, J.

7. *Possession—Assignee of Equitable Life Estate—Conditions—Costs—Appeal.*—The

assignee of an equitable life estate in a freehold farm applied to be let into possession or receipt of the rents and profits of the farm, and the Court made the order upon certain conditions and ordered the applicant to pay the costs of the trustees and the remaindermen. The applicant appealed on the ground that the conditions imposed were unreasonable, and also that the judge had not exercised any discretion about the costs of the remaindermen, but had acted erroneously upon a supposed rule. The appellant was ordered to pay the costs of the appeal, and it was held that the conditions imposed were in substance proper, and that the judge had exercised his discretion as to the costs, and there was no right of appeal from his decision in that respect.

IN RE HUNT, POLLARD v. GEAKE, [1901] W. N. [144, 36 L. J. N. C. 362—C. A.

8. *Re-settlement—Interpretation—Power of Jointuring—To appoint to “any Woman whom he may so marry”—As often as he should Marry—Appointment to First Wife—Divorce obtained by First Wife—Appointment to Second Wife—Public Policy—Validity* ]—By a deed of re-settlement of estates the Marquis of Blandford was empowered, either before or after his marriage with any woman, by deed or will “to appoint to any woman whom he may so marry for her life or for any less period” any yearly rent-charge or rent-charges by way of jointure, not exceeding in the whole, if he should survive the seventh duke, the yearly sum of £2,500, to be charged upon all or any of the premises thereby appointed. A similar power of jointuring was given to each male tenant for life, and it was declared that that power might be exercised as often as the person entitled to exercise the same should marry. And it was declared that the premises thereinbefore appointed, or any part thereof, should not by means of the jointure or jointures be at any time subject or liable to the payment of any annual sum or sums for jointures exceeding the whole sum of £4,000.

HELD—(1) that the Marquis of Blandford (afterwards the eighth Duke of Marlborough), who had already, in the exercise of the power contained in the deed of re-settlement, appointed to his first wife a jointure rent-charge of £2,500, could upon his second marriage during the lifetime of the first wife, who had obtained a divorce from him, appoint a jointure rent-charge of £2,500 to his second wife, but that the second wife could not receive more than £1,500 a year during the life of the first wife; (2) that the deed was not contrary to public policy.

*Cartwright v. Cartwright* ((1853) 3 D. M. & G. 982; 22 L. J. Ch. 841; 17 Jur. 584), *H. v. W.* ((1857) 3 K. & J. 382), and *Cocksedge v. Cocksedge* ((1844) 14 Sim. 244; 13 L. J. Ch. 384; 8 Jur. 659) distinguished.

MARLBOROUGH (DUCHESS OF) v. MARLBOROUGH [(DUKE OF), [1901] 1 Ch. 165; 70 L. J. Ch. 244; 49 W. R. 275; 83 L. T. 578, 17 T. L. R. 137—C. A.

9. *Gift to Son—“In the event of Marriage to be put in strict Settlement”—Jointure.*—A

**General—Continued.**

testator devised real and personal estate to his son, and directed that in the event of his son marrying this property should be put in strict settlement. The son died without any settlement having been made, leaving a widow and three infant daughters, one infant daughter having predeceased him. An action was brought to carry out the trusts of the will. A second infant daughter died before the hearing.

**HELD**—that the two deceased daughters, having died before attaining age or marrying, could take no share in the property directed to be settled, and that the Court, in the exercise of its jurisdiction in carrying out the executory trust, had power to and would provide an annuity by way of jointure for the widow, and that, subject thereto, the property should be held in trust for the two infant daughters in equal shares, as tenants in common in fee on their respectively attaining twenty-one or marrying, and that in case only one should attain that age or marry, then the whole in trust for that one.

**WRIGHT v. WRIGHT**, [1904] 1 Ir. R. 360—M.R.

**10 Agreement for Lease—Lessee becoming Tenant for Life—Benefit of Tenant for Life in Possession.**—An equitable termor, before coming into possession as legal tenant for life, expended £1,500 in building a house on the property in consideration of an agreement to grant him a ninety-nine years' lease. Knowing that he might become tenant for life in possession, he expended that amount without expressing any intention as to what should happen to his leasehold interest when he came into possession. It was clearly for his benefit that the interest should not merge.

**HELD**—that even if the lease had been granted, there would have been no merger in equity, on the ground that it would have been against the interest of the lessee tenant for life; the principle being that the Court looks to the benefit of the person in whom the interests coalesce, and in this respect there is no distinction between a beneficial lease and a term to secure a charge.

**INGLE v. VAUGHAN JENKINS**, [1900] 2 Ch. 368; [69 L. J. Ch. 618; 48 W. R. 684; 83 L. T. 155—Farwell, J.

**11. Timber—Sale of by Court—Conversion—Lunacy of Tenant for Life and of the Tenant in Fee in Remainder.**—An order directing the sale of timber growing on a settled estate was made under the general jurisdiction of the Court. Both the tenant for life, impeachable for waste, and the tenant in fee in remainder were lunatics. The committee of the estates of the lunatics felled timber, sold it, and invested the net proceeds in Consols. The income of the Consols was carried to the credit of the tenant for life.

**HELD**—that, as the timber had been rightfully sold under an order of the Court, all the consequences of the conversion must follow, and that

the Consols formed part of the personal estate of the late owner in fee.

**HARTLEY v. PENDARVES**, [1901] 2 Ch. 498; 70 [L. J. Ch. 745; 50 W. R. 56; 85 L. T. 64—Cozens-Hardy, J.

**12. Fixtures—Tapestry—Purpose and Degree of Annexation to Structure—Tenant for Life and Remainderman—Right of Removal by Executor.**—If something has been made part of a freehold house it must necessarily go to the heir. Where it is something which, although attached in some form or another to the walls of the house, yet having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor.

A tenant for life purchased for a large sum seven tapestries (called French tapestries) which required to be stretched, and they were put up in a drawing-room. Upright battens were put along the walls, and across those battens canvas was nailed, and finally over the canvas the tapestries were fastened by very small tacks of such a nature as not to damage the material of the tapestry, and round the edges mouldings were placed so that the tapestries were completely framed. Some pillars were set up, and between them panels were introduced, and were painted a buff colour so as to set off the tapestries more plainly. In this way it might have appeared to any one looking at the tapestries that they formed the centre of the panels. But they were in fact simply resting in front of the wall-paper, and the so-called panels put up at the side of them only filled up the space which was not occupied by the tapestries. The tenant for life died. The question arose whether the tapestries had become attached to the freehold and passed with it to the remainderman.

**HELD**—that there was nothing in the nature of the attachment which pointed to any intention to dedicate these tapestries to the house; that they had not become part of the house; that they were never intended in any way to become part of the house; and that they formed part of the personal estate of the tenant for life, and were removable by her executor.

Decision of C. A., *sub nom. In re De Fulbe* ([1901] 1 Ch. 523; 70 L. J. Ch. 286; 49 W. R. 455; 84 L. T. 273; 17 T. L. R. 246) affirmed.

**LEIGH v. TAYLOR**, [1902] A. C. 157; 71 L. J. Ch. [272; 50 W. R. 623; 86 L. T. 239; 18 T. L. R. 293—H. L. (E.).

**13. What constitutes Settlement—Merger of Settlor's Life Estate in the Fee—Jointress and Portioners—"Tenant for Life"—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 5.]—A husband, upon his marriage, settled certain lands to his own use for life, with remainder to use that, if his wife should survive him, she might receive a jointure of £400 a year, and subject and charged as aforesaid to the use of the trustees for the term of 100 years, to commence from the death of the plaintiff, upon**

**General—Continued.**

trust to raise portions for the children of the marriage, and subject thereto to the use of the husband in fee simple.

**HELD**—that, notwithstanding the merger of the life estate, this was a “settlement” within the meaning of sect. 2, sub-sect. 1, of the Settled Land Act, 1882, by which lands stood for the time being limited to or in trust for persons by way of succession, and the husband was the tenant for life of the land within the meaning of sub-sect. 5.

**IN RE MARSHALL'S SETTLEMENT, MARSHALL** [r. MARSHALL, [1905] 2 Ch 325, 74 L. J. Ch. 588, 54 W. R. 75; 93 L. T. 246; 21 T. L. R. 678—Eady, J.

**14. “Enfranchisement”—Meaning of—Leasehold—Mortgage of Settled Land for “Enfranchisement”—Purchase of Freehold Reversion of Leasehold—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 18, 21 (6).—**The term “enfranchisement” used in sect. 18 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), includes the acquisition of the freehold reversion of leasehold land.

The trustees of settled leasehold land were therefore authorised by the Court to raise money under sect. 18 by mortgage of the leasehold land in order to purchase the freehold reversion under sect. 21 (6).

**IN RE BRUCE, HALSEY v. BRUCE, [1905] 2 Ch. [372; 74 L. J. Ch. 578; 54 W. R. 60; 93 L. T. 119—Kekewich, J.**

**II. CAPITAL MONEYS.****(a) Improvements.****(i.) In General.**

**15. Application of “Capital Money” — Improvement Rent-charges—Redemption—Payment by Tenant for Life for Reduction of Interest—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (vi.) (xx)—Settled Land Act, 1887 (50 & 51 Vict. c. 30), s. 1.—**A tenant for life of settled estates obtained a transfer of improvement rent-charges by which a reduction of interest on the charges was effected.

In order to gain the consent of the transferors to the transfer, he paid them out of his own moneys £915.

**HELD**—that the repayment of the £915 to the tenant for life by the trustees of the settlement out of capital money come into their hands could not be held to be money expended in “redeeming,” or “otherwise providing for the payment of” rent-charges within the Settled Land Act, 1887, s. 1.

The replacing of thatch with galvanised iron roofing is an improvement within the Settled Land Act, 1882, s. 25 (xx.), on which capital money may be spent.

*Seem*, the erection of new fences partly in place of old fences and partly to divide a park

is an improvement within the Settled Land Act, 1882, s. 25 (vi.).

**IN RE VERNEY'S SETTLED ESTATES, [1898] 1 Ch. [508; 67 L. J. Ch. 243, 78 L. T. 191; 46 W. R. 348—Kekewich, J.**

**16. Estates in England and Ireland included in one Settlement—Proceeds of Sale of Land in Ireland applied to Improvement of English Estate—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. 3.—**Where estates are included in one settlement, and the trusts upon which they are settled are the same, the fact that one property is situate in Ireland and the other in England makes no difference with regard to the question whether capital money in the hands of the trustees arising from the sale of land in Ireland is applicable for the improvement on the estate in England.

*In re Mundy's Settled Estate* ([1891] 1 Ch. 399; 64 L. T. 29) applied.

**IN RE EYRE COOTE, COOTE v. CADOGAN, (1899) [81 L. T. 535—North, J.**

**17. Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 57, sub-s. (2)—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15.—**Having regard to the terms of sect. 57, sub-sect. (2), of the Settled Land Act, 1882, the Court has jurisdiction under sect. 15 of the Settled Land Act, 1890, to make an order directing capital money to be applied in or towards payment for improvements unauthorised by the terms of the Settled Land Act, 1882, but authorised by the settlement.

**IN RE EARL OF EGMONT'S SETTLED ESTATES** [(1), *EGMONT v. LEFROY*, (1900) 16 T. L. R. 380—Byrne, J.

**18. Mansion-house — Repairs — Salvage — Application of Capital Money to—Jurisdiction to Sanction.—**The jurisdiction of the Court to sanction expenditure in the repair of settled property out of capital is to be exercised, if at all, only where a case of salvage is clearly made out.

*In re De Teissier's Settled Estates* ([1893] 1 Ch. 153, 165; 62 L. J. Ch. 552, 41 W. R. 186; 68 L. T. 275; 3 R. 103—Chitty, J.), observations in approved.

**IN RE WILLIS, WILLIS v. WILLIS, (1901) 50 [W. R. 70, 85 L. T. 436—C. A.**

**19. Expenditure allowable out of Capital—Sanitary Improvements—New Drainage System—Engine-house in connection with Light Installation—Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 25 (xii), (xvii).—**Where the whole system of drainage in a mansion-house is defective, the cost of a new and complete system may be paid for out of capital, though certain items, if they stood apart, would be regarded as a tenant's alterations made for his own convenience, and not as improvements within sect. 25. The erection of an engine-house for the purpose of an electric light installation is not an improvement

**Capital Moneys—Continued.**

within sect. 25 (xii.) which can be paid for out of capital.

IN RE LORD LECONFIELD'S SETTLED ESTATES, [1907] 2 Ch. 340; 76 L. J. Ch. 562; 97 L. T. 163; 23 T. L. R. 573—Kekewich, J.

**20. English Settlement—Land in Scotland—Power to lay out Money in Purchase of Land—Improvements on the Land in Scotland—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), ss. 21, 23, 33, and 1890 (53 & 54 Vict. c. 69), s. 13.]—An English settlement comprised some land in Scotland, and contained power to lay out capital moneys in purchase of real estate in England.**

HELD—that capital moneys might be applied to improvements on the Scotch settled land

IN RE GURNEY'S SETTLEMENT, SULLIVAN v. [GURNEY, [1907] 2 Ch. 496; 76 L. J. Ch. 609—Neville, J.

**21. Tenant for Life—Remainderman—Capital or Income—Leasehold Houses—Incidental Expenses and Outgoings—Drainage Expenses—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 25, 51, 56—Settled Land Act, 1890 (53 & 54 Vict. c. 69), ss. 13, 15.]—A testator gave his residuary estate to trustees on trust for conversion and investment then to pay the income in the manner therein directed to three persons as tenant for life, then to hold the estate for the children of one of them. The investment clause contained a power to invest on freehold ground-titles and power was given to the trustees to postpone the sale of any part of the estate. Part of the estate retained by them unsold consisted of three leasehold houses held for the residue of long terms, and upon these large sums had to be expended by the trustees in putting in modern systems of drainage.**

HELD—that the drainage expenses were improvements within the meaning of the Settled Land Acts and that under the circumstances they should be borne by capital, notwithstanding in the will the power of management and the provision for payment of rents, profits, and income to the tenants for life after payment thereof of all incidental expenses and outgoings.

IN RE THOMAS WEATHERALL v. THOMAS, [1900] 1 Ch. 319; 69 L. J. Ch. 198. 48 W. R. 409—Byrne, J.

**22. Leasehold Houses—Drainage—Tenant for Life—Expenses payable out of Capital or Income—Express Provision in Will as to how Expenses to be Borne—Scheme—Discretion of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13.]—A testator bequeathed leasehold houses of which he held long unexpired terms, to trustees upon trust that they should by and out of the rents and profits thereof pay the rents reserved by and perform the covenants and conditions contained in the leases, and subject thereto should hold the same upon trust for a tenant for life with remainders over. During the life of the tenant for life the sanitary authorities of the**

district served notices requiring repairs or improvement of the drainage of the houses. The work was done at a cost of £415 10s. 1d. The leases contained a covenant under which the lessee would have to do the work. The question was whether the £415 10s. 1d. ought to be paid out of capital of the settled property, or whether the same or any part of it ought to be paid out of income. For the purposes of the decision it was assumed that some part of the work was not mere repair, but would be an "improvement" within the Settled Land Acts.

HELD—that as the tenant for life was only entitled to the balance of the rents, income and not capital ought to bear the £415 10s. 1d., that the repairs and improvements could not be provided out of capital under the Settled Land Act, 1882, because they had been executed without first carrying in a scheme for their execution, and that the Court could not exercise its discretion under sect. 15 of the Settled Land Act, 1890, as the testator had expressly provided that these expenses should be borne by income.

Clarke v. Thornton ((1887) 35 Ch. D. 307; 56 L. J. Ch. 302. 35 W. R. 603; 56 L. T. 294—Chitty, J.) and In re Lord Stamford's Settled Estates ((1889) 43 Ch. D. 84, 58 L. J. Ch. 849, 38 W. R. 317, 61 L. T. 504—Stirling, J.) distinguished.

Countess of Cardigan v. Curzon-House ((1893) 9 L. L. R. 211) followed

IN RE PARTINGTON REIGH v. KASL, [1902] 1 Ch. 711; 71 L. J. Ch. 472; 50 W. R. 388. 86 L. T. 191. 13 T. L. R. 387—Buckley, J.

**23. Scheme for—Prospective Approval by Trustees—Tenant for Life—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (iii); s. 22 sub-ss. 1, 2, 7, ss. 25, 26, 53.]—Trustees for the purposes of the Settled Land Acts may approve a scheme by the tenant for life for the execution of improvements thereunder, although at the time of giving such approval they have not in their hands capital moneys for the execution of such improvements, and when, after such approval, the tenant for life, with the knowledge of such trustees, has expended money for such purpose, it is lawful for the trustees, if such early expenditure is for the advantage of all parties concerned, and subject to the proper certificate being obtained to reimburse him out of capital moneys which may subsequently come to their hands.**

In re Millard's Settled Estates ((1893) 3 Ch. 116; 62 L. J. Ch. 761; 41 W. R. 577, 69 L. T. 202—C. A.) distinguished.

IN RE DUKE OF NORFOLK'S PARLIAMENTARY ESTATES, DUKI. OF NORFOLK v. LORD PERRIES, [1900] 1 Ch. 461. 69 L. J. Ch. 236. 48 W. R. 328; 82 L. T. 613; 16 T. L. R. 150—Byrne, J.

**24. Scheme for Improvements by Trustees during Minority—Approval of the Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38) ss. 26, 59, 60.]—Trustees of settled land, acting on behalf of an infant tenant in tail male under the**

**Capital Moneys—Continued.**

Settled Land Act, 1882, ss. 59, 60, have power during the minority to prepare and approve on their own behalf as trustees a scheme of improvements under the Settled Land Act, 1882, s. 26 (1).

IN RE GREY'S COURT ESTATE, [1901] W. N. 60  
[—Farwell, J.]

**25. Improvements executed by Former Tenant for Life—Absence of Scheme—Reimbursement of his Estate after his Death out of Capital Moneys—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (10) (11)—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15.]**—A tenant for life expended certain moneys out of his own pocket upon certain improvements on the lands subject to the settlement, but no scheme had been approved prior to the execution of the improvements. After his death the trustees of the settlement applied to be allowed to recoup his estate out of capital moneys which came into their hands after his death by reason of a sale of a portion of the estates. They knew of and approved the improvements, but had made no scheme during his lifetime as they then had no capital moneys.

HELD—that such of the improvements as came within the Settled Land Acts, 1882 and 1890 might be paid for out of capital.

IN RE EARL OF LISBURN'S SETTLED ESTATES, [1901] W. N. 91—Kekewich, J.

**26. Money in Hands of Trustees—Jurisdiction of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26.]**—Where capital money is in the hands of the trustees of a settlement, and the tenant for life applies to the Court under sect. 26, sub-s. 2 (3), of the Settled Land Act, 1882, for an order directing or authorising the trustees to apply the capital money or some part thereof in repaying the tenant for life the sums paid by him in carrying out an improvement scheme authorised by the Act and approved by the trustees, the Court has a discretion in the matter, and will hear evidence as to whether the scheme is or is not an improvident one and has due regard to the interests of all parties.

IN RE KECK'S SETTLED ESTATES, [1904] 2 Ch. [22, 73 L. J. Ch. 262; 52 W. R. 562; 90 L. T. 113, 20 T. L. R. 156—Farwell, J.]

**27. Approval by Trustees of Settlement—Consideration to be taken into Account—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 25, 26, 53.]**—Where a scheme for the execution of an improvement has been submitted by the tenant for life of settled land to the trustees of the settlement for their approval under sect. 26 of the Settled Land Act, 1882, the discretion of the trustees is limited to seeing that the improvement is one authorised by sect. 25 of the Settled Land Act, 1882, as extended by sect. 13 of the Settled Land Act, 1890, and by the settlement, that the tenant for life is acting *bonâ fide* and on competent skilled advice as to the improvement proposed, the amount to be expended thereon, and the method of execution thereof, and that the tenant for life, in submitting the proposed improvement,

has regard to the interests of all parties entitled under the settlement as a trustee for them.

The trustees are not entitled to take into consideration the general policy which is being pursued by the tenant for life in improving the property, or such matters as the number of previous schemes and amount of money already expended, or the relation between the capital moneys in hand and the value of the estate.

IN RE THE EARL OF EGMONT'S SETTLED ESTATES (2), LEFROY v. THE EARL OF EGMONT, [1906] 2 Ch. 151; 75 L. J. Ch. 649; 54 W. R. 504; 95 L. T. 187; 22 T. L. R. 430—Warrington, J.

(ii.) "Additions and Alterations Reasonably Necessary."

**28. "Additions to Buildings" — Electric Lighting Installations—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (11).]**—Houses in a fashionable quarter of London were vested in the trustees of a settlement of long terms of years which had a considerable time to run and needed some system of lighting, either gas or electric light.

HELD—that electric lighting installations would be "additions" to the houses within the meaning of sect. 13 (11) of the Settled Land Act, 1890, and that the expenses might be sanctioned to be met from the capital money so far as related to the wiring of the houses, but the fittings must be provided for by the tenant for life.

IN RE FREAKE, LORD KINNAIRD v. FREAKE, [1902] 1 Ch. 97; 71 L. J. Ch. 20, 50 W. R. 237; 85 L. T. 454—Joyce, J.

**29. "Additions to Buildings" — Electric Lighting Installations with a View to Letting—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), s. 25; 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. (11).]**—There was a house situated near Uxbridge, and a tenant was minded to take it with electric light, but would not take it without electric light.

HELD—that the installation of electric light was within the words of sect. 13, sub-sect. (11), of the Settled Land Act, 1890, "reasonably necessary or proper to enable the same to be let," but that putting the electric wires into the house was not an "addition to" the building within that sub-section, as "additions" in the sub-section mean structural additions.

In re Gaskell's Settled Estates ([1894] 1 Ch. 485; 8 R. 67; 63 L. J. Ch. 243; 42 W. R. 219; 70 L. T. 554—Chitty, J.) followed.

In re Freake's Settlement ([1902] 1 Ch. 97; 71 L. J. Ch. 20; 50 W. R. 237; 85 L. T. 454—Joyce, J., No. 28, *supra*) lays down no general principle, but was decided on the particular facts.

IN RE CLARKE'S SETTLEMENT, [1902] 2 Ch. [327; 71 L. J. Ch. 593, 50 W. R. 585; 86 L. T. 653, 18 T. L. R. 610—Buckley, J.]

**30. Electric Lighting Installation—Building—Machines—Settled Land Act, 1890 (53 & 54**

**Capital Moneys—Continued.**

Vict. c. 69), s. 13 (ii.).]—Improvements in the nature of a complete electric lighting installation were made for the purpose of enabling a mansion-house to be let, an engine-room and accumulating room forming an entirely new building being erected. This building was filled up with a petroleum engine, a dynamo, an accumulator, a main switch-board with the necessary fittings and connections with the accumulator in the engine-room, and a main cable.

HELD—that the cost of the building would be allowed, but not of the other matters.

*In re Freake, Lord Kinnaird v. Freake* ([1902] 1 Ch. 97; 71 L. J. Ch. 20; 50 W. R. 237; 85 L. T. 454—Joyce, J., No. 28, *supra*) not followed. *IN RE GOSSLING, GOSSLING v. FREAKE*, (1902) [87 L. T. 62—Joyce, J.]

**31. Installation of Electric Light—Dynamo and House—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), s. 25, and 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. 2.]**—By sect. 13 of the Settled Land Act, 1890, "Improvements authorised by the Act of 1882 shall include the following—namely, (ii.) making any additions to or alterations in, buildings reasonably necessary, or proper to enable the same to be let"

HELD—that the provision of a dynamo and installation of electric light in a house did not come within the section. Additions to or alterations in buildings refer to something in the nature of a structural addition or alteration.

*Quære*, whether, if the point had been taken, the Court would have held the dynamo house to be within the section.

*In re Clarke's Settlement* ([1902] 2 Ch. 327; 71 L. J. Ch. 593; 50 W. R. 585; 86 L. T. 653; 18 F. L. R. 610—Buckley, J. No. 29 *supra*) and *In re Gaskell's Settled Estates* ([1894] 1 Ch. 185; 63 L. J. Ch. 213; 12 W. R. 219; 70 L. T. 551—Chitty, J.) approved.

Decision of Joyce, J. (87 L. T. 62) affirmed.

*IN RE BLAGRAVES SETTLED ESTATES, or RE "CALCOT PARK SETTLED ESTATES"* [1903] 1 Ch. 560; 72 L. J. Ch. 317; 51 W. R. 437; 88 L. T. 253; 19 T. L. R. 280—C. A.]

**32. "Alterations in Buildings"—Reasonably necessary and proper to enable the same to be let"**—*Intention to Let—Dry Rot—Re-flooring—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 21, sub-s. 1, 25, 26—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. 1, 15.]*—By sect. 13, sub-sect. ii, of the Settled Land Act, 1890 improvements authorised by the Settled Land Act 1882, include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let"

Trustees acquired as an investment a leasehold house in the City of London containing about 150 rooms let as separate offices to various tenants. There were thirty-three rooms in the basement. The floor of the basement became affected by dry rot, and it was found necessary

on different occasions to replace some of the boards. It was proposed to remove the floor of the rooms in the basement and to replace it with a solid floor of concrete covered with blocks over the whole basement. All the rooms with one exception were let.

HELD—that (1) the execution of such works fell within the words "alterations in buildings" within sect. 13, sub-sect. ii.; (2) the alteration was "reasonably necessary or proper" because it was a thing which, although not absolutely necessary, a reasonable and prudent owner of property, if he were the absolute owner, would do; (3) the alteration was proposed with a view "to enable the same to be let," as the trustees acquired the property a few months ago for the purpose of letting; (4) therefore the works constituted an improvement within the Settled Land Acts.

*In re De Tassier's Settled Estates* ([1893] 1 Ch. 153; 62 L. J. Ch. 552; 41 W. R. 186; 68 L. T. 275; 3 R. 103—Chitty, J.) and *In re Lord Gerard's Settled Estates* ([1893] 3 Ch. 252; 63 L. J. Ch. 23; 69 L. T. 393; 7 R. 227—C. A.) explained.

*STANFORD v. ROBERTS*, [1901] 1 Ch. 410; 70 L. J. Ch. 203; 49 W. R. 315; 83 L. T. 756—Buckley, J.]

**33. New Drainage System—Hot Water Supply—No Capital Moneys—Power to charge on the Property.**—A. was tenant for life under a will of house property, with remainder to B. in fee. One of the houses having become vacant, A. in order to let it, but without consulting B., employed a contractor to put in a bath and hot water supply and a new system of drainage with the result that the house was let at a higher rent. A. died shortly afterwards. The contractor, who as a creditor, had taken out administration to A. sought to have the cost of the works charged on the inheritance as being 'improvements' authorised by the Settled Land Acts. There was no capital money arising under the Acts.

HELD that even assuming the works were 'improvements' authorised by the Acts there was no power under the Acts to charge the cost of executing them on the inheritance.

*Semble*, the new system of drainage would be an alteration in buildings reasonably necessary or proper to enable the same to be let "within sect. 13 (ii) of the Act of 1890.

*Semble*, that the bath and hot water supply were also within the same sub-section.

*STANDING v. GRAY*, [1903] 1 Ir. R. 19—M. R.]

**34. Present Tenant likely to Leave if such Work not done—Reconstruction, Enlargement or Improvement—Dwellings available for Working Classes—Settled Land Acts, 1882 (45 & 46 Vict. c. 38) s. 25 (10) (20) and 1890 (53 & 54 Vict. c. 69), s. 13 (2)—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70) s. 71 (1) (b)."**—Where trustees have approved a scheme of improvements subject to the Court holding such improvements to be within the

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Act, the Court may consider the legal question, although the trustees have as yet no capital moneys available for the purposes of the scheme.

Where the trustees are satisfied that a yearly tenant will leave, unless certain additions and alterations are made to a house, the Court may sanction their being made out of capital as "proper to enable the same to be let."

Dwellings of a kind suitable for the working classes, but at the time occupied by a different class of tenants, are not "available for the working classes" within the meaning of sect. 74 (1) (b) of the Housing of the Working Classes Act, 1890.

Where it is proposed, at the expense of capital, to add to or alter buildings available for the working classes, it is not necessary to satisfy the Court that the work will not be injurious to the estate. The proviso in sect. 74 (1) (b) of the Act of 1890 applies only where it is proposed to erect new buildings.

IN RE CALVERLEY'S SETTLED ESTATES, [1904]  
[1 Ch 156; 73 L. J. Ch. 25; 52 W. R. 206; 89 L. T. 500—Farwell, J.]

**35. Rebuilding—Vineries and Glass Houses—Letting—Commission for obtaining Tenant—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (x.)—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (ii.).]**—Sect. 13 (ii.) of the Settled Land Act, 1890, which authorises the application of capital moneys in "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," does not apply to the substitution of an entire new building for an old one.

An agent's commission for obtaining a tenant of settled property for a short occupation term must be met out of income and not capital.

IN RE LEVESON-GOWER'S SETTLED ESTATES, [1905] 2 Ch. 95; 74 L. J. Ch. 540; 53 W. R. 524; 92 L. T. 836—Eady, J.

**36. Mill—Addition to Shafting—Agricultural Purposes—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), s. 25 (xii.) and 1890 (53 & 54 Vict. c. 69), s. 13 (ii.).]**—In sect. 25 (xii.) of the Settled Land Act, 1882, the words "other mills" are not general, but are restricted to mills for agricultural purposes, they do not include, therefore, a silk and cotton mill.

The lengthening of the main shaft of a silk and cotton mill so as to enable it to be driven by steam instead of by water alone is not an "addition to or alteration in" a building within sect. 13 (ii.) of the Settled Land Act, 1890.

IN RE HARRINGTON'S (EARL) SETTLED ESTATES, (1906) 75 L. J. Ch. 460, 94 L. T. 623—C. A.

**(iii.) Rebuilding Mansion-house.**

**37. Dry Rot—Salvage—Developing Estate—Expenses of Sewers, Paving and Flagging New Streets—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. (ii.); s. 25—Settled Land Act,**

1890 (53 & 54 Vict. c. 69), s. 13, sub-s. (iv.).]

A mansion-house on a settled estate, which was of considerable magnitude, was affected with dry rot, and it was impossible to ascertain for some time how far the dry rot had extended, and it was afterwards found to be much larger than any one anticipated. The result was that the mansion-house had been really rebuilt. Some additions had been made and modern improvements introduced. Expenses had been incurred by the local authority in sewerage, paving, and flagging new streets on a part of the settled land for the purpose of improving and developing the same as a building estate and were charged under statutory powers on the land. There were capital moneys in the hands of the trustees representing the proceeds of sale of part of the settled land.

**HELD**—that there was of necessity a rebuilding of the mansion-house, that it was impossible to find out how much of the money had been expended in salvage proper and no sum could be allowed therefor; that an amount equal to one-half the rental of the settled land of the capital moneys in the hands of the trustees should be applied in the rebuilding under sect. 13, sub-s. (iv.), of the Settled Land Act, 1890, and that the trustees should repay to the tenant for life so much of the instalments paid by him and should pay off the remaining sums due to the local authority to the extent of capital only, no interest being allowed in either case.

IN RE LEGH'S SETTLED ESTATE, [1902] 2 Ch. [274; 71 L. J. Ch. 668; 66 J. P. 600; 50 W. R. 570; 86 L. T. 884—Kekewich, J.]

**38. New Water Supply—"Annual Rental of the Settled Land"—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), s. 25, sub-s. 13, and 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. 2, 4.]**—Whether proposed structural work is a "rebuilding" of a mansion-house within sect. 13, sub-sect. 4, of the Settled Land Act, 1890, or merely an addition to or alteration in the house within sect. 13, sub-sect. 2, is a question of fact in each case.

In order to ascertain the "annual rental" of the settled land within the meaning of sect. 13, sub-sect. 4—which limits the sum to be applied in rebuilding the mansion-house to one-half of the annual rental of the settled land—the cost of repairs ought not to be taken into account.

Capital moneys may be applied for the purpose of obtaining a new water supply to a mansion-house.

IN RE KENSINGTON SETTLED ESTATES, (1906) [21 T. L. R. 351—Eady, J.]

**39. New Drainage and Water Systems—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), ss. 21 (ii.), 25, and 1890 (53 & 54 Vict. c. 69), s. 13 (iv.).]**—Upon the application of a tenant for life, who was willing to pay out of his own pocket £6,000, the Court sanctioned the expenditure of £12,500 out of capital moneys for rebuilding the mansion-house (£12,500 being one-half the annual rental of the settled property), and also £4,500 for improvements.

The improvements included new drainage and

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water systems for house and stables; rebuilding bridge over moat and a saw mill; the erection of a lodge and new gates.

The rebuilding of the house included alteration of entrances, rebuilding of walls and roof, raising of attic, new dining-room and servants' hall, reconstruction of kitchen, fixing of bells, telephone and lift, and also provision of stabling with coachmen's rooms.

IN RE DUNHAM MASSEY SETTLED ESTATES,  
[1906] 22 T. L. R. 595—Kekewich, J.

40. *Expenditure Allowable out of Capital—Fire Hose and Hydrants—Garden Walls—Reconstructed Walls—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), s. 25, and 1890 (53 & 54 Vict. c. 69), s. 13 (iv.).*—A laundry 250 yards from a mansion-house is not part of it, and cannot be rebuilt out of "capital moneys" under sect. 13 (iv.) of the Settled Land Act, 1890.

The following, however, may be treated as "improvements" properly payable out of capital moneys:—(a) Hydrants and fire hose for the protection of the mansion-house under sect. 25 (xii) of the Act of 1882, (b) garden walls enclosing additional ground under sect. 25 (vi), and (c) garden walls replacing old walls, as being a "reconstruction" within sect. 25 (xx.).

IN RE EARL OF DUNRAVEN'S SETTLED ESTATES,  
[1907] 2 Ch. 417, 76 L. J. Ch. 591, 97 L. T. 336, 23 T. L. R. 691—Kekewich, J.

**(b) Investment.**

41. *Practice—Settled Estates Act, 1877, s. 50—Settled Land Act, 1882, s. 33—Money in Hands of Trustees—No Tenant for Life—Married Woman—Dispensing with Examination.*—T., by his will, devised real estate to trustees upon trust to apply the whole, or such part as they should think fit, for the benefit of his son C. E. T. or his wife or children in the usual form of a discretionary trust to protect the son's interest against bankruptcy, with remainders over. The trustees had no power of sale. They presented a petition under the Settled Estates Act, 1877, for approval of a conditional contract for sale, and payment of the purchase-money to them, with leave to invest it as capital money arising under the Settled Land Act. The testator's son was living, and consented. His wife was made a consenting party to the petition in respect of the interest which she might have under the discretionary trust. Sect. 50 of the Settled Estates Act, 1877, requires all married women who consent to any application to be separately examined.

Held—that sect. 33 of the Settled Land Act applied, and the money might be invested as capital money under that Act, though there was no tenant for life to exercise the option given by that section; and that, though the words of sect. 50 of the Settled Estates Act are imperative, the Court can dispense with the examination of a married woman whose interest is remote and represented by trustees.

*Re Halliday* (12 Eq. 199) followed.

IN RE TESSYMAN'S TRUSTS, (1898) 77 L. T. 484  
[—North, J.]

42. *Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 33—Money Liable to be Laid Out in the Purchase of Land—Application as Capital Money.*—By a marriage settlement lands were conveyed to trustees in trust for sale, with a power to invest the proceeds in Government and other personal securities, and it was declared that it should be lawful for the trustees, with the consent of the husband and wife, who were successively tenants for life of the trust funds, to call in or sell any investments, and to invest the proceeds in the purchase of freehold hereditaments to be conveyed to them upon trust for sale, and to hold the proceeds upon the trusts of the settlement. The husband, who was tenant for life, desired to have some improvements made upon the land which remained unsold, and took out this summons asking for leave to submit a scheme of improvements under sect. 26 of the Settled Land Act, and for a declaration that the trustees had power under sect. 33 to sell investments which they held upon the trusts of the settlement and apply the proceeds in making the improvements.

Held—that the words "money which is liable to be laid out in the purchase of land" in sect. 33 of the Act do not mean which must be, but which may be, so laid out, and that the trustees had power to raise money out of the investments in their hands for the improvements.

IN RE SOLTAN'S TRUSTS, [1898] 2 Ch. 629, 68 L. J. Ch. 39; 79 L. T. 335, 68 L. J. Ch. 39—North, J.

43. *Employment of Broker—Right of Choice of Broker by Trustees or Tenant for Life—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 22, sub-s. 2, 31*—Upon an investment of capital moneys arising under the Settled Land Acts, the trustees may select their own solicitors and their own brokers, and a tenant for life is not entitled to direct the trustees to employ a particular broker chosen by himself.

IN RE DUKE OF CLEVELAND'S SETTLED ESTATES, [1902] 2 Ch. 350; 71 L. J. Ch. 763, 50 W. R. 508; 86 L. T. 678; 18 T. L. R. 610—Joyce, J.

44. *Direction of Tenant for Life to Trustees—Powers and Duties of Trustees—Title, Value, and Form of Security—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (1); s. 22, sub-s. 2*—Upon a direction under sect. 22, sub-s. 2, of the Settled Land Act, 1882, given by the tenant for life under a settlement to the trustees of the settlement for the purposes of the Settled Land Act, 1882, to invest capital moneys in their hands as such trustees as aforesaid upon the security of a mortgage referred to in such direction, the trustees as aforesaid are not bound to invest the same accordingly, though such mortgage purports on the face of it to be such a mortgage as is by the settlement or by law authorised as an investment, unless and until they are satisfied that the direction of the tenant for life with reference to any particular investment or mortgage has been given upon a proper investigation as to title, and a proper report as to the value of the proposed security, and upon proper advice as to



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the form of the mortgage; but upon being so satisfied, the trustees are bound to make such investment.

Order of Cozens-Hardy, J. ([1901] 2 Ch. 790; 71 L. J. Ch. 68; 50 W. R. 150; 85 L. T. 543) varied.

IN RE HOTHAM, HOTHAM v. DOUGHTY, [1902] 2 Ch 575; 71 L. J. Ch. 789; 50 W. R. 692; 87 L. T. 112—C. A.

**45. Duty and Right of Trustees to Inquire into Title and Value—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 42, 53.]**—Although sect. 53 of the Settled Land Act, 1882, indirectly imposes upon a tenant for life the duty of inquiring into the title and value of investments proposed by him for capital moneys arising under the Act, and sect. 42 indemnifies the trustees in the case of the purchase of land, provided that they satisfy themselves that the conveyance is in proper form, yet it must not be assumed that they are not entitled (or even bound), in some cases, to make inquiries.

A tenant for life proposed to invest capital moneys in the purchase of freehold ground-rents, and to accept a twenty-two years' title thereto commencing with a mortgage.

HELD—that it was not unreasonable of the trustees to ask for information as to the value of the security or to make certain requisitions as to the title.

IN RE THEOBALD, (1903) 19 T. L. R. 536—[Kekewich, J.]

**46. Trustees having Capital Moneys in Hand—Direction by Tenant for Life as to Investment—Investment within Terms of Power, but undesirable—Jurisdiction of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 21, 22, 53.]**—A tenant for life requested the trustees to invest £2,600 in purchase of eight leasehold houses held for terms of over sixty years unexpired: he produced a favourable report from a surveyor. The trustees' surveyor reported that the houses were an undesirable investment at any price.

Farwell, J. held—(1) That where trustees are asked to make an investment within the terms of their powers, but undesirable, they are justified in bringing the matter before the Court by summons;

(2) That in such a case the Court will restrain a tenant for life from making such an undesirable (though authorised) investment upon the same principles as it would follow in the case of an ordinary trustee;

(3) That the trustees were not bound to act upon his request, even though made *bonâ fide*, and that in the particular case the Court was satisfied that the request was not made *bonâ fide*.

In re Lord Coleridge's Settlement ([1895] 2 Ch. 704; 44 W. R. 59; 73 L. T. 206—Chitty, J.) distinguished.

The C. A. affirmed his decision on the facts, two members of the Court also expressing their concurrence in his view of the law.

Decision of Farwell, J. ([1905] 2 Ch. 418; 74 L. J. Ch. 759; 54 W. R. 119; 93 L. T. 333) affirmed.

IN RE HUNT, BULTEEL v. LAWDESHAYNE, [1906] 2 Ch. 11, 75 L. J. Ch. 496, 94 L. T. 747—C. A.

**III. COMPOUND SETTLEMENTS.**

**47. Title—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), ss. 2, 20, 38; 1890 (53 & 54 Vict. c. 69), s. 4.]**—By will land was devised in strict settlement to A., B., and C. successively, with remainder to their first and other sons respectively in tail male, with remainders over. A. and C. were dead. B. was still living. A., B., and C. all executed jointure deeds under a power conferred by the settlement. That executed by A. was still in operation and constituted an existing charge on the property. The trustees had been appointed trustees for the purposes of the Settled Land Acts.

On a sale by B. under the powers conferred by those Acts, objection having been taken by the purchaser that trustees of the compound settlement must be appointed.—

HELD—that the tenant for life could give a good title, and the trustees for the purposes of the Settled Land Acts a good discharge for the purchase-money, and that accordingly the appointment of trustees of the compound settlement was unnecessary.

Re Tibbitts' Trusts ([1897] 2 Ch. 149) distinguished.

IN RE KECH AND HART'S CONTRACT, [1898] 1 Ch. 617; 67 L. J. Ch. 331; 78 L. T. 287; 46 W. R. 389—Stirling, J.

**48. Sale by Tenant for Life—Series of Settlements the last of which reserved to the Vendor the powers of a former Deed, but operated by way of family arrangement as an Assignment of the Life Estate—Trustees of Compound Settlement—Settled Land Act, 1884 (45 & 46 Vict. c. 38), ss. 2 (1), (3), (5), (8); 20 (2); 38, 45, 50—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 4.]**—Where there was an original settlement and several subsequent deeds dealing with the property, by the last of which (made in 1887) the powers conferred by a former deed on the tenant for life were reserved to him, but the same operated as an assignment of the life estate by way of family arrangement, it was objected by the purchaser on a sale by the tenant for life, that trustees of the compound settlement created by the original and subsequent settlements must be appointed.

HELD—that there was nothing in the Act of 1882 which prevented the trustees from receiving the purchase-money, simply because there had been subsequent dealings with the property, and that therefore their powers were not affected by the deed of 1887. That the true construction to be placed on sect. 4 of the Act of 1890 was, not that such a deed as that of 1887 was to be declared one of the instruments creating the settlement for all purposes, but that it was limited to purposes excluding the operation of

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sect. 50 of the Act of 1882, by which the powers of a tenant for life were not to prejudice an assignee for value without his consent, and that accordingly no trustees of the compound settlement were necessary.

IN RE DU CANE AND NETTLEFOLD'S CONTRACT,  
[1898] 2 Ch. 96, 67 L. J. Ch. 393, 78 L. T.  
458; 46 W. R. 523—Stirling, J.

**49. Several Deeds—Re-settlement—Power of Tenant for Life to convey free from Jointure and Portions—Title—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2 (1), 20 (1), (2), 50, 58.]**—By deed dated March 15th, 1861, the O estate was settled to the use of C. F. M. for life, with remainder to the use of his first and other sons successively in tail male. By a settlement dated August 7th, 1865, in exercise of a power reserved to him by the previous deed, C. F. M., on his marriage, appointed a rent-charge to his wife, and portions to his younger children, both secured by terms of years. By a disentailing assurance of January 28th, 1889, the O estate was disentailed. By a settlement dated January 30th, 1889, C. F. M. and his son appointed the O estate to the use of C. F. M. for his life, with remainders over. The life estate was not expressed to be in restoration or continuance of any estate in C. F. M.

**HELD**—that the settlement of January 30th, 1889, was not a settlement complete in itself, but, with the deeds of 1861, 1865, and 1889, formed a compound settlement within the meaning of the Settled Land Act, 1882, and that, therefore, C. F. M. could sell the O estate freed from the jointure and portions charged thereon.

*In re Marquis of Ailesbury and Lord Iveagh* [1893] 2 Ch. 345; 62 L. J. Ch. 713, 41 W. R. 644; 69 L. T. 101; 3 R. 440—Stirling, J.) approved.

There may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted of one of the deeds only.

*In re Du Cane and Nettlefold's Contract* [1898] 2 Ch. 96; 67 L. J. Ch. 393; 46 W. R. 523; 78 L. T. 458—Stirling, J., *supra*) approved.

The effect of sect. 50 of the Settled Land Act, 1882, is that the statutory power of sale is not a power annexed to the estate of a tenant for life in any such sense as that in which powers were considered to be annexed to an estate by any method of conveyancing arising out of the private deeds of the parties. It is a power vested by the Act once for all in a tenant for life, which remains vested in him, incapable of being assigned or released, and continues exercisable by him notwithstanding any assignment by him of his estate; so that the statutory power of sale remained in C. F. M. notwithstanding his execution of the deeds.

IN RE MUNDY AND ROPER'S CONTRACT, [1899]  
[1 Ch. 275; 68 L. J. Ch. 135, 47 W. R. 226;  
79 L. T. 583—C. A.]

**50. Settlement, Disentailing Deed and Re-settlement—Trustees for Purposes of Settled Land Acts—Mode of Appointment—Trustee—Suitability—Solicitor to Tenant for Life—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1) (8); s. 38.]** An ordinary settlement of estates was made in 1863, giving a life estate to A., followed by estates tail to his sons. In 1898 his eldest son B. joined with A. in disentailing the property, which was then re-settled on A. for life, with remainder to B. for life, &c. The deed of 1863 and the two deeds of 1898 thus formed a compound settlement, and, as it was desired that there should be trustees of the settlement for the purposes of the Settled Land Acts, a declaration was inserted in the re-settlement of 1898 to the effect that the trustees thereof should be trustees of the compound settlement for the purposes of the Settled Land Acts. A. having died, and B. being desirous of selling some of the property under his statutory powers, it became necessary to decide whether the trustees had been appointed in such a way as would satisfy the terms of sect. 2 (8) of the Act of 1842—"the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of the Act . . ."

**HELD**—that the Court must appoint trustees *de novo*: it does not follow that in no case can trustees of a compound settlement be validly appointed by one only of the deeds composing it, but in the present case the appointment could not be regarded as valid, being made by the last deed of three, and one to which some of the beneficiaries under the settlement were not parties. The trustees of the deeds of 1863 and 1898 were the same, and included B.'s solicitor.

**HELD**—that he should not be appointed one of the trustees for the purposes of Settled Land Acts, there being no good reason for breaking the usual rule against appointing as trustee the solicitor to the tenant for life.

*In re Kemp's Settled Estates* ((1883) 24 C. D. 485; 31 W. R. 930; 49 L. T. 231—C. A.) followed.

IN RE SPENCER'S SETTLED ESTATES, [1903] 1  
[Ch. 75; 72 L. J. Ch. 59; 51 W. R. 262; 88  
L. T. 158—Byrne, J.]

**51. Will, Disentailing Deed, and Re-settlement—Original Life Tenancy Expressly Restored—Under which Settlement Title can be made—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1)]**—Under the will of a Mrs. W. estates were devised to C. W. for life, with remainder in tail to his sons in order of age. In 1895 C. W. and his eldest son executed a disentailing deed and a re-settlement, by the latter of which C. W. took a life estate "in restoration and by way of continuation" of his former life estate under the will of Mrs. W. C. W. was now intending to sell some of the settled property, and the question arose whether he could make a good title under the deed of re-settlement alone, or whether trustees must be appointed of the compound settlement for the purposes of the Settled Land Acts.

**HELD**—that the compound settlement created by the will, a jointure deed previously executed

**Compound Settlements—Continued.**

thereunder, the disentailing deed, and the re-settlement deed, was the only settlement under which C. W. could sell, inasmuch as the old life estate was still in existence.

*In re Wright to Marshall* ((1884) 28 Ch. D. 93; 54 L. J. Ch. 60; 33 W. R. 804; 51 L. T. 781—Pearson, J.) and *In re Mundy and Roper's Contract* ([1899] 1 Ch. 275; 68 L. J. Ch. 135, 142; 47 W. R. 226; 79 L. T. 583—C. A., No. 49, *supra*) followed.

IN RE CORNWALLIS-WEST AND MUNRO'S CONTRACT, [1903] 2 Ch. 150; 72 L. J. Ch. 499, 51 W. R. 602, 88 L. T. 351—Farwell, J.

**52. Re-settlement—Original Settlement still existing—Power to Sell—Trustees—Settled Land Acts, 1882** (45 & 46 Vict. c. 38), ss. 2, 50, and 1890 (53 & 54 Vict. c. 69), s. 4.]—A. was tenant for life of settled estates under a will. Subsequently the property was disentailed, re-settled and appointed, so as to extinguish A.'s life estate, but the will still subsisted as a settlement in respect of a jointure and portions charged upon the property under powers contained in the will.

A. desired to sell the property.

HELD—that he could sell under the will alone, without any necessity for appointing trustees of the compound settlement consisting of the will and the later deeds.

*In re Mundy and Roper's Contract* ([1899] 1 Ch. 275; 68 L. J. Ch. 135; 47 W. R. 226; 79 L. T. 783—C. A., No. 49, *supra*) followed.

*In re Cornwallis-West and Munro's Contract* ([1903] 2 Ch. 150; 72 L. J. Ch. 499; 51 W. R. 602; 88 L. T. 351—Farwell, J., No. 51, *supra*) distinguished.

IN RE LORD WIMBORNE AND BROWNE'S CONTRACT, [1904] 1 Ch. 537; 73 L. J. Ch. 270; 52 W. R. 334; 90 L. T. 540—Eady, J.

**53. Trusts to Pay Annuities—Remainder in Trust for Settlor—Will of Settlor—Confirmation of Trusts—Residue in Trust for Sale—Settlement of Proceeds—Settled Land Acts, 1882** (45 & 46 Vict. c. 38), ss. 2, 20, 63, and 1884 (47 & 48 Vict. c. 18), s. 7.]—A settlor settled property in trust to pay certain annuities with remainder to himself.

By his will he confirmed the trusts and left all his residuary estate to other trustees upon trust for sale and conversion.

HELD—that the deeds constituting the original settlement and the will together formed a compound settlement under which a life tenant could sell discharged from the annuities.

IN RE PHILLIMORE, PHILLIMORE v. MILNER, [1904] 2 Ch. 460; 73 L. J. Ch. 671; 52 W. R. 682; 91 L. T. 256—Farwell, J.

**54. Land settled by Will—Other Land settled by Deed to same Uses subject to Incumbrances—Discharge of Incumbrances—Appointment of Trustees to Mortgage—Settled Land Act, 1882** (45 & 46 Vict. c. 48), ss. 2, 45—Settled Land

Act, 1890 (53 & 54 Vict. c. 90), ss. 11, 16.]—Estates were settled by will in 1870. In 1904 the tenant for life bought a smaller property lying in the middle of the settled estates for £7,800. He provided £800 and borrowed the balance on mortgage of his purchase. The purchase was admittedly most beneficial. He settled this land upon the same trusts as the will, but subject to the mortgage and to repayment to himself of his expenses in the matter.

The deed of 1904 gave power to the trustees thereof to satisfy the incumbrances and expenses above referred to by sale or mortgage, but it was desired to raise the amount by mortgage on the entire estates.

HELD—(1) that the trustees of the deed having only a limited power exercisable for certain purposes and not a general power, were not trustees for the purposes of the Settled Land Acts; but

(2) That under the circumstances they ought to be appointed trustees of the compound settlement for those purposes.

*In re Lord Stafford's Will* ([1904] 2 Ch. 72; 73 L. J. Ch. 561; 52 W. R. 536; 91 L. T. 229; 20 T. L. R. 61—Warrington, J., No. 83, *infra*) followed; and

(3) That the Court would sanction a mortgage of the entire settled estates to pay off the incumbrances.

IN RE COULL'S SETTLED ESTATES, [1905] 1 Ch. 712, 74 L. J. Ch. 378; 53 W. R. 504; 92 L. T. 616—Kekewich, J.

**55. Appointment—Settled Land Act, 1882** (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 8.]—Limited owners with joint absolute dominion over the estates comprised in a strict settlement (*e.g.*, the life tenant and tenant in tail male in immediate remainder of estates unfettered by any charges or powers of charging) can resettlement the estates as they please; and if they choose to keep the original settlement alive by a sufficient partial restoration of the subsisting uses, trusts and powers, they can appoint Settled Land Act trustees of the compound settlement constituted by the settlement and resettlement.

*In re Spencer's Settled Estates* ([1903] 1 Ch. 75; 72 L. J. Ch. 59; 51 W. R. 262; 88 L. T. 158—Bryne, J., No. 50, *supra*) distinguished.

IN RE SPEARMAN'S SETTLED ESTATES, [1906] 2 Ch. 502; 75 L. J. Ch. 829; 95 L. T. 605—Eady, J.

**56. Will—Power to Jointure—Exercise of Power by Deed—Appointment of Trustees.]—**Where lands have been settled by a will with power to the tenant for life to charge the lands by way of jointure, and the power is exercised by the tenant for life by a deed, the will and deed do not together constitute a "compound" settlement. In such a case it is only necessary to appoint trustees (for the purposes of the Settled Land Act) of the will.

IN RE HAYES' SETTLED ESTATES, [1907] 1 Ir. R. [88—Barton, J.

## IV. CONSTRUCTION AND OPERATION.

## (a) General.

**57. Expired Term of Years to raise Portions—Intention to Charge.**—By a post-nuptial settlement, dated in 1786, executed in pursuance of marriage articles dated in 1749, a term of years was created, the trusts of which were to raise a sum as portions for younger children. The term expired in 1892, at which time one of the portions had not been raised. The judge, being of opinion that there was in the deeds no expressed intention to charge the portions independently of the term, nor any ambiguous expression from which such intention could be inferred.—

HELD—that the term having come to an end, the portion was not now raisable.

IN RE MARSHALL'S ESTATE, [1899] 1 Ir. R. 96—  
[Ross, J.]

**58. Life Estate to Husband and Wife—Power of Appointment—In Default of, to Children equally—Shares to be Vested in and Paid to them on Attainment of Age, or Marriage—Payment deferred till Death of Parents—Unappointed Residue—Death of Son in Parents' Lifetime, of Age and Intestate—Period of Vesting—Absolute Interest**—By indenture, dated April 16th, 1844, certain trust funds were settled on the husband and wife for life, with power of appointment, and in default of appointment, in trust for the children equally, who being a son should attain twenty-one or die under that age leaving issue, or being a daughter should attain that age or marry, such shares to be vested in and paid to them respectively, at the same age, day or time, if the same should happen after the decease of their parents; but if the same should happen in their lifetime, then immediately after the decease of the survivor. The settlement contained the usual hotchpot clause. There were two children of the marriage, a son and a daughter. On the occasion of the daughter's marriage, one moiety of the trust funds was appointed to her by her parents, and was settled on certain trusts by her marriage settlement. The parents likewise appointed a further portion of the trust funds in favour of the son, which, however, did not exhaust the whole. The son died in the lifetime of his parents, having attained age, unmarried and intestate. One of the trustees of the settlement having taken out an originating summons to have the question determined, whether, on the construction of the settlement, an absolute interest in the unappointed residue became vested in the son on his attaining age, or whether the period of vesting was contingent on his surviving his parents.—

HELD—that the postponement of enjoyment was solely for the convenience of the estate, there being nothing to show that the postponement was intended to depend on any event personal to the children themselves; that, consequently, the son, having attained age, had acquired an absolute interest in the unappointed residue, and that his personal representative was entitled to receive it.

DARLEY v. PERCEVAL, [1900] 1 Ir. R. 129—V.-C.

**59. Real Estate—Conversion—Power or Trust for Sale—Ultimate Limitation to Husband and his Heirs—Declaration that Lands should be considered Personal Estate.**—By marriage settlement fee-simple lands and certain securities were vested in trustees, upon trust, as to the lands, that the trustees should, upon such application, or with such consent, or at such discretion, as thereafter mentioned, sell the same, and hold the sale moneys and the rents until sale upon the trusts thereafter declared; and it was declared that the trustees should stand seised and possessed of lands, sale moneys and securities, upon trust to permit the same to remain in their then state of investment, or should on the application, or with the consent in writing of the husband and wife, or the survivor, and after the death of the survivor, at the discretion of the trustees, call in the securities and receive the moneys to arise therefrom, or arising from a sale of the lands, if sold, and invest the same as therein mentioned, and pay the rents of the lands sold, and the interest of the sale moneys, and securities to the husband, &c., with an ultimate limitation as to the lands, or sale moneys, and portion of the securities, for the husband, his heirs, executors administrators, and assigns. The settlement contained a power to lay out the trust funds in the purchase of hereditaments so as to be purchased, and the said lands should be considered for all the purposes of the settlement as personal estate only. The lands had been recently bought by the husband; part of the purchase-money was paid out of the wife's fortune, and the settlement contained provisions for securing the repayment of the same in certain events. The lands were not sold, and the ultimate limitation took effect.

HELD—that there was no conversion of the lands, and that they passed on the death of the husband, as real estate to his heir-at-law

MAGGWIKE v. MAGGWIKE, [1900] 1 Ir. R. 200—  
[V.-C.]

**60. Marriage Settlement—Jewish Marriage Contract or "Ketubah"—Effect of**—Two Moorish Jews in Morocco signed a marriage contract, or "ketubah," by which the husband took the woman as his wife "according to the laws of Moses and Israel . . . and in accordance with the customs of the Jews exiled from Castile."

HELD, upon the evidence—that the "ketubah" was a settlement operating like an English settlement, and that under it children of the marriage gained a title to a reversionary interest belonging to their mother at the time of her marriage.

Ruling of Byrne, J. not disapproved by the C. A. when reversing his decision on another point.

MONTEFIORE v. GUEDALLA, [1903] 2 Ch. 26,  
[72 L. J. Ch. 412, 88 L. T. 496; 19 T. L. R.  
390—C. A.]

**61. Acts in pari materia—Estates Settled by Private Act—Power to Jointure—Later Enabling Act—Whether Power to Jointure by Will—**

**Construction and Operation—Continued.**

27 Hen. 8, c. 16.—*Bolton Estates Act*, 1863 (26 & 27 Vict. c. 6)]—A private Act of Hen. 8 prohibited alienation of certain settled estates except only "for the jointure of wife or wives for term of life or lives of any husband that hath or shall marry any of them." A private Act of 1863 recited this section, and went on to provide that the power of jointuring might be exercised after marriage as well as before. A tenant in tail in 1901 purported by will to appoint his interest in the estates to his wife for the residue of her life by way of jointure.

HELD—that he had power to do so and that neither fine nor recovery, nor in the present day a disentailing deed was necessary for the due exercise of the power.

A power to jointure by will could not, indeed, for historical reasons have been contemplated in 1535, but "an Act of late time shall be taken within the equity of an Act made long before", the principle laid down in *Vernon's Case* ((1572) 4 Co. Rep. 1, 4a) applied and followed.

Decision of Joyce, J. (72 L. J. Ch. 55) reversed.

IN RE BOLTON ESTATES ACT, *RUSSELL v. MEYRICK*, [1903] 2 Ch. 461; 72 L. J. Ch. 605; 52 W. R. 87; 88 L. T. 850—C. A.

62. *Gift to A for Life and at his Death to "children or child or remoter issue"—Substitutionary gift.*—A settlement gave property to "all the children or any the child or remoter issue" of A in equal shares upon the happening of certain contingencies.

HELD—a substitutionary gift; and that a child living upon the happening of the contingencies took to the exclusion of his issue.

*Re Cleland's Trusts* (1882) 7 L. R. Ir. 74) followed.

IN RE LUND'S SETTLEMENT, *STANFIELD v. KEENE*. 89 L. T. 606—Farwell, J.

63. "*Securities*"—*Power to Vary—Purchase of Ground Rents—Power to Sell.*]—Trustees under a settlement had power to sell certain existing investments and invest the proceeds in (*inter alia*) "the purchase of freehold ground rents." They had power "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature."

They had purchased freehold ground rents, and the tenant for life now agreed to sell the same.

HELD—that the word "securities" included anything to be purchased under the power, and that the power to vary and transfer enabled the trustees to sell the ground rents, and that they were therefore trustees for the purpose of the Settled Land Act.

IN RE TAPP AND LONDON AND INDIA DOCKS [CO.'S CONTRACT, (1905) 74 L. J. Ch. 523; 92 L. T. 829—Kekewich, J.

64. *Life Estate and Remainder in Fee to Husband—Gift over on Insolvency or Alienation.*]—By a marriage settlement the husband's lands

were settled upon trust to pay to him the rents, &c., during the term of his natural life "except in the events hereinafter stated", and after his death, subject to an annuity for his wife, upon trust for the husband. The wife's lands were settled upon trust to pay the rents to her for her life, and after her death, in case her husband should survive her and leave children of the marriage living (which event happened), upon trust to pay the rents to the husband during his life "except in the events hereinafter provided"; and after the death of the survivor upon trust for the children of the marriage, as the husband and wife should jointly appoint; and in default thereof, in equal share. The settlement contained a proviso that in case husband should, during the lifetime of his wife or any of the children, incur the lands, or become bankrupt or insolvent, the lands should remain vested in the trustees upon trust for the wife for life, and after her death in trust for the children of the marriage as was hereinbefore expressed concerning the wife's lands. There were several children of the marriage. The husband made an arrangement with his creditors.

Part of the husband's property included in the settlement was the sub-lessee's interest in the lands of B., held for lives renewable for ever, and also the lands of M. held in fee-simple. The husband purchased the interest of the sub-lessee, and accepted a fee-farm grant from the head lessor. The husband mortgaged to the Hibernian Bank his interest in B. and M.

HELD—that in the events which had happened the gift over took effect not only as regarded the life estate, but also as regarded the estate in remainder.

IN RE WALSH'S ESTATE, [1905] 1 Ir. R. 261—[Ross, J.]

65. *Executory Marriage Articles—Covenant to convey Real Estate to use of Children of Marriage as Tenants in Common—Death of Son under 21—Survivorship.*]—W, in consideration of his intended marriage with B., covenanted to settle and convey real estate to the use of himself for life, with remainder to the use that B. should have a jointure, with remainder to the use of their children in equal shares as tenants in common and their respective heirs and assigns.

A son died unmarried and under age in W.'s lifetime.

HELD—that the other children, who had all attained 21, were entitled to the whole estate subject to the life interest and jointure.

HERRING-COOPER v. HERRING-COOPER, [1905] 1 Ir. R. 465—Barton, J.

66. *Covenant to Settle After-acquired Property—Tenant for Life—Irish Land Acts—Covenant for Settling After-acquired Property—Interpretation.*]—The bonus given to the vendor of real estate in Ireland under sect. 48 of the Irish Land Act, 1903 (3 Edw. 7, c. 37), is so closely connected with the land that it must be regarded as an interest in the land. A. was tenant for life of real estate under a deed of settlement of real estate, and also tenant for life under a deed

**Construction and Operation—Continued.**

of settlement of personalty containing a covenant to settle after-acquired property, with certain specified exceptions, including (*inter alia*) the real estates settled by the realty settlement, or "A's estate or interest" therein. Part of the real estate was situate in Ireland, and under the Irish Land Act, 1903, was purchased by the occupying tenants for a gross sum of £340,380, with the result that A was entitled, as vendor, to a bonus of £40,845 by sect. 48 of the said Act.

**HELD**—that this bonus was not subject to the covenant to settle after-acquired property contained in the personalty settlement, as it was an interest in real estate specifically excepted from the operation of the said covenant.

**HELD**, further, that, as it was not within the covenant, it belonged to A. for her sole use under sect. 3 of the Land Purchase (Ireland) Act, 1904.

*In re Ely's Estates* ([1904] Ir. R. 66) considered.

**IN RE ANNA'S TRUSTS ANNA v. BOURKE**  
[1905] 53 W. R. 150; 92 L. T. 13—  
Kekewich J

**67. "Survivors' read as others—*Stipital Survivorship*.**—Real estate was settled by deed in trust for seven brothers and sisters for their respective lives as tenants in common, with remainder to children attaining a certain age, &c. with a provision for accruer to "survivors and survivor" in the event of any one dying without issue. There was an ultimate remainder to the settlor in fee. Some of the tenants for life died childless.

**HELD**—(1) that the deed must be construed upon the same principles as a will.

*Cole v. Sewell* ((1818) 2 Il. L. C. 186) followed.

And (2) that the words "survivors and survivor" must be construed as "others or other."

*White v. Littlewood* (1872) L. R. 8 Ch. 70, 42 L. J. Ch. 216; 21 W. R. 131; 28 L. T. 123). *Lucena v. Lucena* ((1877) 7 Ch. D. 255; 17 L. J. Ch. 203; 26 W. R. 254; 37 L. T. 420—C. A.) and *In re Blitham* ([1901] 2 Ch. 169; 70 L. J. Ch. 518; 49 W. R. 183; 81 L. T. 199, *see WILLS*, 134, *Joyce, J.*) discussed.

**IN RE FRIEND'S SETTLEMENT, COLE v. ALLCOTT**, [1906] 1 Ch. 47; 75 L. J. Ch. 11; 54 W. R. 295; 93 L. T. 739—*Tarwell, J.*

**(b) Estate Clause.**

**68. Recitals—*Mortgage omitted—Estoppel—Priority*.**—General words, whether descriptive of parcels or in the estate clause, are susceptible of being controlled or modified by other parts of the instrument, and by the scope of the deed read as a whole, and for this purpose negative words are not requisite.

By a settlement made on the marriage of M. T. it was recited that certain lands were subject to two mortgages in fee to A., limited to C. in fee, subject to a limitation over in favour of T. for

life, in the event of C. having no issue (which happened), and C. and T. "according to their respective estates and interests" conveyed the fee simple "and all the estate, right, title, claim, and demand of the said C. and T. respectively in or to arise out of the same premises" to trustees to hold (subject to the two mortgages to A.) to the use of C., T., and M. T. for successive life estates, with remainder to secure a jointure to the wife of M. T., with remainders over.

At the date of the settlement T. was absolutely entitled to a mortgage whereby C. out of the fee created a term of five hundred years to secure £2,000 and interest, but no reference was made to this in the settlement. T. afterwards voluntarily transferred this mortgage to M. T., who charged it in favour of the plaintiffs, who had no notice of the settlement. C. and T. having died, an action was brought by the plaintiffs for a declaration that the £2,000 and interest was a charge on the land subject only to the two mortgages to A.

**HELD**—that on the true construction of the settlement, the mortgage did not pass, as the estate clause was controlled by the scope of the instrument, and that it had priority over the interests of all persons under the settlement.

**HELD** also, that no estoppel as to the mortgage was created by the settlement on account of any representations made by T. in the recitals, or by any standing by on his part.

**WILLIAMS v. PINCKNEY**, (1898) 67 L. J. Ch. 31; [77 L. T. 700—C. A.]

**69. Conveyance by Husband and Wife of Moiety of her Land—Husband's Rent Charge not Mentioned—Release or Grant—Law of Property Amendment Act, 1859 (22 & 23 V. c. 35), s. 10**—A husband was entitled to a rent charge issuing out of his wife's hereditaments. In 1868 by a voluntary settlement the husband and wife and each of them did "grant, release, dispose of and confirm a moiety of the wife's hereditaments "and all the estate," etc., of either of them therein to trustees on certain trusts.

The settlement did not mention the rent charge, and contained no covenants for title.

**HELD**—that the settlement operated by way of release and not of grant of the rent charge; and that, as the husband and wife, the owners of the unsettled moiety, had concurred in it, that moiety remained subject to the entire charge.

*Dren v. Earl of Norbury* ((1846) 9 Ir. Eq. Rep. 171; 3 J. & Lat. 267) and *Johnson v. Webster* ((1854) 4 D. M. & G. 174) explained.

**PRICE v. JOHN** [1905] 1 Ch. 711; 74 L. J. Ch. [469; 53 W. R. 156; 92 L. T. 768—*Eady, J.*

**(c) Words of Limitation.**

**70. Intention to confer an equitable Fee Simple—Omission of word "Heirs"—Effect**—The limitation of a trust of real estate, where the intention to confer an equitable fee simple is clearly apparent, will confer such an estate though no words of inheritance are used.

**Construction and Operation—Continued.**

*Pugh v Drew* ((1869) 17 W. R. 988—James, V.-C) followed.

A settlor settled copyholds in trust for M. and her husband for life estates and after the decease of the survivor in trust for all their children as tenants in common, and in default of children to such uses as M. should appoint, with remainder to M.'s heirs.

**HELD**—that the intention to confer equitable estates in fee simple on M.'s children was clear.

*In re Whiston's Settlement* ([1894] 1 Ch. 661; 63 L. J. Ch. 273; 42 W. R. 327; 70 L. T. 681—Chitty, J.) distinguished.

**IN RE TRINGHAM'S TRUSTS, TRINGHAM v GREENHILL**, [1904] 2 Ch. 487; 73 L. J. Ch. 693; 91 L. T. 370; 20 T. L. R. 657—Joyce, J.

**71. Conveyance to Trustees—No Words of Limitation—Equitable Estate in Fee—What Interest passed to Trustees**—By a post-nuptial settlement made in 1884 it was recited that I. was absolutely entitled to freehold hereditaments, "which said freehold property" he desired to settle on his wife and children. He accordingly assigned "the said freehold hereditaments" to the trustees; there were no words of limitation; but the description of the parties to the settlement contained the words, "who and their executors and administrators are intended to be hereinafter included in the designation of the said trustees." There was a provision for the appointment of new trustees in the future.

It subsequently proved that I. had only an equitable estate in some of the freeholds.

**HELD**—that, as the settlement contained no words of limitation, the only estate in such equitable freeholds passing to the trustees was an estate for the lives of the original trustees and the survivors of them.

**IN RE IRWIN, IRWIN v. PARKES**, [1904] 2 Ch. [752, 73 L. J. Ch. 832, 53 W. R. 200—Buckley, J.

**72. No Words of Inheritance—Effect—Equitable Estate in Fee**.—*Primâ facie* a gift of real estate in trust for A for life, and then for his children without words of inheritance, will not pass an equitable fee. But in spite of the absence of words of inheritance, a limitation in a settlement of real estate for a class of children may confer an equitable fee simple, if the intention to do so is sufficiently expressed.

A settlement conveyed real estate to a trustee upon trust after the deaths of husband and wife to convey and transfer the trust estate between or among their children subject to the usual power of appointment in favour of one or more. There was a hotchpot clause, a power of advancement up to one-half of the value of each child's share, and a gift over if no child attained a vested interest.

**HELD**—that the settlement clearly indicated an intention that the children should take equitable estates in fee simple, and that effect must be given to such intention.

*In re Tringham* ([1904] 2 Ch. 487; 73 L. J. Ch. 693; 91 L. T. 370; 20 T. L. R. 657—Joyce, J., No. 70, *supra*) followed.

**IN RE OLIVER'S SETTLEMENT, EVERED v. LEIGH**, [1905] 1 Ch. 191, 74 L. J. Ch. 62—Fairwell, J.

**73. No Words of Inheritance—Effect—Power to appoint by Will—Execution of Deed inconsistent with Power—Whether a Release—Lost Deed—Evidence of Contents—Memorial**.—By a marriage settlement in 1806 lands were conveyed by J. L., the father of the husband T. L., to trustees and their heirs on trust to permit T. L., his heirs and assigns, to occupy them during his life, and after his death to the use of his first, second, and every other son, and, in default, to female issue.

The settlement itself was lost, and the only evidence of its contents was a memorial from the Registry of Deeds.

By his will, dated 1858, T. L. devised part of the lands to his son, W. L., in tail, and part to him for life, with remainders in either case as he should appoint.

W. L. died unmarried in 1902. By his will, dated 1883, he had appointed all the lands to the defendants, but in 1884 he granted the same lands by deed to trustees in trust (as events happened) for A. absolutely.

**HELD**—(1) that the document of 1806 must be construed strictly as a deed—not as a will or marriage articles, (2) that the children of T. L. took only life estates, and that either there was a resulting trust in favour of J. L., who died intestate, leaving T. L. his heir at law, or there was a reversion in fee direct to T. L., who, therefore, in either event became entitled, and (3) that the deed of 1884 operated as a release of the power vested in W. L., as it was inconsistent with any exercise of the power.

**CHISM v. LIPSETT**, [1905] 1 Ir. R. 60—C. A.

**V. FORFEITURE.**

*And see* **BANKRUPTCY**, 214.

**74. Intention—Words of Futurity—Trusts—Covenant—Retrospective Operation**.—A settlement, after a recital that W. W. was entitled for his life to the income of his father's trust estate, and that W. W. being pressed for money wherewith to discharge certain debts which he had contracted, and certain charges which he had created on his interest under the will, witnessed that W. W. assigned his life interest to trustees in trust for himself during his life, or until he should assign, charge or incur the same, &c., and contained a covenant by W. W. that he would not assign, charge, &c., his interest under his father's will.

**HELD**—that in the face of the recital it could not be held that there was an intention to make past charges a ground of forfeiture.

Decision of *Kekewich, J.* ([1898] 1 Ch. 488; 67 L. J. Ch. 213; 46 W. R. 362; 73 L. T. 147) reversed.

**WEST v. WILLIAMS**, [1899] 1 Ch. 132; 68 L. J. [Ch. 127; 47 W. R. 308; 79 L. T. 575—C. A.

**Forfeiture—Continued.**

**75. Settlor's Life Interest—Separation Deed—Equitable Assignment.]**—By a settlement property vested in trustees was limited to the settlor "until he . . . shall do or commit any other act, or any other event shall occur whereby the said income or any part thereof would or might if hereby absolutely settled upon or in trust for him become alienated by law or vested in any other person or persons." By a separation deed the settlor's wife was to receive for her own benefit the income of the settled property

**HELD** (*dissentiente* Vaughan Williams, L.J.)—that it could not be said that the husband and wife were one person; that the wife's right to receive the income was just as if the husband had assigned it to her; that the covenant in the separation deed was a valid equitable assignment, and therefore a forfeiture had occurred

**IN RE SPEARMAN, SPEARMAN v. LOWNDES**,  
[1900] 82 L. T. 302—C. A.

**76 Non-Residence—Settled Land Act, 1882** (45 & 46 Vict. c. 38), s. 51.]—A testatrix gave to A. B. the use of her house in Dublin during her life as a residence, with a proviso that in the event of A. B. ceasing to reside in it, it should form part of her residuary estate. She also gave to A. B. the income of a sum of £10,000 for life or so long as she made the house her principal residence, with a like gift over in the event of her ceasing to make the house her principal residence.

**HELD**—that in the event of a sale of the house by A. B. under the Settled Land Act, the gift over of the £10,000 was void under the Settled Land Act 1882, sect. 51.

**IN RE FITZGERALD, BREMERSON v. DAY**, [1902]  
[1 Ir. R. 162—M. R.]

**77. Person having the powers of Tenant for Life—Condition requiring Residence—Fair Compensation—Sale of Tenant for Life's Beneficial Interest—Non-exercition of Power of Sale—Investment—Sanction of Court—Settled Land Act, 1882** (45 & 46 Vict. c. 38) s. 50, sub-s. 1; s. 51 sub-s. 1.—The testator gave to his wife "the use of my residence Woodville aforesaid so long as she shall desire to make it her permanent place of residence and shall remain my widow, my estate to pay all rates, taxes and outgoings in respect thereof, and to keep the house and grounds in tenurable repair." He left his residuary real and personal estate to his trustees upon trust for conversion and then upon trust for his children living at his death. He also directed his trustees to postpone the sale of his Honor Oak estate (which included Woodville) until after the death or marriage again of his wife and empowered them from time to time as they should think fit to develop the same estate.

Byrne, J. (*In re Trenchard*) (1900) 16 T. L. R. 525) declared that the widow had the power of a tenant for life under the Settled Land Act, 1882 and that she would not forfeit the benefits given her by the will by selling under such power. A compromise was proposed the nature of which

was this: The pecuniary benefit given to the widow by the will was £350 a year, and for £275 a year she was willing to give up her right to reside in the house Woodville. The testator left three sons and two daughters. The daughters were married and had infant children.

**HELD**—that sect. 51 of the Settled Land Act, 1882, did not enact that the provision as to residence contained in the gift should be void, but that "as far as" it tended to induce the tenant for life not to exercise the power under the Act it should be void; that under sect. 50 the widow could not release or assign her powers of sale, but there was nothing in the Act to prevent her from making any arrangement she pleased for disposing of her beneficial interest in Woodville; that the arrangement was not an investment of money belonging to the testator's daughters and their infant children, nor was it a misapplication of their funds, as in fact, the beneficiaries were receiving something and were not paying anything, and the widow obtained the benefit of no longer being obliged to reside in a certain house; and that it was a fair compromise for all parties, and it was within the power of the trustees to enter into it, and it should be sanctioned.

*In re Haynes* ((1887) 37 Ch. D. 306; 57 L. J. Ch. 619; 36 W. R. 321, 58 L. T. 14—North, J.) followed.

**IN RE TRENCHARD TRENCHARD v. TRENCHARD**,  
[1902] 1 Ch. 378, 71 L. J. Ch. 178, 50 W. R. 266; 86 L. T. 196—Buckley, J.

**78 Limited Interest—Assignment of Interest to Trustees of a Marriage Settlement—Whether a Disposition entailing Forfeiture.]**—A., who under an appointment took an interest in the income of certain property until he should "assign, charge, or otherwise dispose or attempt to dispose or the said share of income, or do or suffer something whereby the said income would become payable to or vested in some other person," transferred such interest to the trustees of his marriage settlement, who were empowered to pay their expenses out of the income

**HELD**—that the transfer to the trustees did not come within the forfeiture clause. A. was still the only person entitled to the income and the real object of the clause was to prevent such a disposition as would deprive him of the enjoyment thereof.

**IN RE SELBY CHURCH v. TANCRED**, [1903] 1 Ch. [715; 72 L. J. Ch. 321, 51 W. R. 510; 88 L. T. 164—Buckley, J.]

**79 Validity of condition in partial Restraint of Marriage—Forfeiture on Marriage without Consent of named Person—Gift over.]**—A condition subsequent in a will or settlement in partial restraint of marriage e.g., providing for the forfeiture of interest given to a daughter (and her children) in case she marries without the consent of a named person is valid if followed by a gift over to take effect in the event of such forfeiture.

*Dashwood v. Lord Bulkeley* ((1804) 10 Ves. 230) and *Lloyd v. Brandon* ((1817) 3 Mer. 108) followed.



**Forfeiture—Continued.**

Decision of Warrington, J. ([1905] 1 Ch. 96; 52 W. R. 653; 20 T. L. R. 538) affirmed.

IN RE WHITING, WHITING v. DE RUTZEN, [1905] 1 Ch. 96, 21 T. L. R. 83—C. A.

**VI. HEIRLOOMS.**

**80 Application by Tenant for Life to Sell—Application refused.**—Although there may be no imputation on the applicant that he is acting capriciously, dishonestly, or selfishly, in the sense that the application is not made under a *bona fide* belief that it would be for the benefit of all parties interested that the heirlooms should be sold, the Court will not order a sale of them, if looking at the interest of all those to come after as well as that of the applicant, it is not expedient to do so.

IN RE FETHERSTONHAUGH'S ESTATE, (1898) 14 [T. L. R. 167—North, J.

**81 Sale of—Tenant for Life in pecuniary difficulties caused by Extravagance—Wishes of Remaindermen and Family—Celebrated Jewel—Intention of Settlor—Benefit of Estate—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 37, 53]**—The fact that a tenant for life has, by his own extravagance, brought himself into pecuniary difficulties, will not induce the Court to relieve him by ordering a sale of heirlooms under the discretionary power conferred by sect. 37 of the Settled Land Act, 1882.

An application by the tenant for life for the sanction of the Court to a contract by him for the sale of the Tavernier Blue (or Hope) Diamond refused.

The Court ought, on such an application, to have regard to the wishes of persons entitled in remainder, and even to their sentimental preferences as, *e.g.*, the wish to preserve in the family a celebrated jewel of a unique kind. It ought to consider what was the intention of the settlor, what are the wishes of the family generally, and what would be for the benefit of the estate as a whole.

Decision of Byrne, J, affirmed

IN RE HOPE, DE CETTO v HOPE, [1899] 2 Ch. [679; 68 L. J. Ch. 625; 47 W. R. 641, 81 T. L. 141—C. A.

**82 Sale of—Repairs of—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37, sub-s. 2]**—Various estates were settled by will upon F for life without impeachment of waste, and after his decease in tail male with divers remainders over, and heirlooms were settled by the same will to go and be held and enjoyed as such by the several persons entitled, and by the will the trustees had a power of sale over the hereditaments thereby devised. Some of the heirlooms settled were sold pursuant to orders of the Court under the provisions of the Settled Land Acts, 1882 to 1890. Some of the unsold heirlooms were warehoused and some wanted repairing.

**HELD**—that an order might be made authorising the tenant for life to sell the warehoused

heirlooms, and authorising the trustees to apply out of the proceeds of sale such a sum as might be necessary to put the remaining pictures, heirlooms, into a proper state of repair.

IN RE WALDEGRAVE (COUNTESS), EARL [WALDEGRAVE v. EARL OF SELBORNE, (1900) 81 L. T. 632—North, J.

**83 Compound Settlement—Settlement of Land—Subsequent Will settling Heirlooms to go with Land—Order of Court sanctioning Sale of Heirlooms—Trustees of Will to receive Purchase Money—Application of Money—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 21, 22 (1), 37, 45.]**—Certain family estates were settled in 1874 by deed, and in 1902 certain heirlooms were settled by will to go, as far as possible, with the settled mansion house. An order of the Court sanctioned the sale of an heirloom, and directed the price to be paid to the trustees of the will. Upon a subsequent summons.—

**HELD**—that the deed and will formed a compound settlement for which special trustees must be appointed.

Accordingly, the trustees were by consent appointed trustees of the compound settlement; and the Court reserved for future argument the question whether the two settlements were so interwoven that money realised by the sale of heirlooms could be applied in discharging incumbrances on the settled land.

IN RE LORD STAFFORD'S SETTLED ESTATES; [GERARD v. STAFFORD, (1904) 91 L. T. 229, 20 T. L. R. 61—Byrne, J.

Upon a further summons, **HELD**—that the land and heirlooms must be treated as if both settled by the deed of 1874; and that, though the heirlooms were now vested in an infant tenant in tail, the tenant for life might have the money applied in discharging the incumbrances.

[1904] 2 Ch. 72; 73 L. J. Ch. 561, 52 W. R. [536—Warrington, J.

**84 Life Tenant Impecunious through no Fault of his Own, and desirous of Selling—Opposition by Remainderman—Discretion of Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 37, 53.]**—A nobleman, tenant for life of settled estates, but impecunious through no fault of his own, was desirous of selling certain heirlooms and family portraits. He had no issue, and would have been tenant in tail but for a deed of resettlement to which he was a party, and which gave a succeeding life estate to his cousin, an older man. This cousin objected to the sale.

**HELD**—that the Court ought to allow the sale.

IN RE TOWNSEND'S SETTLEMENT, (1904) 89 [L. T. 691—Farwell, J.

**VII. MARRIAGE SETTLEMENTS.**

And see BANKRUPTCY, No. 197; CONFLICT OF LAWS.

**(a) General.**

**85 Joint Covenant by Father and Son to pay Money on the Former's Death—Contribution—**

**Marriage Settlements—Continued.**

*Inference from Circumstance.*—With respect to a contract of suretyship, evidence may be given for the purpose of showing that the equity of contribution ought not to be applied, or that the intention ought not to be inferred.

W. G. F. C. B. was about to contract a marriage which, from a social and pecuniary point of view, was a very advantageous one. The lady's fortune was large; her advisers insisted that the intended husband should bring into settlement an adequate amount. A joint and several covenant was taken from the intended husband and his father to pay a sum of £10,000 six months after his death, as the son had no actual property beyond a reversionary interest, which was brought into settlement. He merely had expectations from his father. The father died insolvent.

**HELD**—that it ought not to be inferred, under the circumstances, that the father intended to reserve to his legal representatives a right to sue his son for the payment of a large sum which might, in the event of his son's expectations not being realised, absorb his income for several years, and so defeat one of the objects of the settlement.

**IN RE BENTINCK, BENTINCK v. BENTINCK**, [1899] 80 L. T. 71—Stirling, J.

**86. Informal Contract — Interest whether Absolute or for Life only**—By an informally drawn agreement not under seal, and described as "marriage articles," made between A. and B. (his son), both marksmen and C. and D. (C's daughter), reciting an intended marriage, afterwards duly solemnised between D. and B. as D's marriage portion, A. assigned all his interest in a farm of land (created during the argument as a chattel real) the property of A., to B. and D., their heirs and assigns, after the death of A., with remainder to the children of the intended marriage, after the death of B. and D. and in case D. should survive B., A. and B. transferred and made over the farm to D. "during the term of the natural life of the said D." There were no children of the marriage. D. survived A. and B.

After the death of A., B. and D., the plaintiff in the present action, who was personal representative of A. and B., brought this action to recover possession from the legatee of D.

**HELD**—that D. was entitled to a life interest only, and that the verdict which had been directed for the plaintiff at the trial should stand.

**FEGAN v. MEAGAN**, [1900] 2 Ir. R. 411—[Q. B. D.]

**87. Infant—Change of Domicile—Husband a domiciled Austrian—Ratification—Repudiation—Reasonable Time**—In 1864 an Irish lady an infant, married an Austrian at Berne. Previously to her marriage she executed a settlement. According to the law of her domicile after marriage, which was Austrian, she was unable to ratify the contract or to place it out of her power to revoke it.

In 1893 the husband and wife executed a document in Austria to annul the settlement.

**HELD**—that the wife never had, either before marriage or after, power to make an irrevocable settlement.

The effect of the change of the domicile was that the English doctrine as to the repudiation of a contract by an infant within a reasonable time, became inapplicable by reason of the impossibility of effectually ratifying it.

Decision of Cozens-Hardy, J. ([1899] 2 Ch. 569; 68 L. J. Ch. 553; 47 W. R. 571; 80 L. T. 794; 15 T. L. R. 416) reversed.

**VIDITZ v. O'HAGAN**, [1900] 2 Ch. 87; 69 [L. J. Ch. 507; 48 W. R. 516; 82 L. T. 480; 16 T. L. R. 357—C. A.]

**88. Ante-nuptial Settlement by Infant—Subsequent Repudiation — Implied Covenant by Husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 2, 19.**—An ante-nuptial settlement entered into in 1891 by the intending wife (an infant), the intending husband, and trustees, recited that it was agreed that a legacy to which the lady was entitled, but not given for her separate use, should be settled upon the trusts thereafter declared. The *testatum* was that in pursuance of the agreement, the lady, with the privity and approbation of the intending husband, declared that the legacy should be held upon certain trusts. There was not any express agreement by the husband. The lady repudiated the settlement when of age.

**HELD**—that a covenant would be implied on the part of the husband to do what was necessary to give effect to the settlement and that therefore the instrument would have barred the marital right of the husband if the Married Women's Property Act, 1882, had not been passed, and was a settlement under sect 19 of that Act, and consequently remained unaffected.

The principle of the decision of C. A. in *Hancock v. Hancock* (1888), 31 Ch. D. 78, 57 L. J. Ch. 396; 36 W. R. 117; 58 L. T. 906) applied; *Stevens v. Trevor-Garrick* ([1893] 2 Ch. 307; 62 L. J. Ch. 660; 41 W. R. 412; 69 L. T. 11—Chitty, J.) followed.

**BUCKLAND v. BUCKLAND** [1900] 2 Ch. 534, 69 [L. J. Ch. 618; 48 W. R. 637; 82 L. T. 759; 16 T. L. R. 187—Buckley, J.]

**89. Perpetuity—Remoteness — "Possibility on a Possibility" — Gift of Personal Estate to Unknown Person for Life, Remainder to his Children—Rule Inapplicable to Personal Estate.**—The old rule against "a possibility on a possibility" applicable to legal limitations of real estate namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities. but the rule cannot apply to personal estate, because there is

**Marriage Settlements—Continued.**

no such thing as a legal remainder in personal estate: nor should it be applied to personal estate when it is protected from any limitations unduly restricting alienations by the ordinary rule against perpetuities.

By a marriage settlement funds were settled in trust after the death of the survivor of the husband and wife for the children of the marriage or any issue born in the lifetime of the husband and wife or the survivor of them in such shares and proportions and with such limitations over for the benefit of the children or issue as to part of the funds as the wife alone during her life, and as to the other part of the funds, as the husband and wife jointly during their joint lives should by deed appoint. The husband and wife appointed the funds in equal third shares in trust for each of the three children of the marriage for their respective lives, and after the death of each of them in trust for his or her children born in the lifetime of husband and wife who should live to attain the age of twenty-one.

**HELD**—that the trusts were not void for remoteness.

IN RE BOWLES, AMEDROY *v.* BOWLES. [1902] 2 Ch. 650; 71 L. J. Ch. 822; 51 W. R. 124—Farwell, J.

**90. Covenant to Pay £2,000 to Trustees—Effecting Life Policies for that Amount—Whether a Satisfaction**—A. covenanted on his second marriage to pay £2,000 to trustees upon trust for his second wife (if she survived him) and his children by his first or second wives. He never paid the £2,000, but he insured his life under sect. 10 of the Married Women's Property Act, 1870, for the same amount. By his will he left his personal estate in trust for his third "wife and some of his children."

**HELD**—that under the circumstances he had not fulfilled the covenant in the settlement by effecting the policies.

IN RE CARTWRIGHT, CARTWRIGHT *v.* CARTWRIGHT, [1903] 2 Ch. 306; 72 L. J. Ch. 622; 51 W. R. 666; 88 L. T. 855—Kekewich, J.

**91. Post-nuptial Settlement—Trust for Wife only during cohabitation—Policy of the Law—Contemplation of Separation—Validity.**—By a post-nuptial settlement a husband conveyed property to trustees upon trust to pay the income to his wife for life, or so long as she should continue to be his cohabiting wife, or widow, for her separate use, and from and after the dissolution of their marriage or judicial separation to pay the income to himself.

The husband and wife separated by mutual consent some years later.

**HELD**—that the provision for the determination of the wife's interest in the event of a future separation was not void as being contrary to the policy of the law, and that the trust in her favour had come to an end.

*Cartwright v. Cartwright* ((1853) 3 D. M. & G. 982—Lord Eldon) distinguished.

IN RE HOPE JOHNSTONE, HOPE JOHNSTONE *v.* [HOPE JOHNSTONE, [1904] 1 Ch. 470; 73 L. J. Ch. 321; 90 L. T. 253; 20 T. L. R. 282—Kekewich, J.

**92. Settlor Representing Settled Land to be Unincumbered—Mortgage in fact with Other Land—Contribution to Charge—Right of Settled Lands to Indemnity.**—The owner of two estates subject to a mortgage settled one of them on his daughter's marriage. There was no covenant against incumbrances in the settlement, but a verbal representation was made by the settlor to the intended husband that the estate was free from incumbrances, and it was conveyed without reference to incumbrances. The other estate passed under the settlor's will to his widow, who conveyed to a purchaser for value with notice of the settlement, but not of the verbal representation.

**HELD**—that the purchased estate was bound to indemnify the settled estate from the mortgage debt.

*Averall v. Wade* (L. & G. 252 temp. Sugden) followed.

*Barnes v. Raster* (1 Y. & C. C. C. 401) explained and distinguished.

TIGHE *v.* DOLPHIN, [1906] 1 Ir. R. 305—M. R.

**(b) Covenant to Settle After-acquired Property.**

**93. Covenant by Husband that Wife's After-acquired Property should be Settled**—In a marriage settlement, executed both by the husband and the wife, the husband covenanted with the trustees that all the real and personal estate that should at any time, or by any means, be acquired by the wife, or by him in her right, should be forthwith settled. The settlement contained no recitals. The Court held that real estate to which the wife became entitled during the marriage under her father's will was bound by the above covenant.

IN RE HADEN, COLINS *v.* HADEN, [1898] 2 Ch. [220; 67 L. J. Ch. 428—Stirling, J.

**94. Parties Living—No Evidence as to Circumstances—Revocation.**—An ante-nuptial settlement by an intended husband and wife, of considerable property contained a covenant to settle the wife's after-acquired property upon trusts under which she had power to appoint such property among her issue. A subsequent ante-nuptial settlement by the husband and wife of certain furniture, contained a covenant to settle the wife's after-acquired property upon trusts under which she had, after the death of the husband, a general power of appointment over such property. The two settlements were prepared by different solicitors, and executed at different places. The trustees thereof were different persons, and neither settlement contained any reference to the other. The marriage was then celebrated. The wife became entitled to after-acquired property of large amount, and

**Marriage Settlements—Continued.**

desired that it should be held by the trustees of the second settlement upon the trusts thereby declared. There was issue of the marriage. The husband, wife, and the trustees appointed by the second settlement were living. A summons was taken out for the determination of the question whether the wife's after-acquired property was bound by the trusts of the first settlement or of the second settlement; but no evidence was adduced as to the circumstances under which the settlements were made or the intentions of the parties thereto.

In the absence of all procurable evidence, the Court declined to hold that the first settlement was superseded by the second.

IN RE GUNDRY; MILLS v. MILLS, [1898] 2 Ch. 504; 67 L. J. Ch. 641; 79 L. T. 438; 47 W. R. 137—North, J.

**95. Covenant by Husband—Wife's Real Property—General and Special Powers of Appointment—Exercise by Will—Indications**—Under a marriage settlement the wife had a power of appointment by will amongst the children. The settlement also contained a covenant by the husband (there was none by the wife) that after-acquired property of his wife should be conveyed to the trustees to be held by them upon the trusts of the settlement. The wife died, and by her will, "in pursuance of all powers and authorities in anywise enabling me thereto," appointed her residuary estate as to a moiety for her son, his wife and children. During the coverture she became entitled to certain real and personal property which was not conveyed to the trustees of the settlement.

HELD—that the after-acquired real property was not bound by the covenant, as the husband had only agreed to do what he had power to do, and the covenant did not affect property as to which he had no control whatever.

HELD, also, that there was in the will itself no sufficient indication of an intention to exercise the special power of appointment.

IN RE RICKMAN, STOKES v. RICKMAN, (1899) 80 [L. T. 518—Stirling, J.

**96. £500 or Upwards—Two Legacies of £500 each out of General Estate and Proceeds of Sale of Land respectively—Deduction of Duty—Entitled at one and the same Time—From one and the same Source—Aggregation of Legacies**—A legacy of £500 out of the general estate of a testatrix, and another legacy of £500 out of the proceeds of sale of land, were given to a married woman, by whose marriage settlement it was covenanted that if she at any time during the continuance of the marriage should at one and the same time and from one and the same source become entitled to property of the value of £500 or upwards, the same was to be settled.

HELD—that (1) the legatee in each case had to suffer a deduction of duty at the rate of 10 per cent., so that each of the sums of £500 became, as far as her beneficial receipt of it was concerned, £450 only, and was therefore not

caught by the covenant; (2) the legatee became by the will entitled "at one and the same time," the death of the testatrix, and "from one and the same source," the testatrix to both the legacies, and the two sums ought to be aggregated and were bound by the covenant.

IN RE PARES; IN RE SCOTT CHAD; SCOTT [CHAD v. PARES, [1901] 1 Ch. 708; 70 L. J. Ch. 426; 84 L. T. 385—Buckley, J.

**97. Assignment of Wife's Property "both Present and Expectant or Future"—Gift during Coverture from Husband to Wife**—An inaccurately and loosely drawn ante-nuptial marriage settlement contained no express clause for settlement of after-acquired property, and if the sum in question of £280—a gift by the husband to the wife during coverture—was bound by the settlement, it was by way of contract only, under the assignment of all her property "both present and expectant or future, vested or contingent."

HELD—that the £280 was not bound by the settlement on the broad ground that the parties never intended or for a moment thought of extending the words of assignment to property which the wife should acquire from the husband.

Dictum of Malins, V.-C., in *Dickinson v. Dillwyn* ((1869) L. R. 8 Eq. 546; 39 L. J. Ch. 266; 22 L. T. (N.S.) 647) adopted.

COLES v. COLES, [1901] 1 Ch. 711. 70 L. J. Ch. [324; 84 L. T. 142—Joyce, J.

**98. Conversion—Application of the Rule in Howe v. Earl of Dartmouth**—The rule in *Howe v. Earl of Dartmouth* ((1802) 7 Ves 137 a; 6 R. R. 96) has never been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. The Court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorised investments of all such parts of the residuary estate as are of a wasting or reversionary or unauthorised character. But the rule does not apply to any bequest which is specific, as distinguished from residuary. On principle there is no ground for applying the rule to a covenant in a marriage settlement to settle after-acquired property, which is a contract to be performed in strict accordance with the terms.

IN RE VAN STRAUBENZEE, BOUSTED v. COOPER, [1901] 2 Ch. 779; 70 L. J. Ch. 825; 17 T. L. R. 755; 85 L. T. 541—Cozens-Hardy, J.

**99. Ante-nuptial Agreement for Marriage—Settlement—"Usual" Clauses—Covenant to settle Wife's after-acquired Property**—An ante-nuptial agreement recited that the intended wife was entitled in reversion expectant on the decease of her father or otherwise to a moiety of the funds and property subject to the trusts of her parents' marriage settlement, and it was thereby agreed that as soon as could be after the marriage the intended wife should assign or

**Marriage Settlements—Continued.**

assure such reversion to trustees to be held by them upon trusts thereafter declared, and that the settlement should contain certain specified provisions and should also "contain generally such other agreements, clauses, and provisions as are usually inserted in settlements of a like kind."

HELD—that a provision for the settlement of after-acquired property was not a "usual" clause in such a document

HELD, also, that the proper course is for conveyancing counsel to the Court to embody their opinions on such a question in affidavits when their evidence is obtained as to the usage of conveyancers in this respect.

IN RE MADDY'S ESTATE, *MADDY v. MADDY*, [1901] 2 Ch. 820—Joyce, J.

**100. *Covenant by Infant—Decree of Judicial Separation—Property acquired by Wife after Decree—Repudiation—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25***—Property acquired by a wife after a decree of judicial separation does not fall within a covenant in a marriage settlement to settle property after acquired "during the said intended marriage."

An infant who has executed and acquiesced in a marriage settlement will not be allowed to repudiate it thirty years later upon the ground that she only became aware of its contents shortly before repudiation.

DAVENPORT *v.* MARSHALL, 50 W. R. 39; 85 [L. T. 340, [1902] 1 Ch. 82; 71 L. J. Ch. 29—Buckley, J.

**101. *Legacy to Separate Use with Restraint on Anticipation—Husband a Domiciled Italian—Law Applicable***.—A widow, an Englishwoman, in 1878, about to marry a domiciled Italian, executed in Italy a marriage settlement in English common form which contained a covenant to settle after-acquired property. The parties were subsequently, in the same year, married at Florence and were domiciled there. The wife's father died in 1881, his will contained dispositions in her favour, and he thereby declared that all moneys and personal estate by his will made payable or transferrable to any female should, during any and every coverture, be paid and transferred to her for her sole and separate use, free from marital control, when and as the same money should become due and payable, and so that she should not have power to deprive herself of the benefit thereof by anticipation, and so that their receipt also, whether covert or sole should be a good discharge for such moneys and personal estate. In 1899 her mother died, having by her will bequeathed her a legacy of £1,000.

HELD—that under her father's will the wife became entitled to property upon which there was a restraint on anticipation until the day of payment, but not subsequently and as soon as the date of payment arrived, that was money which simply belonged to her, that this property was bound by her covenant to settle after-acquired property in her ante-nuptial settlement, and so

also was the legacy of £1,000; and that the parties intended to contract according to the English law, which—and not the Italian law—ought to be applied, although the matrimonial domicile was Italian

*In re Currey* ((1886) 32 Ch. D. 361; 55 L. J. Ch. 906; 34 W. R. 541; 54 L. T. 665—Chitty, J.) distinguished.

IN RE BANKES, REYNOLDS *v.* ELLIS, [1902] 2 Ch. [333; 71 L. J. Ch. 708, 50 W. R. 663; 87 L. T. 432—Buckley, J.

**102. *Bequest of Property subject to a General Power of Appointment to Self—Whether the Covenant Evaded***.—A married woman who had covenanted to settle after-acquired property became entitled to legacies under her mother's will, and to a share in her mother's residuary estate; in each case it was provided that she should have a general power of appointment over the property, and that in default of appointment, she should have it for her sole and separate use.

HELD—that she could not by appointing to herself evade the covenant, which bound both classes of property.

*Bower v. Smith* ((1871), L. R. 11 Eq. 279; 40 L. J. Ch. 194; 19 W. R. 399; 24 L. T. 118) distinguished on the ground that in that case the gift over was not to the donee of the power.

*Steward v. Poppleton* ((1877) W. N. 29) followed. *Twynshend v. Harrowby* ((1858) 27 L. J. Ch. 553) distinguished.

IN RE O'CONNELL, MAWLE *v.* JAGOE, [1903] 2 [Ch. 574, 72 L. J. Ch. 709; 89 L. T. 166; 52 W. R. 102—Kekewich, J.

**103. *Bequest to Married Woman—Restraint on Anticipation***.—A testator bequeathed certain freehold property and a legacy of £5,000 to his daughter, a married woman, for her sole and separate use, without power of anticipation. The settlement executed on her marriage contained an "after-acquired" property clause. The testator nominated executors of his will, but did not appoint trustees.

HELD—that as there was no intention expressed in the will that the executors were to act as trustees and retain the fund, the fund should be paid over to the testator's daughter free from restraint, and that it was captured by the "after-acquired" clause in her marriage settlement.

RUSSELL *v.* LAWDER, [1904] 1 Ir. R. 328—[Barton, J.

**104. *Scotch Law—Jus relictæ—Wife's spes successionis—Secured by Covenant of Indemnity—Application of Covenant to Settle***.—Under Scotch law the widow of a domiciled Scotchman is entitled to one-third of his personal property. This *jus relictæ* is a mere *spes successionis*, vesting in a woman only at the date of her husband's death, and does not fall within the scope of a covenant by her to settle "any estate or interest in personal property" coming to her "during the

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coverture" This is so, even where the husband secures the wife against possibility of losing her rights, by a covenant to pay a corresponding sum as damages, if he shall change his domicile before his death.

Decision of Buckley, J. reversed.

IN RE SIMPSON, SIMPSON v. SIMPSON, [1904]  
[1 Ch. 1; 73 L. J. Ch. 53; 52 W. R. 310; 89  
L. T. 542—C. A.]

**105.** *Whether it includes Annuities or Life Interests.*—A marriage settlement contained a covenant that "all real and personal property, if any, not hereinbefore settled" to which the wife "at any time during her intended coverture shall be or become entitled whether in possession, reversion, or otherwise . . . except any legacies or other property acquired at one and the same time not exceeding in amount or value the sum of £100" should be settled

After the marriage the wife's father left to her by will an annuity of £60 per annum, payable quarterly.

HELD—that the annuity was not caught by the covenant, not because it fell within the exception, but because the settlement contained no indication of a specific intention to include such an interest.

*White v. Briggs* ((1848) 22 Beav. 176, n—Lord Cottenham) and *Townshend v. Harrowby* ((1858) 4 Jur. (N.S.) 353—Kindersley, V.-C.) followed.

*Scholfield v. Spooner* ((1884) 26 Ch. D. 94; 59 L. J. Ch. 777; 32 W. R. 910; 51 L. T. 138) distinguished—C. A.

IN RE DOWDING, GREGORY v. DOWDING, [1904]  
[1 Ch. 441; 73 L. J. Ch. 194; 52 W. R. 293,  
90 L. T. 82—Kekewich, J.]

**106.** *Savings from Income of separate Estate—Not included*—A covenant in a marriage settlement by a wife to settle after-acquired property above a certain amount (at any rate if the words "at one and the same time and from one and the same source" be used) will not bind investments made by her out of accumulated savings from her separate income.

*Finlay v. Darling* ([1897] 1 Ch. 719; 66 L. J. Ch. 348; 45 W. R. 445; 76 L. T. 461—Romer, J.) followed.

*In re Bendy, Willis v. Bendy* ([1895] 1 Ch. 109; 64 L. J. Ch. 170; 43 W. R. 345; 71 L. T. 750—Kekewich, J.) not followed.

IN RE CLUTTERBUCK, BLOXAM v. CLUTTERBUCK.  
[(1904) 73 L. J. Ch. 698; 53 W. R. 10; [1905]  
1 Ch. 200—Buckley, J.]

**107.** *Scotch Marriage Contract—Covenant to Settle Wife's "Conquests and Acquirenda"—Accumulations of Income—Legitim—Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21, ss. 7, 8.)*—A Scotch woman, prior to her marriage in 1848, covenanted to convey to trustees all real and personal property that she

might thereafter "conquest and acquire by purchase, succession, or otherwise."

By the terms of the contract the trustees were to pay the income of the trust estate to her during her life for her own separate use, exclusive of the *jus mariti*, and certain provisions in favour of children were to bar any claim by them under the head of *legitim*.

HELD—(1) that the clause of conquest did not extend to estate which at the death of the husband consisted of, or was purchased out of, the wife's accumulations of her separate income; and (2) that the only child of the marriage was not entitled to *legitim* out of her estate.

Decision of Ct. of Sess. ((1902) 5 F. 191) affirmed.

MACKENZIE AND ANOTHER v. ALLARDES AND  
[OTHERS, [1905] A. C. 285—H. L. (Sc.)]

**108.** *Gift from Husband to Wife.*—By a marriage settlement it was agreed that if the intended wife then was, or if during the intended coverture she or her intended husband in her right should, at one time and from one source, become entitled to property of the value of £100 or upwards, except jewels, &c, he and she would do all things necessary for vesting the same in the trustees of the settlement, upon certain trusts thereby declared. The husband, for a nominal consideration, transferred certain shares, exceeding £100 in value, in a limited company to his wife.

HELD—that these shares were not bound by the settlement.

*Coles v. Coles* ([1901] 1 Ch. 711; 70 L. J. Ch. 324; 84 L. T. 142—Joyce, J.) followed and applied.

KINGAN v. MATIER, [1905] 1 Ir. R. 272—  
[Barton, J.]

**109.** *"Become entitled"*—*Whether includes a Reversionary Interest vested before Marriage and falling into Possession during Coverture*—By her marriage settlement, a woman in 1895 covenanted to convey to her trustees all property to which she should "become entitled" "during" her then intended coverture upon trust for sale and conversion, subject to a proviso that during the lives of the husband and wife the trustees should not sell any property of a reversionary nature without their consent.

A reversionary interest in certain property became vested in the wife before her marriage.

HELD—that, even if such interest fell into possession during the coverture, it would not be bound by the covenant; the proviso showed that the words "become entitled" meant "become entitled in interest," and they could not also mean "become entitled in possession" in the absence of express words to that effect.

*In re Clinton's Trusts* ((1872). L. R. 13 Eq. 235; 41 L. J. Ch. 191; 26 L. T. 159) discussed.

IN RE BLAND, BLAND v. PERKIN, [1905] 1 Ch.  
[4; 74 L. J. Ch. 28; 91 L. T. 681—  
Kekewich, J.]

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**110. Estate Tail.**—A marriage settlement contained a covenant that if, during the coverture, the wife or the husband in her right should become seised or possessed of or entitled to any real or personal property for any estate or interest in possession, remainder or expectancy, he or she would permit, convey, assign, settle and assure the same to the trustees.

**HELD**—that an estate tail to which the wife became entitled in remainder during the coverture was not bound by the covenant.

*Hilbers v. Parkinson* ((1888) 25 Ch. D. 200; 53 L. J. Ch. 194; 32 W. R. 315; 49 L. T. 502—Pearson, J.) approved and followed.

**IN RE DUNSANY'S SETTLEMENT, NOTT v. [DUNSANY, [1906]]** 1 Ch. 578; 75 L. J. Ch. 356, 94 L. T. 361—C. A.

**111. "Property in Possession or Expectancy"—Contingent Reversionary Interest.**—A marriage settlement contained a covenant by both husband and wife that all future real and personal estate and effects whatsoever, whether in possession or in expectancy, of or to which the husband and wife or either of them in her right or by marital right should at any time or times during coverture become seised, possessed, or entitled, or of or to which the husband, or any person claiming through or under him, should by any means whatsoever become in her right or by marital right at any time or times after the marriage seised, possessed or entitled, should be transferred to the trustees and settled upon the trusts of the settlement. During coverture the wife became entitled to a contingent reversionary interest in personal property which did not become vested until after the coverture had been determined by the death of the husband.

**HELD**—that it was within the covenant.

*LLOYD v. PRICHARD*, (1907) 52 Sol. Jo. 58—[Parker, J.]

**(c) Illegal Consideration.**

**112. Woman Marrying Deceased Husband's Brother—Failure of Trust.**—The plaintiff's mother, on the eve of her going through the form of marrying her deceased husband's brother, executed what purported to be a settlement of her property, which included certain licensed premises formerly mortgaged by her, by which it was reserved to herself and her heirs until the "solemnisation of their intended marriage," and thereafter to herself for life and then to her two younger sons. No life interest was given by it to her intended husband, nor was any provision made for any children that might result from the intended union. She went through the form of marriage with the deceased husband's brother, and subsequently died.

The plaintiff, her eldest son, brought an action to enforce the equity of redemption of the said mortgage, as the heir-at-law of his mother. The Court held, looking at the evident intention of the parties, that the plaintiff could not succeed.

*NEALE v. MITCHELL*, (1898) 14 T. L. R. 154—[Williams, L.J.]

**113. Marriage with Deceased Husband's Brother—Limitations after Solemnisation of intended Marriage held Void.**—H. N., intending to marry her deceased's husband's brother, executed a settlement of her real property, which provided that her trustees were to hold the premises to the use of herself and her heirs until the intended marriage, and from and after the solemnisation of the said intended marriage upon trust for herself for life, with remainder in fee to her two sons. H. N. died intestate.

**HELD**—that there never was any such marriage, because it could not legally take place. Therefore the event upon which the limitations in favour of the sons were to take effect never did happen. Solemnisation of marriage means a legal marriage, and not a state of concubinage.

*Chapman v. Bradley* ((1863) 4 De G. J. & S. 71; 33 L. J. Ch 139; 10 Jur. (N.S.) 5; 9 L. T. (N.S.) 495) followed.

*NEALE v. NEALE*, (1899) 79 L. T. 629, 15 T. L. R. [20—C. A.]

**114. Marriage with Deceased Wife's Sister—Limitation in favour of Deceased Wife's Sister held Void.**—A settlement was avowedly made upon C. P., a lady who was the sister of the settlor's deceased wife, in contemplation of what was called his marriage with her. After the limitation of a life estate to the settlor, there came a limitation to the use of C. P. during her life, "provided she shall remain a widow and unmarried," with remainders over. The settlor died intestate.

**HELD**—that the settlement was made with a view to what is called a marriage which had been agreed upon between the parties, and though the deed was not expressed to be a voluntary one, but as made for a consideration which under the circumstances could not legally take effect, and which must continue to be illegal so long as the parties lived, the trust for C. P. for her life was illegal and invalid, and the trustees held the property on trust for the legal personal representative of the settlor, who was, by virtue of the Land Transfer Act, 1897, his real representative.

*Ayerst v. Jenkins* ((1873) L. R. 16 Eq. 275; 42 L. J. Ch. 690; 21 W. R. 878; 29 L. T. (N.S.) 126) distinguished.

*PHILLIPS v. PROBYN*, [1899] 1 Ch. 811; 68 L. J. [Ch. 401; 80 L. T. 513; 15 T. L. R. 324—North, J.]

**(d) Interpretation.**

**115. Wife's Property—Ultimate Trust for Next-of-Kin of Wife—"Die without having been Married"—Infant Child.**—By a marriage settlement a sum of money to which the wife was entitled on the death of her mother was settled upon trust to pay the income to the husband for life, then to the wife for life, and after the death of the survivor in trust for the children and remoter issue as the husband and wife or the survivor should appoint, and in default of appointment to the children equally, if sons, on attaining twenty-one years, or if daughters on attaining

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that age or marrying under that age. In default of issue attaining vested interests, the fund was to be held in trust for the wife absolutely if she survived her husband, but if she predeceased him, then upon such trust as she should by will appoint, and in default of appointment, in trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the decease of the said wife have been entitled thereto, if she had died possessed thereof, intestate, and without having been married. There were three children of the marriage, all of whom died under age and unmarried. No appointment was made by husband or wife. The wife predeceased her husband, leaving him and two of the three children surviving, and her only next-of-kin other than the children, being her mother and two brothers. The husband survived his wife's mother and his two children, and married again. By his will he left all his property to his second wife, and appointed her executrix. On his death the fund became distributable.

**HELD**—that the fund went to the persons who would have been entitled thereto if the first wife had died a spinster, and not to her infant children.

*Harman v. Maffett* ((1884), 13 L. R. Ir. 499) followed; *Stoddart v. Saville* ([1894] 1 Ch. 480) 63 L. J. Ch. 467; 42 W. R. 361; 70 L. T. 552—Chitty, J.) distinguished.

**IN RE DEANE'S TRUSTS**, [1900] 1 Ir. R. 332—M.R.

**116. Ultimate Trust for Wife's Next of Kin**—*"In case she had Died Intestate without having been Married"*—Object of Provision—Exclusion of Husband—Non-exclusion of Child.—By a marriage settlement certain hereditaments were conveyed to trustees upon trust for sale and conversion and to stand possessed of the proceeds upon usual trusts in favour of the husband, wife and children; but in case there should be no child of the marriage who being a son, should attain the age of twenty-one years, or being a daughter, should live to attain that age or be married, upon trust as to one moiety if the husband should survive the wife for him absolutely, and as to the other moiety if the wife should die in the husband's life, then for the wife for life and then as she should by will appoint, and in default of appointment upon trust for such person or persons as under the statutes for the distribution of intestates' effects should or would have been entitled to her personal estate "in case she had died intestate without having been married." The wife died in the lifetime of her husband intestate in 1848; her only son died in 1864, an infant, without having been married

**HELD**—that the son, having survived the wife, took on the ground that the only object of the provision was to exclude the husband; and that there must be a declaration that the son became entitled to the moiety in question of the trust funds as sole next-of-kin of his mother.

*Wilson v. Atkinson* ((1864) 4 D. J. & S. 455;

4 N. R. 451; 33 L. J. Ch. 576; 11 L. T. (N.S.) 220—Knight Bruce, L.J.) followed.

**IN RE MARE, MARE v. HOWEY**, [1902] 2 Ch. 112; [71 L. J. Ch. 649; 87 L. T. 40—Kekewich, J.

**117. Trust for Persons who would have been Entitled as Wife's Next of Kin if Wife had Survived Husband—Survivorship of Husband—Time for Ascertaining Next of Kin.**—Under the ultimate trust in a marriage settlement trustees were directed to hold certain funds "in trust for the person or persons who, under the statutes made for the distribution of intestates' personal estates, would then be entitled to the personal estate of A. P." (the wife) "in case she having survived" her husband "had died possessed of the said stocks, funds, and securities, and to be paid and divided accordingly." The husband survived the wife.

**HELD**—that the persons entitled were the wife's next-of-kin at the time of the husband's decease.

*Pinder v. Pinder* ((1860) 28 Beav. 44—Romilly, M.R.) followed.

**IN RE PEIRSON CAYLEY v. DE WEND**, (1903) 51 [W. R. 519; 88 L. T. 794—Byrne, J.

**118. Ultimate Trust in Default of Children taking Vested Interest—Wife's Next of Kin—Die "Without ever having been Married"—Children Dying before attaining Vested Interest.—Where a settlement made on the marriage of a spinster contains an ultimate trust, in default of any child of the marriage attaining a vested interest, in favour of her statutory next-of-kin, as if she had died intestate and "without ever having been married," the ordinary and natural meaning of the words is to exclude children who survive their mother, but do not live to take a vested interest, and thus to exclude the husband as representing them.**

There is no technical rule of construction laid down by *Wilson v. Atkinson* (1864) 4 D. J. & S. 455, or by any other case, which requires a different meaning to be put upon such words, and therefore the ordinary meaning prevails.

*Clarke v. Colls* ((1861) 9 H. L. C. 601, 612; 11 Eng. Rep. (H. L.) 864) followed.

*Stoddart v. Saville* ([1894] 1 Ch. 480; 63 L. J. Ch. 467; 42 W. R. 361; 70 L. T. 552—Chitty, J.) and *In re Mare* ([1902] 2 Ch. 112; 71 L. J. Ch. 649, 87 L. T. 41—Kekewich, J., No. 116, *supra*) not followed on this point.

**IN RE SMITH'S SETTLEMENT, WILKINS v. SMITH**, [1903] 1 Ch. 373, 72 L. J. Ch. 184; 51 W. R. 217; 87 L. T. 740—Eady, J.

Approved by C. A. in next case, *infra*.

**119. Ultimate Trust of Wife's Property—"As if she had Died without having been Married"—Exclusion of Deceased Infant Children.—Where in a marriage settlement the ultimate trust of the wife's fund, in default of any child living to take a vested interest, is for "the persons who would have been entitled thereto as her statutory next-of-kin at her death if she had died**



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intestate and without having been married"; these words ought *prima facie* to be construed according to their natural sense, unless something in the context shows that they were intended to bear a different meaning.

According to their natural meaning these words exclude children of the wife who die before taking a vested interest, and so exclude the husband as their representative.

*Wilson v. Atkinson* (1864) 4 D. J. & S. 455 was decided upon peculiar circumstances, and lays down no general rule to the contrary.

*In re Smith's Settlements* (*supra*) approved, as a correct exposition of the law and commentary on the previous authorities.

Decision of Kekewich, J. reversed.

IN RE BRYDONE'S SETTLEMENT, *COBB v. BLACKBURN*, [1908] 2 Ch. 84; 72 L. J. Ch. 528; 51 W. R. 497; 88 L. T. 614—C.A.

**120** *Trust "for All and Every the Child and Children or Grandchild" of J. G. "living at the Decease of the Survivor of Husband and Wife"—"Or" not read as "And"—Substitutional Class—Children of Parents dying before Period of Distribution.*—In the events which happened the following trust of a settlement made on a marriage came into operation "In trust for all and every the child and children or grandchild of Julia G., the wife of the said John G. (party hereto), living at the decease of the survivor of them the said H. C and M. P., his intended wife."

**HELD**—that the clause was to be read as though the word "grandchild" were equivalent to "grandchildren or grandchild"; that grandchildren could not take in competition with their parents; that the word "or" must be read as "or"; that the class of grandchildren was a substitutional class; that there was nothing in the settlement equivalent to a substitution of grandchildren being children of members of the first class, for the parent dying before the period at which the first class was to be ascertained, and that the children of parents dying before the period of distribution could not take.

IN RE COLEY, *GIBSON v. GIBSON*, [1901] 1 [Ch. 40; 70 L. J. Ch. 153; 49 W. R. 165; 83 L. T. 671—Byrne, J.

**121. Limitation of Real Estate—Eldest Son—Mortgage by Tenant for Life and Tenant in Tail—Child other than Son becoming entitled to Estate under Settlement—Disentailment—Portions for Younger Children—Power of Appointment—Revocation of.—By marriage settlement of 1839 an estate was settled on H. (the husband) for life, remainder to the first and every son of the marriage successively in tail male. The estate was charged with a sum of money (subject to life interests of H. and his wife therein) in favour of the children of the marriage "other than the son of the marriage who under the limitations of the settlement should become entitled to the lands" in such shares as H. and M. (his wife), or the survivor of them, should**

appoint, and in default of appointment in trust for such children equally, the shares to be vested at twenty-one or marriage. There was a hotch-pot clause in the settlement. There were four children of the marriage—A, J., and C, sons, and one daughter. By deed poll of 1874 (after reciting the death of C. intestate), H. and M. appointed (subject to their life interests therein) the sum of £5,000, portion of the trust fund, to the daughter, and appointed the residue of the fund to J., the second son. The deed poll contained a power of revocation over the share thereby appointed to J.

A., the first-born son, attained age, and joined with his father in mortgaging the estate for £1,100 in 1876, and for £2,000 in 1880, the lands having been disentailed by them for the purpose of carrying out the two loans, and to that extent only J., the second son, joined in the mortgage of 1880 for the purpose of covenanting with the mortgagee that the principal sum of £2,000 thereby secured, and interest thereon, should be paid before and have priority over his share and interest in the trust fund on the estate. The father, H., covenanted that so long as any money remained due on the mortgage security he would not exercise the power of revocation contained in the deed poll of 1874. A., the eldest-born son, died in 1883, intestate and unmarried. In 1884 H. and J. disentailed the estate. H. died in 1896 (having survived his wife), and thereupon J. became owner in fee of the lands, subject to incumbrances. By his will H. purported to revoke the appointment contained in the deed poll of 1874 in favour of J. of the residue of the trust fund (after setting apart £5,000, the portion for the daughter), but made no further appointment of it.

**HELD**—(1) that A. had become entitled to the estate under the limitations of the settlement by reason of joining with his father in charging the inheritance, and that consequently his representatives could not share in the trust fund charged on the estate in favour of the other children; (2) that the revocation by H. in his will of the share appointed to J. by the deed poll of 1874 was invalid so far as it would prejudice the security of the plaintiffs (who were assignees of the mortgage of 1880), but that without prejudice to the mortgage the revocation was valid as between the parties entitled under the settlement of 1839 to the trust fund; and that the residue thereof (after providing for the £5,000 appointed to the daughter of the marriage) went as unappointed to J. and the representatives of C., the share of J. therein being bound by his covenant in the mortgage deed of 1880.

*ROOKE v. PLUNKETT*, [1902] 1 Ir. R. 299—M.R.

**122. Ultimate Trust in Marriage Settlement—If Wife shall "survive" her "coverture"—Divorce Decree absolute—Effect of.—A wife, who is divorced, has "survived" her "coverture," which is a different thing from "surviving" her "husband."**

S., upon his daughter's marriage, settled £10,000, which was to be held, in the event (which in fact, happened) of there being no issue, in trust for the daughter absolutely "if

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she shall survive her now intended coverture," but in trust for himself absolutely "if she shall die during her now intended coverture"

The daughter was divorced by her husband.

HELD—that she had "survived her coverture," and was absolutely entitled to the £10,000.

IN RE CRAWFORD, COOKE v GIBSON, [1905]  
[1 Ch. 11; 74 L. J. Ch. 22; 53 W. R. 107; 91 L. T. 683—Kekewich, J.]

**123. Covenant to Settle Money if Marriage "solemnised" — Decree of Nullity — Effect on Covenant.**—By an ante-nuptial settlement a wife's father covenanted that, if the intended marriage were "solemnised," his executors should within twelve months of his death pay a certain sum of money to the trustees of the settlement to be held upon the trusts thereof.

Five years after the marriage ceremony, and two years after her father's death, the wife obtained a nullity decree on the ground of her husband's impotence.

HELD—that the marriage having been declared null and void, was never "solemnised," within the meaning of the covenant.

RE GARNETT, RICHARDSON v. GREENER, [1905]  
[74 L. J. Ch. 570; 93 L. T. 117—Kekewich, J.]

**124. Trust for Husband for Life or until Bankruptcy or Seizure—Gift over upon Happening of "any such events"**—Property belonging to a woman was on her marriage conveyed to trustees upon trust for her husband during his life or until he should become bankrupt or allow the property to be seized sold or taken on execution; upon the happening of "any of which such events" the trustees were to raise £750 upon the property for the wife's benefit, subject to such £750 the trustees were to hold the premises in trust for the husband absolutely.

HELD—that the husband's death was one of the "events" contemplated, and that thereupon the wife became entitled to have the £750 raised.

O'DONOGHUE v. O'DONOGHUE, [1906] 1 Ir. R. [482—Walker, L. C.]

**(e) Power of Appointment.**

See also title POWERS.

**125. Rectification—Mistake—Parol Evidence Non-execution—Imperfect Execution—Statute of Frauds** (29 Car. II c. 3) s. 4.]—In an action seeking rectification of a marriage settlement, after the death of the husband, it was proved that it was intended by all parties that the settlement should operate in favour of the plaintiff—the intended wife—upon two sums of £4,000 and £7,000 mentioned in a letter of the intended husband's solicitor, and that a power of appointment which the intended husband possessed over the £7,000 should be exercised by the settlement, and that all parties thought it had been exercised thereby, and that the husband died in that belief, but that a mistake was made

by the solicitor friend of the intended wife's family, who treated the £7,000 as coming from the same source as the £4,000.

HELD—that the settlement ought to be rectified.

HELD, also, that the Statute of Frauds could not be validly pleaded, as a marriage settlement can be rectified on parol evidence, the action not being one seeking "to charge any person upon any agreement made upon consideration of marriage" within sect. 4 of the Statute of Frauds.

HELD, further, that the Court could give relief against a non-execution, as distinct from an imperfect execution of the power. The deed when rectified would be a perfectly valid appointment.

JOHNSON v. BRAGGE, [1901] 1 Ch. 28, 70 L. J. [Ch. 41; 49 W. R. 198; 83 L. T. 621—Cozens-Hardy, J.]

**126 Appointment by Will of Married Woman—Right of Administrator with Will annexed to give Valid Receipt and Discharge for Funds**—A married woman having a general power of appointment over funds of personalty, made an appointment of the funds by will, and appointed an executrix and an executor, she died on September 14th, 1882. Her husband died in 1900. The executrix and executor died without proving the will. Letters of administration with the will annexed were granted to the plaintiff.

HELD—that the plaintiff could give a valid receipt and discharge for all the settled funds.

Re Philbrick's Trusts ((1865) 34 L. J. Ch 368; 13 W. R. 570; 12 L. T. (N.S.) 200), and In re Hoskin's Trusts (1877) 6 Ch. D 281; 46 L. J. Ch 817; 25 W. R. 779; 35 L. T. 935—C. A.) applied.

IN RE PEACOCK'S SETTLEMENT, KELCEY v. [HARRISON, [1902] 1 Ch 552; 71 L. J. Ch. 325; 50 W. R. 473, 86 L. T. 414—Eady, J.]

**127. Appointment of a Share of Funds for the time being Subject to the Trusts—Other Funds afterwards Vested in the Trustees on same Trusts—Assignment by Appointee of his Share in the Trust Funds.**—In 1879 the widow of R. appointed to one of her sons W. a share (subject to her own life interest) in the funds, &c., settled by her marriage articles, or "for the time being subject to the trusts thereof." By a codicil dated 1878 B., who died in 1900, directed that a legacy bequeathed by her in her will itself to R. (then dead) should be transferred to the trustees of the marriage articles to be held upon the trusts thereof. In 1893 W. assigned to the trustees of his marriage settlement his share in the trust funds under the marriage articles, which he specified in a schedule, and in "all other the trust moneys . . . for the time being subject to the trusts of the said articles."

HELD—that W.'s assignment in 1893 did not pass to his trustees his interest in B.'s legacy; for:—

(1) *Seem*, this legacy did not form an

**Marriage Settlements—Continued.**

accretion to the original trust funds, but a new settlement on similar trusts.

*Re North* ([1897] 76 L. T. 186—Stirling, J.) referred to

(2) In any event the legacy did not accue to the trust funds till 1900, and the appointment of 1879 only affected monies at the time subject to the trusts; and further (3) that W.'s assignment in 1893 only passed the share which he then had in the trust funds.

IN *RE WALPOLE'S MARRIAGE SETTLEMENT*, [THOMSON v. WALPOLE, [1903] 1 Ch. 928; 72 L. J. Ch. 522, 88 L. T. 419—Joyce, J.]

**VIII. TENANT FOR LIFE.****(a) General.**

**128. Proceedings by Tenant for Life and Trustees for Protection of Settled Estate—Salvage—Costs of Action made a Charge on the Inheritance—Form of Judgment**—An action was brought by the tenant for life and the trustees of a settled estate to establish their right to a several fishery which formed part of the settled estate, and a decree was made, and a perpetual injunction granted with costs. The plaintiffs, being unable to recover the costs from the defendants, who were paupers, instituted a separate action to have the costs made a charge on the inheritance, on the ground that the original action had been brought for the preservation of the fishery, and was in the nature of a salvage suit, and made defendants the next tenant for life, and the first tenant-in-tail in remainder. The defendants filed no defence and gave a consent for judgment:—

HELD—that the Court had jurisdiction to make the costs a charge on the inheritance, and that it was a proper case in which to exercise the jurisdiction.

HAMILTON v. TIGHE, [1898] 1 Ir. R. 123—[Porter, M R (Ir.).]

**129. Remainderman—Trust for Sale—Power to Postpone—Interim Rents and Profits—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6—10, 63.**—Where real estate is settled upon trust for sale, and to pay the income of the proceeds to a person for life, that person is "for the time being beneficially entitled to the income of the land until sale" within the meaning of the Settled Land Act, 1882, s. 63, and is therefore tenant for life under the Act.

*Yates v. Yates* ((1860). 28 Beav. 637; 29 L. J. Ch. 872) commented on.

*Casamajor v. Strobe* (1809), 19 Ves. 390, n), *Hope v. D'Hedouville* ([1893] 2 Ch. 361; 62 L. J. Ch. 589; 41 W. R. 330; 68 L. T. 516, 3 R. 348—Kekewich, J), and *In re Carter*, ((1892) 41 W. R. 140—Kekewich, J.) applied.

IN *RE SEARLE, SEARLE v. BAKER*, [1900] 2 Ch. [829; 69 L. J. Ch. 712; 49 W. R. 44—Kekewich, J.]

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**130. Trust for Sale Exercisable on Death of Tenant for Life—Tenant for Life one of the Trustees—Trustees for the Purposes of Settled Land Acts—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 8—Settled Land Act, 1890 (53 & 54 Vict. c. 69) s. 16, sub-s. 11**—Under sect. 16, sub-sect. 11. of the Settled Land Act, 1890, the persons who are for the time being trustees of a settlement which contains a future trust for sale are within the definition of that sub-section, and it is immaterial that some or one of them are persons who in all human probability will not, or in fact cannot, ever exercise the trust, as for instance that one of them is a person who necessarily will be dead before the trust takes effect.

Mrs. J. was tenant for life under a will. She and Mr. A. were trustees of the will. The will contained a trust for sale which did not take effect until after the decease of Mrs. J.—a future trust for sale.

HELD—that Mrs J. and Mr A. were trustees for the purposes of the Settled Land Acts.

IN *RE JACKSON'S SETTLED ESTATE*, [1902] [1 Ch. 258, 71 L. J. Ch. 154; 50 W. R. 235; 85 L. T. 625, 18 T. L. R. 168—Buckley, J.]

**131. Powers—Conflict Between Provisions of Settlement and of Act—Consent of Tenant for Life—Several Tenants for Life of Undivided Shares—Consents of Tenants for Life—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56, sub-s. 2—Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6, sub-s. 2**—A testator's daughters became tenants for life in possession of their several shares in his estate, with absolute powers of appointment by deed or will. He gave his trustees power to sell or dispose of his real and residuary personal estate, and they purported to exercise that power of sale. The question arose whether they could exercise the power, or whether, by reason of the provision in sect 56 of the Settled Land Act, 1882, they were bound to get the consent of some persons to the sale.

HELD—that the power of sale given by the will was not exercisable without the consents of the persons beneficially interested under the will who were tenants for life, or entitled to exercise the powers of a tenant for life, under the Settled Land Acts as there was a conflict within the meaning of sect. 56.

HELD, also—that a daughter was not one of several persons who together constituted a tenant for life. she was simply a tenant for life of one undivided share; she was not tenant for life of the entirety, nor was she one of several persons who were together tenant for life of the entirety; and there was no person who was tenant in common with her of the undivided share.

IN *RE OSBORNE AND BRIGHT'S, LD.*, [1902] [1 Ch. 335; 71 L. J. Ch. 285; 50 W. R. 468, 86 L. T. 178—Kekewich, J.]

**132. Possession during Minority—Trustees for the Purposes of the Conveyancing Act and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60—Testamentary Guardian—12 Chas 2, c. 24,**

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**Tenant for Life—Continued.**

s. 9.]—A testator made a will which contained a specific devise of his Pitminster estate to the infant plaintiff for life, and he appointed the defendants trustees for the purposes of the Settled Land Acts, but did not expressly appoint them trustees for the purposes of sect. 42 of the Conveyancing and Law of Property Act, 1881. The will, however, contained a clause providing for the application of the accumulations of income in the event of the death of the infant tenant for life during his minority which showed that the draftsman of the will thought he had appointed the defendants trustees for the purposes of sect. 42.

**HELD**—that the defendants were not appointed trustees for the purposes of sect. 42, nor were they by virtue of sect. 60 of the Settled Land Act, 1882, trustees for the purposes of sect. 42, and that the testamentary guardian of the infant was entitled during his minority to receive the rents and profits of the property in question by virtue of 12 Chas. 2, c. 44, s. 9.

**IN RE HELYAR, HELYAR v. BECKETT**, [1902] 1 Ch. 391; 71 L. J. Ch. 209, 50 W. R. 285. 85 L. T. 627; 18 T. L. R. 207—Joyce, J.

**133. Trust to Keep up Mansion House and to Permit A. to Reside there—Settled Land Act, 1882 (45 & 46 Vict. c. 38).**—A testatrix devised all her real estate to trustees on trust to accumulate the proceeds for twenty years for the benefit of her granddaughter; and in the meantime the trustees were ordered to keep up the several mansion houses with their grounds, &c., in a fit state for residence, and to pay the wages of indoor and outdoor servants necessary for that purpose, and to permit her daughter to reside at any of them at any time, and to pay her an allowance of £80 per week during such residence.

**HELD**—that, as the daughter had an absolute right of living there, she must be regarded as tenant for life of the mansion houses for the purposes of the Settled Land Acts.

*In re Carne's Settled Estates* ([1899] 1 Ch. 324; 68 L. J. Ch. 120; 47 W. R. 352; 79 L. T. 542—North, J., No. 205, *infra*) followed.

Decision of *Swinfen Eady, J.* ([1902] 2 Ch. 679; 72 L. J. Ch. 89; 51 W. R. 89; 87 L. T. 647; 18 T. L. R. 752) affirmed.

**IN RE BARONESS LLANOVER'S WILL, HERBERT v. FRESHFIELD**, [1903] 2 Ch. 16; 72 L. J. Ch. 406, 51 W. R. 418; 88 L. T. 648; 19 T. L. R. 338—C. A.

**134. Mansion House Burnt Down — Policy Monies—Fires Prevention (Metropolis) Act, 1874 (14 Geo. 3, c. 78), s. 83**—Where a mansion house and other property were settled by will upon a tenant for life with remainder over, and the premiums payable on a policy of insurance against fire on the mansion house were paid out of the income of the estate, and the mansion house was destroyed by fire.—

**HELD**—that the policy monies must be applied

in rebuilding the mansion house, and did not belong to the tenant for life.

**IN RE QUICKER'S TRUSTS, POLTIMORE v. QUICKER**, (1907) 24 T. L. R. 23—Eady, J.

**135. Heir-at-Law—Trustees in Possession—Rents being Accumulated to Pay off Incumbrances—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2 (2), 58 (1)**—The plaintiff was heiress-at-law of L, who had devised her realty to the use of trustees, giving them powers of management, and directing them to pay certain annuities out of rents and profits. During the lives of the plaintiff and two other persons (but not for more than twenty years after the testatrix's death) the trustees were to apply the surplus rents in the discharge of incumbrances on the estates, or in the purchase of other estates to be held on like trusts.

Subject to and after the determination or failure of the foregoing directions, the trustees were to stand possessed of the estate in trust for F's daughters successively according to seniority in tail male, with a like remainder to E's daughters. No such daughters were yet born.

After the determination or failure of the foregoing directions and trusts, the trustees were to settle the estates to successive uses for lives, and in tail male for ultimate remaindermen, but there was ultimate limitation of the fees. There were ultimate remaindermen for lives and in tail male already born.

In *In re Baroness Llanover* ([1903] 2 Ch. 330), Farwell, J., held that the direction to apply the surplus rents in the purchase of other estates must be deemed to be struck out by the Accumulations Act, 1892, and that the accumulation trust must be read as limited to the discharge of incumbrances; and subsequently he declared that when the accumulations should be sufficient to discharge the incumbrances the accumulation trust would become void, and that from that time, and so long as the surplus rents should by law remain undisposed of, they would belong, and be payable by the trustees as received, to the plaintiff as heiress-at-law. The accumulations were not yet sufficient to discharge the incumbrances if a mortgage created by the trustees to pay estate duty was to be included.

**HELD**—(1) that this mortgage was an incumbrance within the accumulation trust.

(2) That, subject to the accumulation trust, the surplus rents would be payable to a daughter of F. or E. as tenant in tail male, but that until the birth of such a daughter, and subject to any such daughter's interest, they were payable by the trustees to the plaintiff as heiress-at-law during the lives of F. and E., after whose deaths, subject to any daughter's estate in tail male, the ultimate remaindermen would come into possession.

(3) That, having regard to the nature and extent of her interest as heiress-at-law, the plaintiff had not at the present time the powers of a life tenant either under cl. vi. or cl. ix. of sect. 58, sub-sect. 1, of the Settled Land Act, 1882.

*In re Jones* (1884) 26 Ch. D. 736, 53 L. J.

**Tenant for Life—Continued.**

Ch 807; 50 L. T. 466; 32 W. R. 735—C. A.) followed as to cl. vi and distinguished as to cl. ix.

*In re Clitheroe Estate* ((1885) 31 Ch. D. 135. 55 L. J. Ch. 107; 53 L. T. 733, 34 W. R. 169—C. A.); *In re Richardson* ([1900] 2 Ch. 778, 69 L. J. Ch. 804—Stirling, J., No. 138, *infra*); and *In re Money Kyrle's Settlement* ([1900] 2 Ch. 839; 69 L. J. Ch. 780, 83 L. T. 74; 49 W. R. 44—Cozens-Hardy, J., No. 200, *infra*) distinguished.

IN RE BARONESS LLANOVER, HERBERT v. [RAM, [1907] 1 Ch. 635; 76 L. J. Ch. 427; 97 L. T. 287—Eady, J.

136. "Settlement"—*Settlement of Personality—Land Purchased by Trustees under Power Contained in Settlement—Settled Land—Settled Land Act, 1882* (45 & 46 Vict. c. 38), ss. 2 (1), 33, 63.]—A settlement comprising personal property only gave power to the trustees to invest the trust funds in the purchase of land to be held by them upon trust for sale, and until sale upon the trusts of the settlement.

HELD—that land so purchased was "settled land," the settlement being a settlement upon trust "for persons by way of succession" within the meaning of sect. 2 (1) of the Settled Land Act, 1882, that the person entitled for the time being to the income of the trust funds was "tenant for life" within sect. 63, and that the personal property still in the hands of the trustees was capital monies.

IN RE CHILD'S SETTLEMENT, [1907] 2 Ch. 348, [76 L. J. Ch. 565; 97 L. T. 80; 23 T. L. R. 609—Kekewich, J.

**(b) Persons having the Powers of Tenant for Life.**

137. *Trust for Accumulation—"Other Purposes"—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 58, sub-s. 1 (vi.).]—A tenant in tail in possession of certain real estates subject to a trust for the payment of certain annuities. He disentailed the property and conveyed it, subject to annuities, to the trustees of his marriage settlement to the use (subject to a rent-charge by way of pin-money) of the trustees for a term of twenty-one years, and subject thereto to the use of the husband for his life, with remainders over. The trusts of the term were for management and accumulation.

HELD—that the settlor had the powers of a tenant for life under the Settled Land Act, 1882, s. 58, over the property comprised in the will and settlement subject to the term.

*In re Strangways, Hickley v. Strangways* ((1886), 34 Ch. D. 423, 56 L. J. Ch. 195; 35 W. R. 83; 55 L. T. 714—C. A.) distinguished.

IN RE MARTYN, COODE v. MARTYN, (1900) [69 L. J. Ch. 733; 83 L. T. 146—Kekewich, J.

138. *Possession—Term of Years to Secure Incumbrances—Delivery of Title Deeds—Conditional Order—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-s. 5, 7, s. 53; s. 58, sub-s. 1,

cls. (6), (9).]—Apart from the Settled Land Act, the Court has a discretion to direct the trustees of settled estates to give up possession to the tenant for life, and *semble* that the power may be exercised in favour of a tenant for life, who is not a *cestui que trust*, but whose estate is subject to a term for securing incumbrances.

See *Tidd v. Lister*, (1820) 5 Madd. 429; 21 R. R. 323, and *Blake v. Bunbury*, (1790) 1 Ves. Jr. 194; 1 R. R. 111.

Since the passing of the Settled Land Act, 1882, the Court has exercised the discretion which it had before much more freely.

See *In re Bagot*, [1894] 1 Ch. 177, 63 L. J. Ch. 515; 42 W. R. 170, 70 L. T. 229, 8 R. 41—Chitty, J.

By the trusts of a settlement the applicant to be let into possession of the settled estates was entitled to an annuity of £600 a year. He had the powers of a tenant for life under the Settled Land Acts, and could therefore let. The trustees had no power to grant leases.

HELD—that the most beneficial way in which the property could be dealt with was to let the applicant into possession upon his giving the usual undertakings as to the performance of the trusts of the term, and he ought to have the title-deeds in his possession.

*In re Clitheroe Estate* ((1885) 28 Ch. D. 378; 54 L. J. Ch. 401; 52 L. T. 294)—V.-C. Bacon) followed.

IN RE RICHARDSON, RICHARDSON v. RICHARDSON, [1900] 2 Ch. 778; 69 L. J. Ch. 804—Stirling, J.

139. *Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 58, sub-s. (vi.).]—A testator by his will gave his wife the use of his residence as long as she should desire it, his estate to pay all rates, taxes, and outgoings in respect thereof.

HELD—that she had the powers of a tenant for life in respect thereof under the Settled Land Acts.

IN RE TRENCHARD, WARD v. TRENCHARD, [(1900) 16 T. L. R. 525—Byrne, J.

140. *Condition of Residence—Invalidity of Condition—Settled Land Act, 1882* (45 & 46 Vict. c. 38), ss. 51, 58.]—A testatrix devised real estate to her niece on condition that she resided there during an aunt's life and kept a home there for the latter whenever she should require it, in default, there was a gift over on the same condition to another niece. The aunt was a lunatic and under restraint.

HELD—that the niece was a "person having the powers of a tenant for life" under sect. 58 of the Settled Land Act, 1882; that the provision as to residence was a condition (not a trust for the aunt's benefit) and as such was void under sect. 51; and that therefore the niece could sell the property as tenant for life.

IN RE RICHARDSON, RICHARDSON v. RICHARDSON (2), [1904] 2 Ch. 777, 73 L. J. Ch. 783; 53 W. R. 11, 91 L. T. 775—Joyce, J.

**Tenant for Life—Continued.**

**141. Devise to Widow during Widowhood for Benefit of Herself and Children—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 58.]**—A. gave real estate to trustees upon trust for his wife during widowhood, for the benefit and maintenance of herself and her children, and for their proper bringing up.

**HELD**—that although the widow's interest was charged with the maintenance of the children, she had the powers of a tenant for life under sect 58 (1) (vi.) of the Settled Land Act, 1882

**IN RE POLLOCK, POLLOCK v POLLOCK, [1906]**  
[1 Ch 146, 75 L. J. Ch. 120; 54 W. R. 267,  
94 L. T. 92—Eady, J

**142. Trust to allow Residue to Remain as Invested—Discretion to Sell—Power in the Nature of a Trust—Settled Land Acts, 1882 (45 & 46 Vict. c. 38), ss. 58 (1) (ix.) 63 and 1884 (47 & 48 Vict. c. 18), s. 7.**

*Semble*, a case covered by sect 63 of the Settled Land Act, 1882, cannot be regarded as falling within sect 58 (1) (ix.) of that Act

A testator left realty and personalty to trustees upon trust, either to allow it to remain as invested at his death, or, as and when his trustees should, in their absolute discretion, see fit to do so, from time to time to sell and convert

The income of the original, or any substituted, investment was to be paid to his wife during widowhood, and on her re-marriage half was to continue to be so paid, subject to her life interest the property was to be held in trust for his son, and, if he should die under twenty-five, then in trust for the widow absolutely

**HELD**—that the will created not a mere power, but a trust for sale with a power to postpone, and that the widow was a tenant for life within the meaning of sect. 63 of the Settled Land Act, 1882.

**IN RE CRIPS, CRIPS v TODD, (1907) 95 L. T. 865**  
[—Kekewich, J.

**143 Non-beneficial Owners—Trustees—Estate *par autre vie*—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (v.)**—The nine clauses of sect. 58 (1) of the Settled Land Act, 1882, refer only to persons beneficially entitled. Therefore trustees having an estate *pur autre vie* cannot exercise the powers of a life tenant under sect 58 (1) (v.).

*Vine v. Raleigh* ([1896] 1 Ch. 37, 65 L. J. Ch. 103; 73 L. T. 655; 44 W. R. 169; Chitty, J.) not followed.

**IN RE JEMMETT AND GUESTS CONTRACT, [1907] 1 Ch. 629; 76 L. J. Ch. 367—Eady, J**

**(c) Powers.****(1.) General.**

**144. Subsequent Settlement of other Land subject to Mortgage upon Identical Trusts—Discharge of Mortgage by Mortgage of both Properties—Settled Land Act, 1882, s. 2, sub-s. 1—Settled Land Act, 1890, s. 11.]**—The tenant

for life of estate A., which was unincumbered, settled estate B., subject to a mortgage, upon trusts, which in the events which happened were identical with those upon which estate A. was settled. The mortgagee of estate B. having given notice requiring payment off of the mortgage, the tenant for life took out a summons asking for a declaration that he had power to raise the sum required by a mortgage of both estates.

**HELD**—that the tenant for life had power to raise the sum required by a mortgage of both estates.

**IN RE LORD MONSON'S SETTLED ESTATES, [1898] 1 Ch. 427; 67 L. J. Ch. 176, 78 L. T. 225, 14 T. L. R. 217; 46 W. R. 330—Rome, J.**

**145. Tenant for Life—Paving Expenses—“Charge on the Premises”—Incumbrance—Raising Money to discharge Incumbrance—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 150, 257—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11.]**—A tenant for life of an estate, in order to avoid further proceedings by an urban district council paid a proportion of the expenses of paving a street bounding the estate

**HELD**—that the expenses being until recovery a “charge on the premises in respect of which they were incurred,” within sect. 257 of the Public Health Act, 1875, the tenant for life was entitled to be recouped and to keep the charge alive in his own favour; and that it was an incumbrance within sect. 11 of the Settled Land Act, 1890, and the tenant for life could raise the money necessary for discharging that incumbrance and costs

**IN RE SMITH'S SETTLED ESTATES, [1901] 1 Ch. [689; 70 L. J. Ch. 273—Buckley, J.**

**146. Power to Mortgage—Consolidating Mortgages—Costs—“Where Money is Required”—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11.]**—Sect. 11 of the Settled Land Act, 1890, must be read as if it meant “where money is reasonably required having regard to the circumstances of the settled land.”

Where land was settled subject to several mortgages, all bearing interest at 4 per cent., and the tenant for life had a right under the settlement to resort to capital in the event of the income payable to her falling below a certain figure, and one of the mortgages was called in, and it was found that that mortgage could not be readily transferred, but that a consolidating mortgage for the whole amount due under all the mortgages could be got at  $3\frac{1}{2}$  per cent interest:—

**HELD**—that the tenant for life was empowered by the 11th section of the Settled Land Act, 1890, and was justified in raising the amount by which the costs of the consolidating mortgages exceeded the costs of the transfer of the mortgage called in by a mortgage of the settled land for that amount.

**IN RE CLIFFORD, SCOTT v. CLIFFORD, (1901), [50 W. R. 58, 85 L. T. 410; [1902] 1 Ch. 87; 71 L. J. Ch. 10—Buckley, J.**

**Tenant for Life—Continued.**

**147. Exchange of Easements—No Exchange, or Partition of Land—Settled Land Act, 1890** (53 & 54 Vict. c. 69), s. 5.]—On the true punctuation of sect. 5 of the Settled Land Act, 1890, an easement over the settled land may be granted in exchange for the grant of an easement over other land, although there is no exchange or partition of land.

**IN RE BRACKEN'S SETTLEMENT**, [1903] 1 Ch. 265; 72 L. J. Ch. 101; 51 W. R. 411, 87 L. T. 743—Eady, J.

**148. Annuitants Entitled to Rents and Profits—Remainderman—Tenants for Life for Purposes of Settled Land Acts—Settled Land Act, 1882** (45 & 46 Vict. c. 38), ss. 2 (5) (6), 58 (1) (ix.) ]—A testator gave his residuary real and personal estate to trustees upon trust to pay certain life annuities out of the rents and profits, and in each year to divide any surplus income between the annuitants then living in shares proportionate to their annuities (considering, for this purpose, the person entitled subject to the life annuities to the trust funds, as an annuitant to the extent of any lapsed annuities); then followed an ultimate gift, after the death of all the annuitants, in favour of the person entitled to a certain estate.

**HELD**—that the whole body of annuitants for the time being could together exercise the powers of a tenant for life under sect. 58 of the Settled Land Act, 1882.

**IN RE BENNET, BENNET v. BENNET**, [1903] 2 Ch 136; 72 L. J. Ch. 524, 88 L. T. 683—Kekewich, J.

**149. Power of Tenant for Life to Release Easement Enjoyed with Settled Land—Settled Land Acts, 1882** (45 & 46 Vict. c. 38), s. 2, sub-s. 10, s. 3, sub-s. 1, ss. 17, 21, and 1890 (53 & 54 Vict. c. 69), s. 5.]—A tenant for life has no power, under the Settled Land Acts, 1882 to 1890, to release a right of way enjoyed in connection with settled land over another tenement, either by way of sale or in exchange for a release of a similar right of way enjoyed over his settled land. Nor can the tenant for life purchase the release of the latter easement out of capital money.

**IN RE BROTHERTON, BROTHERTON v. BROTHERTON**, (1907) 52 Sol. Jo. 44—Joyce, J.

**(ii.) Leasing.**

**150. Powers of Leasing by Settlement or by Statute Minerals with varying Rents—Selling Price—Validity—Settled Land Act, 1882** (45 & 46 Vict. c. 38), ss. 2, 9, 11, 56—*Settled Land Act* 1890 (53 & 54 Vict. c. 69), s. 8.]—Henry, late Earl of Lonsdale, who died in 1876, by his will devised large estates to uses under which there were several successive tenants for life, with remainder to the issue in tail male of each according to seniority. St. George, the last Earl of Lonsdale, one of such tenants for life in 1881, purchased the reversionary interest of his brother, the present earl—the plaintiff—and conveyed it

to trustees on trust for management and for the maintenance of the earldom. St. George died in 1882 without issue. Since then the estates had been managed by the trustees of the settlement of 1881. The will of Henry contained a power of granting mining leases at "the best rents, tolls, duties, royalties or reservations, by the acre, ton, or otherwise that can be reasonably gotten without taking anything in the nature of a fine or premium." Many leases of the settled minerals, reserving rents varying with the selling price of the minerals gotten, had been granted since 1883, and all had been granted by the present earl with the consent of the trustees, and were expressed to be made in exercise of "every power" or authority enabling him in that behalf.

**HELD**—(1) that the power of leasing in the will had not been extinguished by the alienation of the life estate, as it is settled that a power appendant may be exercised by the donee thereof, although the estate to which it was appendant be gone, provided there is no derogation from the rights of the alienor of the estate; and (2) that the power in the will authorised the grant by the earl, with the consent of the trustees, of the leases reserving a rent varying with the selling price of the minerals, in accordance with the custom of the country; and (3) that the power in the will, and that only, had been executed, and (4) that no part of the rents need be set aside.

**HELD**, also, that the words "in case of conflict between the provisions of a settlement and the provisions of this Act," occurring in sect. 56 of the Settled Land Act, 1882, mean provisions connected with the execution of the power, *e.g.*, consent of a third person—not with the results of such execution.

A person, who has effectively appointed under a power created by one instrument, cannot again appoint the same property under a power created by another instrument.

**EARL OF LONSDALE v. LOWTHER**, [1900] 2 Ch. 687; 69 L. J. Ch. 686; 83 L. T. 312; 16 T. L. R. 509—Farwell, J.

**151. Mineral Lease—Consideration for Accepting Surrender of Lease—Capital or Income—Casual Profit.**—According to the common law rule, money paid to a legal life tenant as the consideration for accepting the surrender of a lease belongs to that life tenant.

A lease of seams of coal was made by a legal life tenant in possession in 1899 for twenty-two years from July, 1898, under a power in a will, and was granted on the surrender of a previous lease, which was not determinable by the lessees in pursuance of a provision in the lease until 1900. The lessees paid the tenant for life £1,425 for the remaining nineteen years of the term.

**HELD**—that the case was outside the settled Land Acts; that the life tenant had no option in the matter, and, therefore, no question of *mala fides* could arise; that there was no ground for raising any equity against the tenant for life, compelling her to hold the money as capital; and that the ordinary common law

**Tenant for Life—Continued.**

rule applied, and she was entitled to retain the £1,425 as a casual profit.

IN RE HUNLOKE'S SETTLED ESTATES, FITZROY  
[v. HUNLOKE. [1902] 1 Ch 941; 71 L. J. Ch.  
530; 86 L. T. 829—Eady, J.

**152. Mining Lease—Varying Minimum Rent—Wayleave after Coal worked—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6, 7, sub-s. 2, s. 9, sub-s. 1 (i.), (ii); s. 17, sub-s. 1, s. 53.]**—Whether any particular lease satisfies the requirements of the Settled Land Act, 1882, must depend on the evidence.

An estate comprised about 340 acres of land lying in scattered plots, the coal under which could not be worked except in conjunction with the coal under the adjoining and intermixed lands. The applicant was the tenant for life in possession under his father's will, and his son, the tenant for life in remainder, was an infant. In 1900 the applicant entered into an agreement with a limited company whereby he agreed, as tenant for life, to lease a seam of coal under the settled estate for sixty years from January 1st, 1898. It was proved that the terms of this agreement were such as were usually, or indeed universally, adopted in this particular mining district, and that the rent was the best rent within the meaning of sect. 7, sub-sect. 2, of the Settled Land Act, 1882, and that the agreement was made honestly in the interest of all parties. By a provision in the will two-thirds of the rent were to be set aside as capital moneys.

**HELD**—that the lease might reserve a minimum yearly rent, which was not to begin until the second year of the term and need not be constant when once it began, but might increase year by year until the fifth year of the term, that the minimum rent was reserved in order that the lessee might have a strong pecuniary inducement to get the coal with reasonable speed and regularity, and it was really a part payment in advance of the purchase-money, and the remaindermen were not damaged, inasmuch as their proportion of all money so paid in advance was secured, that there might be inserted in such lease a proviso for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof if any, as in accordance with the provisions of the lease were not to be worked or paid for, should have been paid for at the acreage rate reserved by the lease, that such lease might contain a wayleave for foreign coal to continue after such cesser at a nominal rent, as it was practically impossible to deal with the wayleave in any other way, and that there was nothing in the statutes to vitiate the provisions in question.

Decision of Byrne, J. ((1901) 50 W. R. 199, 86 L. T. 76, 18 T. L. R. 83) reversed.

IN RE ALDAM'S SETTLED ESTATE, [1902] 2  
[Ch. 46; 71 L. J. Ch. 552; 50 W. R. 500, 86  
L. T. 510; 18 T. L. R. 579—C. A.

**153. Lease of Right to let down Surface—Mining Lease—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 6, 7.]**—S. was tenant for life of

certain property settled by himself; he had reserved to himself by the deed of settlement all mines under the property with power to work the same; any person exercising such reserved rights being bound to make reasonable compensation to the trustees of the settlement, for all damage done to the inheritance, and to the persons for the time being entitled to the surface for all damage to things thereon.

**HELD**—(1) that S. could not under the reservation authorise a lessee of the mines to let down the surface; but

(2) That under sect. 6 of the Settled Land Act, 1882, he could as tenant for life grant to his lessee of the mines a lease of the right to let down the surface.

SITWELL v. LONDESBOROUGH (EARL OF), [1905]  
[1 Ch. 460, 74 L. J. Ch. 254, 53 W. R. 415—  
Warrington, J.

**154. Building Lease—Reservation of Minerals—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6–13, 17, 20.]**—The Settled Land Act, 1882, does not enable a tenant for life to grant a building lease of the service reserving the mines and minerals.

IN RE NEWELL AND NEVILL'S CONTRACT,  
[1900] 1 Ch. 90, 69 L. J. Ch. 94, 48 W. R.  
181, 81 L. T. 581—Kekewich, J.

Disapproved, *In re Gladstone, infra*.

**155. Building Lease—Reservation of Minerals—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6, 13, 17.]**—A tenant for life has power, under sect. 6 of the Settled Land Act, 1882, to grant a lease of settled land containing a reservation of the mines and minerals.

*In re Newell and Nevill's Contract* ([1900] 1 Ch. 90, 69 L. J. Ch. 94; 48 W. R. 181; 81 L. T. 581—Kekewich, J., *supra*) disapproved.

IN RE GLADSTONE GLADSTONE v. GLADSTONE,  
[1900] 2 Ch. 101, 69 L. J. Ch. 455, 48 W. R.  
531; 82 L. T. 515, 16 T. L. R. 361—C. A.

**156. Power of Leasing for Building Purposes Reserving Minerals.]**—Under a settlement a tenant for life had very large powers of leasing both for building and mining purposes, and they followed the precedents contained in the leading precedent books. The question arose whether the tenant for life had under the powers contained in the settlement power to grant leases of settled estates for building purposes reserving the minerals under the land.

**HELD**—that it was quite clear there was a power to grant building leases reserving minerals under the land, under such a power as was contained in the lease.

*Cockerell v. Cholmeley*, ((1830) 10 B. & C. 564, 1 C. & F. 60) discussed and distinguished.

IN RE DUKE OF RUTLAND'S SETTLED ESTATES,  
[DUKE OF RUTLAND v. MARQUIS OF BRISTOL,  
[1900] 2 Ch. 206; 69 L. J. Ch. 603—Byrne, J.

**157. Estate Agents' Commission for Letting on Building Leases—Payment out of Capital—**



**Tenant for Life—Continued.**

*Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 21 (x)]—A tenant for life of a settled estate in the course of development applied for an order that the trustees of the settlement might be authorised to pay certain charges by way of commission of the agents of the estate for letting various portions of the estate on building leases, and that these charges might be paid out of capital moneys in the hands of the trustees.

**HELD**—that these charges were payable out of capital money arising under the *Settled Land Act*, 1882.

**IN RE MARYON WILSON'S SETTLED ESTATES**, [1901] 1 Ch. 934, 70 L. J. Ch. 500; 84 L. T. 708—Joyce, J.

**158. *Regard to Interest of all Parties***—*Bonâ fide Exercise of Power—Objection of Remaindermen—Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 53 ]—A tenant for life in exercising any of the powers conferred by the *Settled Land Acts* must have regard to the interests of all parties entitled under the settlement.

A testator gave to his wife (the defendant) the use and enjoyment rent free of his residence for so long during her widowhood of him as she should personally reside in and occupy the same. The defendant, being about to marry again intended, prior to her marriage, to exercise her power of leasing under the *Settled Land Acts* by granting a lease of the residence to her intended husband for twenty-one years. Those in remainder objected.

**HELD**—that as the real object of the widow in granting the lease was that she might continue in occupation of the residence, it was not a *bonâ fide* exercise of her powers as tenant for life, and those in remainder were entitled to an injunction to restrain the widow from granting such a lease without first giving the plaintiffs an option of accepting a lease on the same terms or obtaining the sanction of the Court.

**MIDDLEMAS v. STEVENS**, [1901] 1 Ch. 574; 70 [L. J. Ch. 320, 49 W. R. 430, 84 L. T. 47; 17 T. L. R. 214—Joyce, J.

**159. *Lease to Self and Others Invalid—Power to Grant Lease to Trustee for Self—Settled Land Acts***, 1877 (40 & 41 Vict. c. 18), s. 46, and 1882 (45 & 46 Vict. c. 38), s. 7 ]—A tenant for life cannot under his statutory powers grant a valid lease to himself and others, as co-lessees; for, whether the lessees' covenants therein contained are in form joint only or joint and several, there would not be binding covenants upon which an action might be brought against each of the lessees at any time after the grant of the lease, and the existence of such covenants is by the statute necessary to the validity of the lease.

A man cannot at one time be both plaintiff and defendant per Best, C. J., in *Neale v. Turton* ((1827) 4 Bing. 149, 29 R. R. 531).

It is doubtful whether the Courts would now uphold a lease granted by a tenant for life to a trustee for himself, notwithstanding *Bevan v.*

*Hahgood* ((1860) 1 J. & H. 222—Lord Hatherley).

**BOYCE v. EDBROOKE**, [1903] 1 Ch. 836; 72 [L. J. Ch. 547; 51 W. R. 424, 88 L. T. 344—Farwell, J.

**160. “Park”**—“*Lands (if any) usually occupied therewith*”—*Park not occupied with Mansion House—Invalid Lease by Tenant for Life—Claim for Damages by Lessee—Settled Land Act*, 1890 (53 & 54 Vict. c. 89), s. 10, sub-s. 2 ]—By sect. 10, sub-sect. 2, of the *Settled Land Act*, 1890, “notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.”

**HELD**—that the words “usually occupied therewith” applied only to the “lands (if any),” and that therefore a tenant for life could not sell, exchange or lease the park, though it was not usually occupied with the mansion house, without the consent of the trustees or an order of the Court.

*Sutherland v. Sutherland* ([1893] 3 Ch. 169; 62 L. J. Ch. 946; 42 W. R. 13, 69 L. T. 186—Romer, J.) followed.

The word “park” in the section is not used in its legal sense, but in its popular meaning of woodland surrounding or adjoining a mansion house, devoted to recreation or enjoyment, but chiefly to the support of deer, though sometimes to cattle or sheep. A tenant for life without the consent of the trustees agreed to let the “park” for a term of years. The lessee entered under the agreement, which contained no provision as to title. The lessor died without executing a lease and the remainderman ejected the lessee.

**HELD**—that the lessee had no claim for damages against the lessor's estate.

*Day v. Singleton* ([1899] 2 Ch. 320; 68 L. J. Ch. 593; 48 W. R. 18; 81 L. T. 306—C. A., see *SALE OF GOODS*, 83) distinguished.

**PEASE v. COURTNEY**, [1904] 2 Ch. 503; 73 [L. J. Ch. 760; 53 W. R. 75; 91 L. T. 341; 20 T. L. R. 653—Eady, J.

**161. *Lease of Principal Mansion House—Lease to Wife—Bonâ fide Exercise of Power by Tenant for Life—Two Estates and Two Mansion Houses—Consent of Trustees—Settled Land Act***, 1890 (54 & 55 Vict. c. 69), s. 10.]—A tenant for life may grant a lease of the settled land to his wife if it is not done at the expense or to the serious injury of the remaindermen.

Two estates in different counties, each with a mansion house upon it, were settled by the same will upon a tenant for life with remainders over. The tenant for life lived with his wife in one of the houses, and he granted a lease of the house to his wife under the *Settled Land Acts*. The trustees of the settlement approved of the lease and took an active part in its preparation, and it was admitted that the terms thereof were

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proper, but they did not give a formal consent to the lease, as they assumed that the house was not the principal mansion house on the settled land within sect 10 of the Settled Land Act, 1890

**Held**, upon the evidence—that the house was not the principal mansion house on the settled land, the house upon the other estate being the principal mansion house, and that, therefore, the lease was valid without the consent of the trustees.

Meaning of "principal mansion house" discussed.

**Held**, also, that if the consent of the trustees had been necessary they had by their conduct, sufficiently given their consent.

**GILBEY v. RUSH**, [1906] 1 Ch 11, 75 L J Ch [32], 51 W R 71; 95 L T 616 22 F L R 23—Kekewich J

**(iii.) Sale.**

**162. No Trustees for Purposes of Settled Land Act—Payment of Money into Court—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22.]**—Where a tenant for life is selling settled land under the powers of the Settled Land Act, and there are no trustees for the purposes of the Act, he cannot require the purchaser to pay the purchase money into Court, as sect 22 of the Settled Land Act, 1882, presupposes that there are trustees for the purposes of the Act in existence

**IN RE FISHER AND GRAZEBROOK'S CONTRACT**, [1898] 2 Ch 666; 67 L J Ch 613, 79 L T 268, 17 W R 58—Romer J

**163. Power of Tenant for Life of Undivided Money to Sell—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 6, 10 (1), s. 19.]**—The Settled Land Act, 1882, enables the tenant for life of an undivided moiety of land to sell that moiety without the concurrence of the owner of the other undivided moiety

**In re Collinge's Settled Estates** ((1887) 36 Ch D 516; 57 L J Ch 219; 36 W R 264 57 L T 221—North, J) overruled.

**COOPER v. BLESSEY**, [1899] 1 Ch 639 68 [L J Ch 258, 17 W R 443; 80 L T 69—C. A.]

**164. Sale of Right to Construct and Maintain Tunnels—Sale of Subsoil—Easement—Settled Land Act, 1882 (45 & 46 Vict. c. 38) ss 3, 63—Settled Land Act 1884 (47 & 48 Vict. c. 19), s. 7.]**—A tenant for life took out a summons under sect. 7 of the Settled Land Act 1884, for an order that she might have leave to enter into a contract with a company for the sale to them of the right to construct and for ever thereafter to maintain and use tunnels in the subsoil of the property in question settled by way of trust for sale.

**Held**—that the sale of the subsoil of the settled land was not the sale of an easement under sect 3 of the Settled Land Act, 1882, but that an order would be made under that section,

giving the plaintiff leave to enter into the contract for sale as being a sale of part of the settled land.

**IN RE PEARSON'S WILL**, (1901) 83 L T 626—[Cozens-Hardy, J.]

**165. Sale of Option—Settled Land Act, 1882 and 1884.]**—The defendant company in 1887 entered into a contract with a tenant for life (Sir C. J. P.), acting under the powers conferred by the Settled Land Acts, 1882 and 1884, to purchase Bell's Field with a view to erecting thereon certain buildings and works in connection with their undertaking, and in the contract agreed to enter into restrictive covenants. By an indenture dated December 11th, 1888 the plaintiff's predecessor in title (Sir C. J. P.) sold and conveyed Bell's Field to the company subject to a restrictive covenant. On December 12th, 1888, Sir C. J. P. conferred an option on the company at any future time by paying £10 to obtain a release of the restrictive covenant. Sir C. J. P. died on July 11th 1895, and was succeeded by the plaintiff.

**Held**—that the agreement to release the restrictive covenant on payment of £10 at any future time was quite beyond the power of the tenant for life under the Settled Land Acts; and that it was not binding on the plaintiff.

**PALMER v. GRAND JUNCTION WATERWORKS CO** (1902) 86 L T 352—Eady, J.

**166. Title—Incumbrances—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20.]**—B. devised his real estate to his six daughters for life. After his death, by deed of family arrangement the property was conveyed to trustees to hold upon the trusts of the will, charged as to the life estates of two of the daughters with repayment of moneys lent to their husbands by the testator at a date subsequent to that of his will.

**Held**—that such sums were not money actually raised within sect 20 of the Settled Land Act, 1882; and that the persons who together constituted the tenant for life of the settled estates, could convey the property to a purchaser discharged from such sums.

**CONNOLLY v. KEATING**, [1903] 1 Ir. R. 353—[MR]

**167. Assignment to Remainderman of Undivided Share—Merger—Power to Sell Whole Estate—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50.]**—A tenant for life of real estate can make a good title to the whole of the settled estates, although he has assigned to the remainderman his life interest in an undivided portion thereof.

A life tenant assigned to the remainderman her interest in two undivided third shares of the settled estates, and it was contended in reliance on a passage in *Clidry L.J.*'s judgment in *Mundy and Roper's Contract* ([1899] 1 Ch. 275, 296, 68 L J Ch. 135, 47 W R 226; 79 L T 533 (C.A.)) that, so far as such shares were concerned, the settlement had come to an end by merger and that the life tenant could not make a good title to the whole estates.

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HELD—that the whole estates were still “settled land,” and that she could make a good title to them. The observations in *Mundy and Roper’s Contract* referred only to a case of an assignment to the remainderman of the whole of the life tenant’s interest

IN RE BARLOW’S CONTRACT, [1903] 1 Ch. 382;  
[72 L. J. Ch. 214; 51 W. R. 399; 88 L. T.  
84—Eady, J

**168. Sale at an Undervalue—Purchaser Dealing in Good Faith—Validity of Sale—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 4, 45, 53, 54.]**—The mere fact that a sale under the Settled Land Acts by a tenant for life is at an undervalue is not sufficient to invalidate the purchase as against a purchaser who has dealt with the tenant for life in good faith. And the purchaser need not make any inquiry as to whether the trustees have had a valuation made.

W. bought in good faith a public house from a tenant for life for £2,000, and at once resold it for £3,000.

HELD—no ground for setting aside the transaction.

HURRELL v. LITTLEJOHN, [1904] 1 Ch. 689;  
[73 L. J. Ch. 287, 90 L. T. 260; 20 T. L. R.  
198—Joyce, J.

**169. Sale of Settled Land—Discretion of Court—Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (iii).]**—A person who, by virtue of sect. 63 of the Settled Land Act, 1882, is “deemed to be tenant for life” of settled land is not entitled, as a matter of course, to an order under sect. 7 (iii.) of the Settled Land Act, 1884, giving him leave to sell the settled land.

IN RE TUTHILL, [1907] 1 Ir. R. 305—M.R.

**170. Conveyance to Trustees without Words of Limitation—Consequent Reversion in Settlor—Power of Tenant for Life to Sell Fee Simple—“Estate or Interest Comprised in the Subject of the Settlement”—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2 (2), 20 (1), 58 (1).]**—Estates were settled by a deed which conveyed them to trustees, without words of limitation. consequently the estate of the trustees was limited to the life of the survivor of them, and there was a reversion left in the settlor. The tenant for life desired to sell the estates.

HELD—that he could make a good title by reason of sect. 2 (2) of the Settled Land Act, 1882. “An estate or interest in remainder or reversion not disposed of by the settlement and reverting to the settlor . . . is for the purposes of this Act an estate or interest . . . comprised in the subject of the settlement.”

IN RE HUNTER AND HEWLETT’S CONTRACT,  
[1907] 1 Ch. 46; 76 L. J. Ch. 26; 95 L. T.  
674—Eady, J.

**171. Sale to Public Body under Private Act—Price to be Fixed by Arbitration—Power to Bind Persons Interested under Settlement.]**—By an agreement between a tenant for life of settled

lands and a municipal corporation for the purposes of a waterworks reservoir, the purchase price to be settled by arbitration. The agreement purported to be made under the Settled Land Acts, and provided that the award should be binding on all persons interested in the estates. it was expressed to be conditional upon the sanction of Parliament being given to the purchase of the lands and the execution of the works, and to confirm the agreement. By a private Act obtained by the corporation, the agreement was “confirmed and made binding on the parties thereto respectively, and the same shall and may be carried into effect accordingly.”

HELD—that the intention of the Act was that the tenant for life should sell under the Settled Land Acts and convey the fee simple in the lands, so as to bind all persons interested under the settlement.

IN RE THE EARL OF WILTON’S SETTLED  
[ESTATES, [1907] 1 Ch. 50; 76 L. J. Ch. 37;  
96 L. T. 193, 23 T. L. R. 64—Warrington, J.

**(d) Remaindermen and Tenant for Life.**

**172 Apportionment of Annuity—Simple Interest.]**—A testator had covenanted to pay an annuity to his wife for life. By his will he gave half his residuary estate to trustees upon trust for his daughter for life, if and when she attained twenty-five, with remainders over. Until the daughter attained twenty-five the income was to be added to capital. The daughter had just attained twenty-five. The residue was earning 3 per cent. interest:—

HELD—that each future instalment of the moiety of the annuity payable out of the daughter’s share must as it accrued be apportioned between capital and income, as follows, viz., calculate what sum with 3 per cent. simple interest from the day when the daughter attained twenty-one to the day of payment would have met that particular instalment. Charge such sum to capital and the balance to income.

*In re Bacon* ((1893) 62 L. J. Ch. 445; 68 L. T. 522; 41 W. R. 478—Kekewich, J.) and *In re Henry* ([1907] 1 Ch. 30, see TRUSTS, No. 23) not followed.

*In re Harrison* ((1889) 43 Ch. D. 55; 59 L. J. Ch. 169; 61 L. T. 762; 38 W. R. 265—North, J.) followed.

IN RE PERKINS, BROWN v. PERKINS, [1907]  
[2 Ch. 596—Eady, J.

**173. Authorised Security—No Income for Some Years—Security ultimately Realised at a Loss—Apportionment of Capital Sum Realised.]**—Where a life tenant has for some time received no interest from settled property, and ultimately the security is realised at a loss, an account must be taken between the life tenant and remainderman in order to apportion the amount realised between income and capital.

The account runs from the date at which it was first discovered that the security was insufficient; and the sum realised must be divided in the proportion which the arrears of interest from

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that date to the date of realisation bear to the capital.

IN RE PHILLIMORE, PHILLIMORE v HERBERT,  
[1903] 1 Ch. 942. 72 L. J. Ch. 591; 88  
L. T. 765—Eady, J

Overruled in *In re Atkinson*, No. 175, *infra*.

**174. Bequest of Personality to be Invested (inter alia) in Realty to be held as Personality—Repairs—Equitable Tenant for Life**—Personality bequeathed to trustees upon trust by the direction or with the consent of the tenant for life, to invest (*inter alia*) in real estate to be held as personality in trust for a beneficiary for life with remainder to others (no powers of leasing, repairing, or managing the real estate thus acquired being given by the will) was invested with the sanction of the Court in an administration action, in the purchase of an estate comprising a mansion house, buildings, and cottages. The trustees permitted the tenant for life to enter, receive the rents and profits, and grant leases thereof.

The tenant for life mortgaged his life interest, and those entitled in remainder mortgaged their interest therein; and ultimately the mortgagees of the life estate entered into possession.

The property was permitted to fall into bad repair, and the question raised was, by whom the necessary repairs should be executed, and whether the cost of such repairs must be borne by income or capital.

HELD—that the equitable tenant for life was not bound to repair; and that the repairs should be executed by the trustees and the cost thereof charged to capital.

IN RE FREEMAN, DIMOND v. NEWBURN, [1898]  
[1 Ch. 28; 67 L. J. Ch. 14; 77 L. T. 460—  
North, J

**175. Capital and Income—Authorised Investment—Mortgage—Deficiency—Apportionment of Amount realised**—Where a settlement fund is invested upon security of a mortgage authorised by the settlement, and the mortgaged property proves insufficient to pay both principal and interest in full, the amount realised ought to be apportioned between tenant for life and remaindermen in the proportion which the amount due for arrears of interest bears to the amount due in respect of capital.

*In re Alston* ([1901] 2 Ch. 584; 70 L. J. Ch. 869—Kekewich, J., No. 192, *infra*) followed.

*In re Foster* ((1890) 45 Ch. D. 629; 39 W. R. 31; 63 L. T. 443—Kay, J.) and *In re Phillimore* ([1903] 1 Ch. 942; 72 L. J. Ch. 591, 88 L. T. 765—Eady, J., No. 173, *supra*) overruled

IN RE ATKINSON, BARBER'S CO. v. GROSE-SMITH,  
[1904] 2 Ch. 160, 73 L. J. Ch. 585; 53  
W. R. 7, 90 L. T. 825—C. A.

**176. Company paying Bonus out of Reserve—Simultaneous Issue of New Capital equal in Value to Bonus**—A company, having power to divide as dividends part of its reserve fund, consisting of accumulated profits, resolved to

divide a portion thereof amongst shareholders in the shape of a bonus of 50 per cent. upon the amount paid up, and at the same time to increase the capital of the company by a concurrent issue of preference shares equal in value to the bonus.

A circular was sent to each shareholder intimating the sum to which he was entitled as bonus, and the number of preference shares to which he was entitled, and enclosing a form of application for such shares. Warrants for the bonus dividend were sent out, payable on the day on which payment for the new shares was due.

Trustees who were properly holding shares in the company applied the bonus in payment for new shares.

HELD—that the operation was a payment of dividend to which the life tenant was entitled, and not a conversion of profits into capital.

BLYTH'S TRUSTEES v. MILNE, (1906), 7 F. 799—  
[Ct. of Sess.

**177. Compensation under Railway Clauses Act paid to Trustees of Settled Land—Apportionment of Amount between Tenant for Life and Remainderman**—Trustees of settled land had been paid a sum of money by a railway company under the Railway Clauses Act by way of compensation for not working coal mines. The coal was included in a lease, under which dead rent and royalties were reserved to the tenant for life. Separate compensation had been paid to the lessee, and the fact that the coal under the railway could be worked out before the expiration of the lease was proved, a question having arisen as the mode of apportioning the compensation money between the tenant for life and the remainderman, the Court held that the proper principle of apportionment was to treat the money as rent accruing *de die in diem* to the tenant for life for the unexpired residue of the lease, or for a less period, if the coal would have been worked out in a less period. The money would, therefore, be payable as income over that period.

CARDIGAN v. CURZON-HOWE (No. 1), [(1898) 14  
[T. L. R. 550—Romer, J.

**178. Compensation Money charged on Licensed Houses—Deduction from Rent—Income Insufficient to pay Annuity in full—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3**—A testator, who died before the Licensing Act, 1904, was passed, by his will gave his property to trustees upon trust out of the income of his trust estate to pay an annuity of £200 to his wife for the maintenance of herself and their unmarried daughters, and the residue of the income was to be accumulated, and after the death of the widow the trust fund was to go to his daughters equally. The property included three freehold beerhouses, with on-licences, and under sect. 3 of the Licensing Act, 1904, charges were imposed upon these houses for the compensation fund and paid by the tenants, who in turn made deductions from their rents. In consequence thereof the income from the trust fund was insufficient to pay the annuity in full.

HELD—that by the terms of the will the

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annuity was charged upon the income of the trust fund only, and not upon the capital, and that there was no provision in the Licensing Act, 1904, under which any part of the charge could be thrown on capital.

IN RE SMITH, SMITH *v.* DODSWORTH, [1906]  
[1 Ch. 799; 75 L. J. Ch. 442; 70 J. P. 169;  
54 W. R. 449; 94 L. T. 643; 22 T. L. R. 412  
—Eady, J.]

**179** *Covenant to pay Life Annuities—Apportionment between Capital and Income.*—A testator, who had covenanted to pay certain life annuities, left his property in trust (after realisation) for a tenant for life with remainders over.

HELD—that each instalment of the annuities must be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the date of testator's death.

*Yates v. Yates* ((1860) 28 Beav. 637—Romilly, M.R.) followed.

*In re Bacon* ((1893) 62 L. J. Ch. 445; 41 W. R. 478; 68 L. T. 522—Kekewich, J.) not followed.

IN RE DAWSON, ARATHOON *v.* DAWSON, [1906] 2 Ch. 211; 75 L. J. Ch. 604; 54 W. R. 556; 94 L. T. 817—Eady, J.]

**180.** *Fines and Fees on admission to Copyholds—Appointment of New Trustees—Admission of Heir-at-Law of last surviving Trustee—Admission of New Trustees—Apportionment*—The fines and fees payable in respect of the admission of new trustees to copyhold estates devised to trustees in trust for a tenant for life, with remainders over to other persons, must be borne by the tenant for life and remaindermen in proportion to the value of their respective interests.

*Carter v. Sebright* (26 Beav. 374) followed.

IN RE BULLOCK'S SETTLED ESTATES, LOFT—[HOUSE *v.* HAGGARD, 91 L. T. 651—Eady, J.]

**181.** *Income or Capital—Leaseholds sublet at Rack Rent—Impecuniosity of Sub-tenant—Dangerous Structures and Sanitary Expenses—Liability of Tenant for Life—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76)—London Building Act, 1894 (57 & 58 Vict. c. cccxii.).*—The trustees of a settlement acted rightly and properly in complying with a dangerous structures notice served by the London County Council, and a sanitary notice served by the Vestry of Lambeth, relating to leasehold premises forming part of the property subject to the settlement. The trustees were liable under the superior lease to pay the expenses of complying with the notices; they were entitled to recover from the under-tenant by virtue of his covenant these amounts; he being unable to pay, the trustees were entitled to indemnity out of the whole trust estate.

HELD—that as between tenant for life and remainderman the expenses were a liability which

the interest of the equitable tenant for life would have had to bear but for the existence of the underlease at rack rent. The existence of the underlease entitled her to the benefit of the covenants contained in it. She lost that benefit by reason of the impecuniosity of the sub-tenant, but she was not thereby relieved from the burden arising by virtue of her position. The amount in question was therefore chargeable against income.

IN RE COPLAND'S SETTLEMENT, JOHNS *v.* [CARDEN, [1900] 1 Ch 326; 69 L. J. Ch. 240; 82 L. T. 194—Byrne, J.]

**182.** *Keeping down Interest on Paramount Incumbrances—Insufficient Current Rents—Subsequent Rents—Several Estates—Arrears of Interest—Charge paid off by Sale of Part of Settled Estates—Liability to make good Arrears out of subsequent Income.*—Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during his life are applicable to liquidate arrears accruing the same life tenancy. See *Reiel v. Watkinson* ((1748) 1 Ves. Sen 93); *Tracy v. Viscountess of Hereford* ((1786) 2 Bro C C. 128); *Caulfield v. Maguire* ((1845) 2 J. & Lat. 141).

Where several estates are included in the same settlement, the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates. *Frewen v. Law Life Assurance Society* ([1896] 2 Ch. 511; 65 L. J. Ch. 787; 44 W. R. 682; 75 L. T. 17—North, J.).

Upon principle the tenant for life of several estates included in the same devise remains liable as between himself and the remainderman to make good arrears of interest accrued during his tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a part of the property

HONYWOOD *v.* HONYWOOD, [1902] 1 Ch 347; [71 L. J. Ch. 174; 86 L. T. 214—Byrne, J.]

**183.** *Leaseholds—Rent—Repairs.*—A testator bequeathed to his niece, M. T., the leasehold house in which he then lived, together with the furniture, books, &c., therein contained, "for the term of her natural life, and after her death to go to G. A. and his wife, my niece M. A., for their benefit, and that of their family of children." And the testator appointed his niece M. T. and his nephew G. A. executrix and executor of his will

HELD—that a tenant for life was not liable to pay the rent or to perform the covenants contained in the lease.

IN RE TOMLINSON, TOMLINSON *v.* ANDREW, [1898] 1 Ch. 232; 67 L. J. Ch. 97; 78 L. T. 12; 46 W. R. 299—Kekewich, J.]

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**184. Mansion House—Repairs—Salvage—General Jurisdiction of Court to order Repairs at Expense of Trust Estate.**—A testator devised his freehold mansion with the grounds and appurtenances to the use of the trustees in fee simple upon trust for his sister so long as she should live and remain a spinster, "subject to the condition that she shall keep the said premises substantially in the state of repair in which she finds them at my death," with remainder over. The mansion was in a general state of disrepair at the testator's death. The question arose whether the trustees ought out of capital monies to execute and do any and what repairs or other works in order to place the mansion in a good state of repair. It was conceded that the Settled Land Act, 1882, did not apply to the case.

**HELD**—that the trustees had a mere legal estate—a mere bare estate, that they had no trust to perform with reference to the mansion at all; that they were simple trustees for certain tenants for life and certain tenants in remainder, that the case could not be treated differently from the ordinary case of a legal tenant for life with legal remainders; and that there was no general jurisdiction of enabling the proposed expenditure to be made at the expense of the estate, and that a case of salvage had not been made out.

*In re De Tessier's Settled Estates* ([1893] 1 Ch. 153, 165; 62 L. J. Ch. 552; 41 W. R. 184; 68 L. T. 275; 3 R. 103—Chitty, J.) applied.

**IN RE WILLIS, WILLIS v. WILLIS**, [1902] 1 [Ch. 15; 71 L. J. Ch. 73; 50 W. R. 70; 85 L. T. 436—C. A.

**185. Mining Lease—Coal left unworked to support Reservoir—Compensation for Royalties Lost to Lessor—"Shorts"—Right to make up Shorts against future Royalties—Claim by Lessee—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 6, 22, 25.**—A life tenant of settled lands was entitled to all rent and royalties reserved on mining leases. Certain coal had to be left unworked to support a reservoir, and the water company compensated the lessee, compensation was also payable to the lessee in respect of acreage royalties which would have been received by him in the five years necessary for working the coal in question. The sum was assessed and paid into Court.

**HELD** (1) as between life tenant and remainderman, that the sum should be paid or allocated to the former in ten half-yearly instalments calculated according to the quantity of coal that would have been worked in each half-year.

*In re Robinson* ([1891] 3 Ch. 129; 60 L. J. Ch. 776; 39 W. R. 632; 65 L. T. 244—Chitty, J.) followed.

*In re Barrington* (1886) 33 Ch. D. 523; 56 L. J. Ch. 175; 35 W. R. 164; 55 L. T. 87—Kay, J.) not followed.

(2) As between lessor and lessee, that, although the lessee had a right to make up "shorts" to

an extent exceeding the lessor's compensation for royalties, the lessee was not entitled to immediate payment of the compensation, but that, if he continued working, he would become entitled to each instalment as it accrued due to the lessor

**IN RE FULLERTON'S WILL**, [1906] 2 Ch. 138; [75 L. J. Ch. 552; 94 L. T. 667—Eady, J.

**186. Railway Bonds—Deficiency in Interest—Sale of Bonds—Apportionment.**—Second mortgage bonds of a railway company, with interest coupons attached, contained a promise to pay the principal monies secured in 1917, and interest thereon in the meantime upon surrender of coupons "accumulative at the rate of 6 per cent. per annum . . . as and when earned out of any net earnings of any year" after meeting interest on the first mortgage bonds. Any deficiency in interest was not to be "waived, but shall be paid out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose."

In 1899 some of these bonds were settled in trust for M. for life, then for her husband T. (if surviving) for life, and ultimately for M.'s next of kin.

Prior to 1901 interest had not been paid in full, and no deficiency had ever been made up in a subsequent year. In 1902 the bonds and coupons were sold. Subsequently M. died, leaving T. her personal representative.

**HELD**—that T. was not entitled to any part of the money realised by the sale of the bonds in respect of any deficiency of interest during M.'s lifetime.

**IN RE TAYLOR'S TRUSTS, MATHESON v. TAYLOR** [1905] 1 Ch. 734; 74 L. J. Ch. 419; 53 W. R. 441; 92 L. T. 558—Buckley, J.

**187. Repairs—Serving Notices on Tenants to Repair—Surveying Property—Apportionment of Expenses.**—A sum of money was settled by a marriage settlement upon trust for the husband and wife during their joint lives, and then to the survivor, with remainder over. The trustees had power to purchase certain reversions, which were to be settled upon the same trusts as the money (which was done), and there was a provision that until the reversions were sold the trustees were to pay the net rents and profits after payment of outgoings to the person entitled to the income of the trust premises. The property was let to tenants who were under covenant to repair, and the trustees incurred expenses in surveying the property and serving notices on the tenants to repair.

**HELD**—that those expenses were not "outgoings," but were expenses incurred for the benefit of the property as a whole, and must be fairly apportioned as between the tenant for life and remaindermen, and that this could best be effected by raising the amount by a mortgage of the property.

*In re Hotchkys* (1887) 32 Ch. D. 408; 55

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L. J. Ch. 546; 55 L. T. 110; 34 W. R. 569—C. A.) applied.

IN RE MCCLURE'S SETTLEMENT, *CARR v. COMMERCIAL UNION ASSURANCE CO.*, (1906) 76 L. J. Ch. 52; 95 L. T. 704, 23 T. L. R. 42—Kekewich, J

**188. Shares in Company—Return of Capital—Capitalised Profits—Special Resolution of Company—Retrospective Effect—Companies Act, 1880 (45 Vict. c. 19), ss. 3, 4, 5.]**—The general rule is that a tenant for life is entitled as against the remainderman to all payments made out of profits in respect of shares in a limited company, except such as have been validly capitalised by the company.

*Bouch v. Sproule* ((1887) 12 App. Cas. 385, 56 L. J. Ch. 1037; 57 L. T. 345; 36 W. R. 193—H. L.) applied.

A trust estate comprised shares in a limited company; for a number of years the company, out of profits available for dividends, returned annually to its shareholders a part of the capital paid upon their shares, increasing the unpaid capital by the same amount. In 1905 for the first time, the company passed a special resolution authorising such return in that year, and in future years, and also confirming the similar returns in previous years.

HELD—that the resolution was valid only so far as 1905 was concerned, and had no prospective or retrospective effect; and that, consequently, the tenant for life was entitled to receive as income all returns except that made for 1905.

IN RE PIERCY, *WHITWHAM v. PIERCY*, [1907] 1 Ch. 289; 76 L. J. Ch. 116, 95 L. T. 868; 14 Mans. 23—Neville, J.

**189. Sanitary Works required by Local Authority—Expenses of Remaindermen—Tenant for Life—Assignees of Life Interest]**—A notice having been served by a sanitary authority requiring the trustees of settled property to execute certain works, the mortgagees of the equitable life tenant's interest agreed with the trustees to do the work without prejudice to the question of ultimate liability.

HELD—that the mortgagees were entitled to be subrogated to the trustees' rights, and to have a charge on the *corpus* of the settled property for the amount expended in permanent improvements and also for their costs

*Semble*, it is a matter for the discretion of the court as to how the cost of such repairs is to be divided in any particular case between *corpus* and income.

Decision of Kekewich, J. (52 W. R. 535), reversed

IN RE FARNHAM'S TRUSTS, *LAW UNION AND CROWN INSURANCE CO. v. HARTOPP*, [1904] 2 Ch. 561, 73 L. J. Ch. 647, 91 L. T. 781; 2 L. G. R. 1050—C A

**190. Special Dividend—Capital or Income—Decision of Directors.]**—By the report of the directors of a company registered in India the special dividend of Rs 1,500,000 was intended to be applied in full of the amount payable in respect of the preference shares, and the directors anticipated the shareholders would so apply the special dividend and authorise the directors to appropriate it for that purpose, but any shareholder desiring the special dividend in cash would be so paid, and the preference shares which would have been allotted to him if he had paid for them would be disposed of by the company as it might think fit. The question arose whether a sum received by the executors of the will of a late shareholder in respect of shares in the company held by the testator at his death ought to be treated as income or capital.

HELD—that the company had said that it was income if the shareholder intended so to take it, and the sum would therefore go to the tenant for life as income.

*Bouch v. Sproule* ((1887) 12 App. Cas. 385; 56 L. J. Ch. 1037; 36 W. R. 193; 57 L. T. 345; H. L. (E.)) distinguished.

IN RE DESPARD, *HANCOCK v. DESPARD*, (1901) [17 T. L. R. 478—Kekewich, J.

**191. Trust for Conversion—Lease by Testator—Chalk Pits on Land Leased—Conversion not Effected—Moneys Received from Lessee for Chalk Worked.]**—Real and personal estate were devised and bequeathed by will to trustees upon trust for conversion, the proceeds to be invested and the income thereof paid to the testator's widow for life, and after her death in trust for his children. Part of the testator's estate consisted of land which had been let by him on lease, the lease empowering the lessee to dig chalk under portions thereof, and also to take additional chalk land, and the lessee was to pay by way of consideration for additional land a specified acreage rent. The land comprised in the lease was not converted, but there was no improper delay in effecting the conversion.

HELD—that the moneys received by the trustees from the lessee for additional chalk land should be treated as income, and not capital, and should be paid to the widow during her life.

*In re Searle, Searle v. Baker* ([1900] 2 Ch. 829; 69 L. J. Ch. 712; 49 W. R. 44; 83 L. T. 364—Kekewich, J., No. 129, *supra*) followed.

See SETTLEMENTS, 129

IN RE LORD DARNLEY, *CLIFTON v. DARNLEY*, [1907] 1 Ch. 159; 76 L. J. Ch. 58, 95 L. T. 706; 23 T. L. R. 93—Kekewich, J.

**192. Trust Funds—Mortgage Security—Amount recovered by Sale—Apportionment.]**—Trust funds of a settlement comprised a sum secured by mortgage. Payments in respect of interest on the mortgage were made very irregularly. There being considerable arrears of interest due, the trustees of the settlement went into possession of the mortgaged property and collected the rents. The property comprised in the mortgage was then sold, and realised

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considerably less than the principal and interest in an ear.

**HELD**—that the amount which had been recovered must be apportioned between capital and income in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal, and as between the successive tenants for life, the amount attributed to interest would be apportioned in proportion to the arrears due to them respectively.

*In re Moore* ((1885) 54 L. J. Ch. 482, 33 W. R. 447; 52 L. T. 510—Pearson, J.) followed

*In re Foster* ((1890) 45 Ch. D. 629; 60 L. J. Ch. 175; 39 W. R. 31, 63 L. T. 413—Kay, J.) commented on

*IN RE ALSTON, ALSTON & HOUSTON*, [1901] 2 Ch 584, 70 L. J. Ch 869—Kekewich, J.

Followed in *In re Atkinson*, No. 175, *supra*

**193 Waste — Timber — Equitable Waste — Ornamental Timber—Intention of Settlor—Inference from Existing Circumstances**—Where, in an action for an injunction by a remainderman under a settlement of real estate, to restrain a tenant for life not impeachable for waste from cutting timber, the plaintiff adduces some evidence that some of the timber which is being cut by the defendant (the tenant for life) was either originally planted or was left standing for the purpose of ornament or shelter, by the settlor, the plaintiff has made out a *prima facie* case for an injunction on the ground of equitable waste, which the defendant must answer.

*WELD-BLUNDELL & WOLSELEY AND OTHERS*, [1903] 73 L. J. Ch 45; 2 Ch. 664; 51 W. R. 635, 89 L. T. 59—Eady, J.

**(e) Rights and Duties**

**195 Minerals — Lease — Open or unopened Mines—Separation by a Strip belonging to Third Party—Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 4**—A settled estate was divided into two portions by a strip of land belonging to a different owner. A seam of coal underlay the whole. When the tenant for life of the settled estate came into possession, the part of the seam underlying the northern portion of the estate was an opened mine. The tenant for life subsequently acquired the coal underlying the dividing strip. The tenant for life now proposed to grant a lease of the part of the seam underlying the southern portion of the estate, which had not yet been worked. This part of the seam it was practicable to work from the opened mine, but it was not commercially convenient, and it was therefore intended to sink a new shaft in the southern portion of the estate.

**HELD**—that the part of the seam underlying the southern portion of the estate was an unopened mine, and that therefore three-fourths of the rent under the lease must be set aside and invested

*IN RE MAYNARD'S SETTLED ESTATE*, [1899] 2 [Ch 347, 68 L. J. Ch 609; 63 J. P. 552, 48 W. R. 60, 81 L. T. 163—Kekewich, J.

**196. "Opened Quarries"—Rent and Profits.]**

—A lady, who was absolutely entitled to property which contained open quarries, settled it by a marriage settlement in English form, reserving to herself for life the income of the property. The quarries were not worked for four years

**HELD**—that the proceeds of the opened quarries formed part of that which went to the tenant for life, and that she was entitled to take them as part of the proceeds of the soil, and that they did not fall to be accumulated for the benefit of the child of the marriage

Open mines are part of that which may be given to a tenant for life, and he is entitled to take the mineral therefrom as though it was the recurrent produce of the soil. The rule is not limited to mines opened by the settlor or testator

*GREVILLE-NUGENT & MACKENZIE*, [1900] A. C. [83; 69 L. J. P. C. 1 81 L. T. 793; 16 T. L. R. 43—H. L. (Sc)]

**197 Waste — Mining Lease — Unimpeachable for Waste—Open Mines—Proportion of Rent to be Set Aside as Capital—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 11**—A tenant for life entitled to work mines may be properly described as not impeachable for waste in respect of the minerals got from such mines, whether the power arises from the terms of the settlement or by inference from the circumstances that the mines are open.

As regards open mines a tenant for life is not impeachable for waste in respect of minerals within the meaning of sect. 11 of the Settled Land Act, 1882, although he is not expressly declared by the settlement to be unimpeachable for waste. In such a case he is under an obligation to set apart one-fourth part of the rent as capital money if he grant a lease of open mines

*IN RE CHAYTOR*, [1900] 2 Ch. 804; 69 L. J. Ch. [837, 49 W. R. 125, 16 T. L. R. 546—Stirling, J.

**198 Mines—"Opened"—Seams of Coal not actually Worked—Intention of Testator**—In 1894 H. C. purchased the Stockinford Colliery, which consisted partly of freeholds and partly of leaseholds, and it was a colliery in which there had been driven an incline for the purpose of working underground. By the time of H. C.'s death this incline had been used for that purpose. It had been driven through all the seams, which were seams not lying horizontally, but sloping or leaning one against the other. Cross-headings had been driven out to the right and to the left from this incline, and those cross-headings had passed through all the seams excepting the "slate coal," but including the "five-foot seam." But so far as regards the "slate coal," they had only been brought up to the face of it, and had not been carried into that seam itself. H. C. gave instructions for the making of his will in June, 1897. He thereby left his freeholds to trustees in trust for Sir W. C. for life with remainders afterwards. The leaseholds were left to trustees not specifically, but as part of the testator's personality for different reasons from those who took the freeholds. Then



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he empowered his trustees at their discretion to carry on so long as they should think proper his mining, manufacturing, and other businesses, and to increase or diminish any such businesses or his capital therein, or to sell or otherwise to deal with and manage the same as they in their absolute discretion should think proper.

**HELD**—that taking all the facts of the case into consideration, including the will of the testator, all the seams of coal, including the "slate coal" and the "five-foot seam," were to be included as open mines, and that the tenant for life was entitled to work all the seams of coal.

CHAYTOR *v* TROTTER, (1902) 87 L. T. 33—C. A.

**199. Instalment Mortgage—Payment of Instalments—Sale—Deficiency of Proceeds—Rateable Repayment.**—A testator devised certain lands, subject to an instalment mortgage, to his wife for life, remainder to his children for life, remainder over. After the testator's death his widow paid several instalments on foot of the mortgage. She died intestate, and further instalments were then paid by the other tenants for life. The lands were sold under the Settled Land Act, and the balance of the mortgage paid off out of the proceeds, and by an order of the Court the tenants for life were declared entitled to be recouped the sums expended by them on foot of the mortgage, out of the remaining surplus of the purchase-money. The fund proving insufficient to repay the tenants for life in full —

**HELD**—that the several tenants for life were entitled to be recouped rateably, the first tenant for life having no right to be repaid the sums expended by her on foot of the mortgage, in priority to the other tenants for life.

IN RE NEPEAN'S SETTLED ESTATE, [1900]  
[1 Ir. R. 298—V.-C.]

**200. Possession — Term of Years—Trust for Management—Conditional Order—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 5, 7; s. 53; s. 58, sub-s. 1, cls (6), (9)**—The plaintiff was tenant for life of certain landed property. In 1868 a part of the property had been devised to trustees for a term of five hundred years, with directions to manage and receive the rents and profits, and apply the surplus rent in paying off two mortgages of £16,000 and £14,000 respectively. The mortgages had now been reduced to £9,000 and £8,000 respectively, and the plaintiff applied to be let into immediate possession of the estates, and that such of the title-deeds relating thereto as were in the possession of the trustees might be delivered up to him.

**ORDERED**—that the plaintiff, upon giving security to the satisfaction of the judge in chambers for the due performance of the undertaking to account for the rents and pay the surplus rents to the trustees, be let into possession of the settled estate, and that the trustees deliver up to him any deeds which were in their possession.

*In re Richardson* ([1900] 2 Ch. 778; 69 L. J. Ch. 804—Stirling, J., No. 138, *supra*) approved.

IN RE MONEY KYRLE, MONEY KYRLE *v* MONEY  
[KYRLE, [1900] 2 Ch. 839, 69 L. J. Ch. 780;  
49 W. R. 44, 83 L. T. 74—Cozens-Hardy, J.]

**201. Possession—Ground Rents—Sale—Proceeds applied in Paying off Incumbrances on Ground Rents—Delivery of Title Deeds and Documents.**—The tenants for life under the Settled Land Acts, 1882 to 1890, of a settlement created by the will of a testator of annual ground rents thereby devised, took out a summons against the surviving trustee of the settlement and the persons beneficially interested in remainder under the settlement of ground rents, asking for a declaration that the proceeds of sale of any of the ground rents sold by the applicants under their statutory powers might be applied in paying off the incumbrances upon the ground rents remaining unsold, and that the applicants might be let into immediate possession of the ground rents and that the deeds and documents of title relating thereto might be delivered up to them.

**HELD**—that the declaration asked for by the applicants must be made.

RE WILKINSON, LLOYD *v* STEEL, (1901) 85  
[L T. 43—Cozens-Hardy, J.]

**202. Lease by—Breach of Covenant to Repair by Lessee—Right of Tenant for Life and Trustees to Sue for Breach—Set-off—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6, 7, 53**—Premises were devised to trustees upon trust to pay the rents and profits thereof to a person for life with remainder over. The tenant for life granted a lease of the premises by which the lessee covenanted to keep the premises in repair. The lessee having committed a breach of the covenant to repair —

**HELD**—that the tenant for life, in granting the lease, was by reason of sect. 53 of the Settled Land Act, 1882, in the position and had the duties of a trustee for all parties under the settlement, that, therefore, the damages were recoverable by the tenant for life as trustee for the trust estate, and the trustees under the will were entitled to be joined as plaintiffs in the action, and that the defendant could not set up a set-off against the tenant for life alone.

MITCHELL AND OTHERS *v* ARMSTRONG, (1901)  
[17 T. L. R. 495—Bigham, J.]

**203. Fire Insurance—Premiums paid by Trustee out of Income—Policy Moneys, who entitled to—Gift to Trustees of Fund.**—A tenant for life, under no liability by the settlement to insure and not impeachable for waste, by whose directions a policy of insurance has been kept up on the mansion-house, and the premiums thereon paid out of his income, is entitled as against the trustees of the settlement to money paid by the insurance office in respect of damage done to the mansion-house by fire.

As regards the reasoning to be applied to such cases, those given by Kindersley, V.-C. in

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*Seymour v. Vernon* (16 Jur. 189), and *Chitty, J.* in *Wurricke v. Bretnall* (23 Ch. Div. 188), which were cases of tenants in tail, are precisely applicable, and those cases accordingly followed.

The fact that pending a decision by the tenant for life as to whether he will expend the insurance fund in rebuilding the premises, the money has been invested in the names of the trustees of the settlement during a period of fourteen years.

**HELD**—not, under the circumstances, to amount to an abandonment of the life tenant's right to the fund or a gift of it by him to the trustees for the benefit of the corpus of the settlement fund.

*GAUSSEN v. WHATMAN*, (1905) 93 L. T. 101—  
[Kekewich, J.]

**IX. TRUSTEES.**

*See also title TRUSTS AND TRUSTEES.*

**204 Bankruptcy—Action to set aside Settlement—Parties—Costs.**—A. settled property, to which he was absolutely entitled, upon trust to pay the income to him until he should die or become bankrupt, and after the determination of the trust by bankruptcy upon trust for the benefit of himself and his children.

He became bankrupt, and his trustee in bankruptcy brought this action against the trustees to set aside the settlement, and, at the request of the trustees, added A.'s wife and child as parties.

**HELD**—that the limitations over in case of bankruptcy were void as against creditors; the trustees of the settlement must have their costs as between solicitor and client, but the beneficiaries, though not improper, were unnecessary parties, and there would be no order as to their costs.

*MERRY v. POWNALL*, [1898] 1 Ch. 306; 67 L. J. Ch. 162; 78 L. T. 146; 46 W. R. 487—  
Kekewich, J.

**205. Trust to Allow Widow to Occupy Mansion-house and Land so long as she might wish to do so—Trustees for Purposes of Settled Land Act, 1882—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 38, 58.**—A mansion-house and land were vested in trustees for a term of 1,000 years upon trust to allow the plaintiff to occupy the same rent-free so long as she might wish to continue to do so.

**HELD**—that the plaintiff was tenant for life within the meaning of the Settled Land Act, 1882; but held—that the trustees of the term were not trustees for the purposes of the Settled Land Act.

*In re Eastman's Settled Estates* ([1898] W. N. 170 (15)) followed.

*IN RE CARNE'S SETTLED ESTATES*, [1899] 1 Ch. 324, 69 L. J. Ch. 120; 47 W. R. 352; 79 L. T. 642—North, J.

**206 Minerals—Newly-Discovered Seam of Coal—Powers of Trustees to Grant Mining Lease.**—

A testator settled his real estate, and empowered his trustees to lease any portion of it for any number of years, and subject to such provisions, &c., as the trustees should in their discretion think proper and beneficial.

After his death coal was discovered under part of the estate.

**HELD**—that the trustees had power to grant mining leases, reserving proper rents and royalties.

*IN RE BARKER, WALLIS v. BARKER*, (1903) 88 L. T. 685—Kekewich, J.

**207. Trustees with Power of Sale—Land Subsequently Purchased—Land "comprised in" the Settlement—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 16 (1).**—A testator by his will declared that it should be lawful for his trustees to sell all or any of his real property, with the exception of the mansion house and certain specified land, the proceeds to be re-invested in land. There was also a trust for sale of the residuary personal estate, the proceeds to be applied in the purchase of land. The real estate owned by the testator, over which there was a power of sale, was sold, and the proceeds arising from the sale of the personal estate were invested in the purchase of land, which was conveyed to the trustees. The tenant for life having entered into a contract to sell the mansion house and lands under the Settled Land Act, the purchaser took the objection that there were no trustees for the purposes of the Settled Land Acts.

**HELD**—that the trustees of the will were trustees for the purposes of the Acts under sect 16 (1.) of the Settled Land Act, 1890, as they were trustees with power of sale "of any other land comprised in the settlement," those words meaning land for the time being comprised in the settlement.

*IN RE MOORE, MOORE v. BIGG*, [1906] 1 Ch. 789, 75 L. J. Ch. 342; 54 W. R. 434; 95 L. T. 521; 22 T. L. R. 342—Eady, J.

**X. VOLUNTARY SETTLEMENTS.**

*And see BANKRUPTCY*, 273, 285—288.

**208. Interest in Default of Appointment—Acquisition of Interest by Appointment—Estoppel.**—Under a marriage settlement, certain property was vested in trustees upon trust, after the death of the plaintiff's mother, and in default of appointment by her, for the plaintiff, as the only child of the marriage absolutely.

By a post-nuptial settlement, which recited that the property comprised in the marriage settlement was vested in the trustees thereof upon trust after the death of the plaintiff's mother, for the plaintiff, her heirs, executors, administrators, and assigns, the plaintiff, who was then an infant, conveyed the property, subject to her mother's life interest therein, to trustees upon certain trusts. This deed did not contain any covenant for the settlement of the plaintiff's after-acquired property. Subsequently the plaintiff's mother irrevocably

**Voluntary Settlements—Continued.**

appointed the property after her death to the plaintiff.

**HELD**—(following *Sweetapple v. Horlock*, 11 Ch. D. 745), that the interest which the plaintiff took under the appointment was not comprised in the post-nuptial settlement.

LOVETT v. LOVETT, [1898] 1 Ch. 82; 67 L. J. Ch. [20; 77 L. T. 650; 46 W. R. 105—Romer, J.

**209. Guardians and Ward—Undue Influence—Independent Advice—Duty of Adviser—Solicitor.**—In an action claiming to have a settlement set aside and delivered up to be cancelled, the plaintiff, then just of age, was induced by strong moral pressure to execute a settlement. She did not have the benefit of the advice of an independent solicitor. The solicitor who purported to act for her had, in fact, acted throughout the business for the step-mother as well—who benefited under the settlement. The solicitor never examined the plaintiff separately to ascertain whether she was acting independently, and had not advised her as to the proper course to adopt, or recommended the insertion in the settlement of a power of revocation.

**HELD**—that the settlement must be set aside and delivered up to be cancelled.

**HELD**, also, that the youth, being in the eye of the Court unfit to deal irrevocably with his parent or guardian in the matter of a gift, must appoint some independent adviser to act for him. It is the duty of the independent adviser to protect the donor against himself, and not merely against the personal influence of the donee, in the particular transaction. If he is not satisfied that the gift is right and proper for the donor to make under all the circumstances, his duty is to advise the donor not to go on with the transaction, and to refuse to act further for him if he persists.

POWELL v. POWELL, [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84—Farwell, J.

**210. Post-nuptial—Rectification—Intention—Instructions.**—A husband, who was about to enter into partnership as a stockbroker, by a voluntary settlement settled certain property upon his wife for life, with remainder to his children. No life interest was reserved to the settlor. On the death of his wife many years afterwards, the husband alleged that he first discovered the omission to give a life interest to himself, and he brought an action to have the settlement rectified to this extent, as being contrary to his intention. He did not allege that he had given express instructions to the solicitor who drew the settlement to have such a provision inserted. In the draft deed the reservation to the settlor of a life interest had been struck out.

**HELD**—that the husband had not made out a case for rectification.

RAKE v. HOOPER, (1901) 83 L. T. 689; 17 [T. L. R. 118—Kekewich, J.

**211 Confidential and Fiduciary Relationship—Undue Influence—Independent Advice—Imperfect Knowledge of Contents of Deed.**—This action, the trial of which extended over fourteen days, was brought for the purpose of setting aside a voluntary settlement. The settlor (plaintiff), at the date of the deed, was twenty-five years of age, and the judge came to the conclusion that he was "a young man of considerable natural ability, but indolent, prodigal and self-indulgent, and too idle to concentrate his attention on business, unless he was forced to apply himself to the matter in hand, or unless it had reference to the gratification of some immediate wish." He had already wasted a considerable part of a large fortune, and it was admitted that the advice given to him to execute a voluntary settlement was sound and to his own interest. The objection, however, to the settlement was that S, one of the trustees, and his wife took a life interest in one half of the settled funds, if the settlor died intestate, while his wife and children were included in the "discretionary trust," and his consent was necessary before the settlor could revoke the settlement.

S. was "very much older than the plaintiff, an experienced man of the world, with a sufficient knowledge of business, particularly in connection with joint stock company enterprise, in which, however, he had not been successful." For some months the plaintiff boarded in his house, and allowed S to open his business letters. The other trustee, R., was the solicitor who drew the settlement, but he was not introduced to the plaintiff by S.

The judge came to the conclusion, upon the evidence, that the relationship between the plaintiff and S was one of "the variety of relations in which dominion may be exercised by one person over another" (see Sir S. Romilly's reply in *Huguenin v. Basely* (1807) 14 Ves. 273, adopted by Lord Cottenham in *Dent v. Bennett* (1840) 4 My. & Cr. 277); that he did not have independent advice free of S's influence and control, it being "almost farcical to consider R. as his solicitor any more than S's," and that consequently the settlement must be set aside, and that the defendants S. and R. must pay the costs of the action, including those of the formal defendants other than S's wife.

*Powell v. Powell* ([1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84—Farwell, J., No. 209, *supra*) followed.

CAVENDISH v. STRUTT (1903) 19 T. L. R. 483 [—Byrne, J.

**212 Voluntary Assignment of an Expectancy—Property in fact reaching Assignor—Court will not grant Specific Performance.**—An assignment of a bare *spes successionis* cannot operate by way of a grant, but equity may treat it as an agreement to subsequently grant and assign—only, however, if value has been given, for a volunteer cannot enforce a contract made by deed to dispose of an expectancy.

L. by deed granted and assigned to trustees all the real or personal estate that might come to her on the death of her sister and brother; there was a strong probability, but no certainty, of

**Voluntary Settlements—Continued.**

her so receiving some property. On the death of her sister, she did receive property, and transferred it to the trustees, on the death of her brother she received more property, which she did not now wish to transfer to them.

**HELD**—that she could not be compelled to do so.

The decision in *Meek v. Kettlewell* (1842) 1 Hare, 464, (1843) 1 Ph. 342, 58 R. R. 137) is still good law.

**IN RE ELLENBOROUGH; TOWRY-LAW v. BURNE**, [1903] 1 Ch. 697, 72 L. J. Ch. 218; 51 W. R. 315; 87 L. T. 714—Buckley, J.

**213. Common Law Grant of Realty—Disclaimer of Trustee by Deed—Effect on the Settlement**—A settlor by a common law grant, containing no power of revocation, settled real estate; but the trustee disclaimed by deed

**HELD**—that the settlement had been duly constituted, and that the legal estate passed to the trustee, and that upon his disclaimer the settlor became trustee of the settlement.

*Jones v. Jones* (1874) W. N. 190) followed.

**MALLOTT v. WILSON**, [1903] 2 Ch. 494; 72 [L. J. Ch. 664; 89 L. T. 522—Byrne, J.

**SEVERAL FISHERY.**

*See FISHERIES*

**SEWERS AND DRAINS.**

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For cases relating to sewers and drains in London, *see* title METROPOLIS.

*See also* HIGHWAYS; NUISANCE; PUBLIC HEALTH; WATER AND WATER-COURSES.

**I. "DRAIN" OR "SEWER."**

**1. "One Building only" — Semi-detached Houses—Carrying Drain through another Person's Land—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13**—The defendant was the owner of a freehold plot 112, and the plaintiff's predecessor in title bought two freehold plots 113, 114; plot 112 adjoined plot 113. The defendant being about to erect a pair of semi-detached houses on plot 112 sent plans both as to drainage and as to the building to the local

authority. The defendant in making a connection between a manhole on plot 112 and the public sewer carried that connection or culvert across the frontage of plot 113 which became the property of the plaintiff. The plaintiff complained of this, and asked for a declaration and an injunction. The plaintiff and the defendant each owned one-half of the road in front of his plot.

**HELD**—that there was "one building only" within the meaning of sect. 4 of the Public Health Act, 1875, on plot 112, and none the less because it was used as a pair of semi-detached houses; that the culvert was not a "sewer" so far as it went over the defendant's land; that even if the culvert was a sewer down to the boundary of the defendant's land, he could not, by a wrongful act, by a trespass on the land of some one else, make that portion of the culvert which ran through that other person's land a "sewer" within the meaning of the Public Health Act, 1875.

**HEDLEY v. WEBB**, [1901] 2 Ch. 126; 70 L. J. Ch. 663; 65 J. P. 425; 84 L. T. 526; 17 T. L. R. 393—Cozens-Hardy, J.

**2. Pipe draining several Houses in a Row the Property of one Owner—Connection with Sewer by Single Private Drain—Liability for Repair—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19 (1)**—The upper portion of a pipe may be a "sewer" although the lower portion is a "single private drain."

Twelve houses forming part of a crescent, numbered with odd numbers from 51 to 73, were the property of one owner, No. 75 belonging to another person, and Nos. 77 to 81 to a third person. At the rear of these sixteen houses ran a main or common drain which was connected with the public sewer in front of such houses by a branch drain, which ran between the houses numbered 73 and 75, at about right angles to the road, under a narrow strip of land, between such two houses, which was unbuilt upon. Each of the sixteen houses connected with the main or common drain by means of branch drains, which conveyed the sewage of each of the houses to the main or common drain, and thence through the branch drain into the public sewer in front of the houses. The main or common drain and branch drain were constructed wholly upon private property. A nuisance having arisen in the main or common drain and branch drain, a notice was served upon the owners to do the necessary repairs and works to abate such nuisance. The sanitary authority, under sect. 41 of the Public Health Act, 1875, entered and did the work and demanded from the owner of Nos. 51 to 73 his apportioned expenses under sect. 19 of the Public Health Acts Amendment Act, 1890. He did not dispute that the branch drain was a single private drain.

**HELD**—that the main or common drain at the rear of the houses Nos. 51 to 73 (odd numbers) was a sewer, and that the owner was not liable to pay for the repair thereof.

Decision of Div. Ct. ([1904] 2 K. B. 359; 73

**"Drain" or "Sewer"—(Continued).**

L. J. K. B. 428, 68 J. P. 306; 53 W. R. 95, 90 L. T. 417) affirmed.

JACKSON *v.* WIMBLEDON URBAN DISTRICT [COUNCIL, [1905] 2 K. B. 27, 74 L. J. K. B. 641; 69 J. P. 225, 53 W. R. 485; 92 L. T. 553; 21 T. L. R. 479, 3 L. G. R. 586—C. A.

3. *Premises within the same "Curtilage"*—*Block of Houses with Common Access*—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 4, 13, 15, 19 ]—The appellants owned eighteen houses, Nos. 7 to 25 in No. 1 Court, E Lane, S. The houses are back-to-back houses. Nos. 7 to 13 face Nos. 14 to 19, and between them is an open space of ground, with a pavement on either side; Nos. 20 to 25 face a boundary wall, with an intervening space of ground and a pavement. The main entrance to the court is from a partially enclosed piece of ground, entered from a main thoroughfare. There are also two narrow passages between houses in the 7 to 13 block, by which entrance can be obtained.

HELD—that the houses were not premises within the same "curtilage," and that therefore the surface-water channels from their respective sinks running along the court pavement to gullies were not "drains" within sect. 4 of the Public Health Act, 1875

HARRIS AND OTHERS *v.* SCURFIELD, (1904) 68 [J. P. 516; 20 T. L. R. 659; 91 L. T. 536—Div. Ct.

5. *Sewer—Vesting in Local Authority*—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 13—*Public Health Acts Amendment Act, 1890* (53 & 54 Vict. c. 39), s. 19. ]—A drain ran under certain premises contracted to be sold, and received the sewage from two adjoining houses belonging to other owners.

HELD—that this drain was a sewer and vested in the local sanitary authority, under sect. 13 of the Public Health Act, 1875, notwithstanding that it was a "single private drain" under sect. 19 of the Public Health Acts Amendment Act, 1890, and that therefore it was a blot upon the title.

PEMSEL AND WILSON *v.* TUCKER, [1907] 2 Ch. [191; 76 L. J. Ch. 621; 71 J. P. 547; 97 L. T. 86—Warrington, J.

6. *"Sewer"—What is—Overflow Sewer—Sewer for one Purpose, but not for all—Use of a Sewer as a mere Conduit Pipe, but not as a Sewer*—*West Riding of Yorkshire Rivers Act, 1894* (57 & 58 Vict. c. clxvi.), ss. 3, 7, 9, 10, 11—*Rivers Pollution Prevention Act, 1876* (39 & 40 Vict. c. 75), s. 3—*Rivers Pollution Prevention Act, 1893* (56 & 57 Vict. c. 31), s. 1 ]—The liquid refuse from a manufactory was carried away in a wooden trough. Prior to 1878 this trough had discharged direct into the river Aire. In 1878 the trough was shortened in order to make room for an empty pipe erected by the local authority, and was made to discharge into the iron pipe. The authority erected this iron pipe to form a continuation of an "overflow" sewer or culvert

with the object of discharging the contents thereof into the river at a point lower down the river than that at which the culvert originally discharged. The culvert or "overflow" sewer was generally dry, but on some thirty days in the year it took storm water mixed with sewage which the ordinary sewers in a neighbouring street could not deal with. The manufacturers were fined for discharging refuse into the river.

HELD—that the conviction must be upheld, per Lord Alverstone, C.J., and Riley, J., on the ground that, even if the pipe was a sewer for all purposes, the magistrate had properly found that they were not using it for the ordinary purposes of a sewer, but as a mere conduit pipe to lengthen their trough.

Per Darling, J., on the ground that, even if a sewer, it was not a sewer for all purposes, and they were not justified in using it as a sewer for their refuse

*Quære*, whether an "overflow" sewer is a sewer into which inhabitants can claim a right to discharge regularly.

*Quære*, whether a manufacturer is under any liability if an authority allow him to discharge refuse into their sewers and it flows through them into a river.

*Semble*, a "sewer" is not necessarily a sewer for all purposes.

LEEDS AND DISTRICT WORSTED DYERS AND FINISHERS' ASSOCIATION, LD. *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD, (1906) 70 J. P. 480; 5 L. G. R. 72—Div. Ct.

7. *Two Semi-Detached Houses*—"One Building"—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 4, 13, 15 ]—In every case it is a question of fact whether two semi-detached houses are, or are not, one building so as to make the pipe draining them a "drain" which the owner, and not the authority, must repair. The Court can lay down no general rule upon the point.

*Travis v. Uttley* ([1894] 1 Q. B. 233; 63 L. J. M. C. 48; 58 J. P. 85; 42 W. R. 461—Div. Ct.) and *Hedley v. Webb* ([1901] 2 Ch. 126, 70 L. J. Ch. 663; 65 J. P. 425, 84 L. T. 526—Cozens-Hardy, J., No. 1, *supra*) considered.

HUMPHREY *v.* YOUNG, [1903] 1 K. B. 44; 77 [L. J. Ch. 6; 67 J. P. 34; 51 W. R. 298; 87 L. T. 551, 19 T. L. R. 20; 1 L. G. R. 142—Div. Ct.

## II. "SINGLE PRIVATE DRAINS"

8. *Drain constructed on Private Ground—Liability of Owner to Abate Nuisance*—*Public Health Act, Amendment Act, 1890* (53 & 54 Vict. c. 59), s. 19. ]—The expression "single private drain" in sect. 19 of the Public Health Act, 1890, applies to a drain, whether used for the drainage of one or more buildings, which is constructed upon private ground and into which the public cannot drain without the consent of the owner.

A drain was made at the back of a number of houses, belonging to different owners, and forming one side of a street. The drain ran through

**"Single Private Drains"—Continued.**

the gardens, and joined the public sewer at some distance from the end of the street, and it was a drain for the particular houses on that side of the street, each of which was connected therewith by a branch drain, and it was not a general drain into which any houses could be drained.

**HELD**—that the drain was a single private drain within the meaning of sect. 19, and that the local authority were entitled to proceed under sect. 41 of the Public Health Act, 1875, against the owners of the houses to compel them to abate nuisances in such drain.

**SEAL v. MERTHYR TYDVIL URBAN DISTRICT COUNCIL**, [1897] 2 Q. B. 543; 61 J. P. 551, 67 L. J. Q. B. 37, 77 L. T. 304; 13 T. L. R. 509—Div. Ct.

**9. Nuisance — Defective Drain — Structural Defect in Single Private Drain — Liability of Owners—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41.**—Sect. 41 of the Public Health Act, 1875, applies to every case where the fact that a drain is in bad condition, or requires alteration and amendment, causes the drain to be a nuisance or injurious to health, and in places where the Public Health Acts Amendment Act, 1890, is in force, sec. 19 of that Act applies that section to the same extent to every drain which is a single private drain for the purposes of sect. 19 of the Act of 1890.

**SOUTHWOLD CORPORATION v. CROWDY** (1903), [67 J. P. 278, 1 L. G. R. 897—Div. Ct.

**10. Pipe Draining Houses of more than one Owner—Drainage passing through Sewer and thence into Pipe — Whether Houses connected with Public Sewer by Single Private Drain—Public Health Act, 1875 (38 & 39 Vict.) c. 55), ss. 4, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.**—A row of houses, of which six belonged to the respondent and the remainder to other owners, were drained by a system of pipes arranged as follows. The houses were drained in pairs; each house of a pair was drained by a separate pipe which discharged into a pipe common to both houses, and each "common pipe" discharged into a "line of pipes" laid in private ground behind the houses, which conveyed the drainage to a public sewer. It was admitted by the appellants that the "common pipes" through which the drainage of the respondent's houses passed, were sewers within the meaning of the Public Health Act, 1875.

**HELD**—that, even assuming that the "line of pipes" which was laid behind the houses was a single private drain, yet, as the "common pipes" were sewers, the respondent's houses were not connected with the public sewer by such single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act, 1890, and that, therefore, the respondent was not liable under that section and sect. 41 of the Public Health Act, 1875, to contribute to the

expense of repairing the line of pipes behind the houses.

Decision of Div. Ct. ((1905) 71 L. J. K. B. 954; 69 J. P. 464; 93 L. T. 431, 3 L. G. R. 1147) affirmed.

**WOOD GREEN URBAN DISTRICT COUNCIL v. JOSEPH**, [1907] 1 K. B. 182; 76 L. J. K. B. 173, 71 J. P. 89, 96 L. T. 176; 23 T. L. R. 126; 5 L. G. R. 322—C. A.

**11. Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.**—A pipe passing through private land conveyed to a public sewer the drainage of a number of houses belonging to one owner and the drainage of a number of houses belonging to another owner. A nuisance having arisen in the pipe at a point where it drained the houses belonging to both owners:—

**HELD**—that at that point the pipe was a "single private drain" within the meaning of sect. 19 of the Public Health Acts Amendment Act, 1890.

**Bradford v. Eastbourne Corporation** ([1896] 2 Q. B. 205; 65 L. J. Q. B. 571; 60 J. P. 501, 45 W. R. 31; 74 L. T. 762—Div. Ct.) approved.

**Hill v. Haer** ([1895] 1 Q. B. 906; 64 L. J. M. C. 164; 59 J. P. 374, 43 W. R. 651; 72 L. T. 629—Div. Ct.) overruled.

Decision of Channell, J. ([1904] 2 K. B. 807; 73 L. J. K. B. 976, 68 J. P. 473; 20 T. L. R. 567) reversed.

Decision of Div. Ct. ([1901] 2 K. B. 1, 73 L. J. K. B. 497, 68 J. P. 315; 90 L. T. 507) reversed.

**HAEDICKE v. FRIERN BARNET URBAN DISTRICT COUNCIL, THOMPSON v. ECCLES CORPORATION**, [1905] 1 K. B. 110; 74 L. J. K. B. 130; 69 J. P. 45; 53 W. R. 211; 91 L. T. 750, 21 T. L. R. 19; 3 L. G. R. 20—C. A.

### III. RIGHTS AND DUTIES.

*See also PUBLIC HEALTH.*

#### (a) General.

**12. Carrying Sewer through Private Land—Compensation — Arbitration — Abandonment — Costs—Public Health Act, 1875 (38 & 39 Vict. c. 55) s. 16.**—The defendants gave notice to the plaintiff of their intention to make a sewer through her land. The plaintiff claimed the sum of £800 by way of compensation for injury and damage she sustained by reason of the proposed work and required an arbitration. Notice was also given by her that she had appointed an arbitrator. The defendants having appointed their arbitrator, one meeting was held, and then the defendants abandoned their intention of constructing the proposed sewer and gave notice of such abandonment to the plaintiff. The arbitrators made their award, by which the defendants were ordered to pay to the plaintiff the sum of £10 for damages, and to pay the

**Rights and Duties—Continued.**

arbitrators' costs, and the costs of the plaintiff as between solicitor and client

**HELD** (per Ridley, J.)—that the arbitrators were wrong in awarding the £10, inasmuch as the submission did not contain anything more than a reference of the damage or injury which would be caused by the execution of the works and did not include damage caused by the land being tied up by a notice; and, further, that they had in law no power to deal with the costs. Per Channell, J., that the arbitrators had power to deal with the costs, as they were properly appointed and the arbitration properly began.

DAVIS v. WITNEY URBAN DISTRICT COUNCIL  
[1898] 14 T. L. R. 433—Div. Ct.

**13. Carrying Sewer through Private Land—“Necessary”**—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 16.]—A local authority working under provisions in a Scotch Act very similar to those of sect. 16 of the Public Health Act, 1875, proposed to carry a sewer through private land. Their surveyor certified that the intended course of the sewer “seems to be the best and most practical way of taking it. . . . To carry out this plan it is necessary that the sewer be carried through the above close.”

**HELD**—that such certificate was sufficient.

Lewis v. Weston-super-Mare Local Board  
(1888) 40 Ch. D. 55; 58 L. J. Ch. 39, 37 W. R. 121; 59 L. T. 769 approved.

BROWN v. KIRKCUDBRIGHT MAGISTRATES,  
[1906] 8 F. 77—Ct. of Sess.

**14. Connection with Sewer—Pipe in Private Road, a Sewer in Law—No Right to Connect Drain with Sewer without Consent of Owner of Road**—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 21.]—Although a pipe laid in a private road has, by virtue of sect. 4 of the Public Health Act, 1875, become a sewer, neither the owner of a house abutting on the road nor the local authority have any right to connect the drains of the house with the sewer without the consent of the owner of the road.

WOOD v. EALING TENANTS, LD., [1907] 2 K. B. 390; 76 L. J. K. B. 764, 71 J. P. 456; 97 L. T. 520; 5 L. G. R. 1055—Div. Ct.

**15. Drain—Connection with Sewer—Inspection Chamber—Right to Construct in Foot-pavement**—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 21.]—The owner or occupier of a house in a street is not entitled to break up the surface of the footway for the purpose of constructing therein an inspection chamber in a drain carrying the drainage of the house into the public sewer.

*Semble*, that he has the right, when making the connection between his drain and the sewer, to construct an inspection chamber beneath the footway.

ATTORNEY-GENERAL v. ASHBY, (1907) 71 J. P. 387; 97 L. T. 479; 23 T. L. R. 498; 5 L. G. R. 1192—Joyce, J.

**16. Duty of Local Authority to make Sewers—Default—Mandamus**—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 15, 299.]—A complaint to the Local Government Board under sect. 299 of the Public Health Act, 1875, is the exclusive remedy for neglect by the local authority of their duty to provide sufficient sewers for draining their district, under sect. 15 of the Act, and a *mandamus* will not be granted to compel them to perform that duty.

Judgment of C. A., *sub nom. Peebles v. Oswaldtwistle Urban District Council* ([1897] 1 Q. B. 625) affirmed.

PASMORE v. OSWALDTWISTLE URBAN DISTRICT COUNCIL, [1898] A. C. 387, 62 J. P. 628; 67 L. J. Q. B. 635, 78 L. T. 569—H. L. (E.)

**17. Joint Private Drain—Joint Notice—Inspection of Drain—Improving System**—*Public Health Act, 1875*, s. 41—*Public Health Act, 1890*, s. 19.]—B. was the owner of Nos. 6 and 7 P. T., and the appellant was the owner of Nos. 8, 9, and 10. All these houses were connected with the public sewer by a private drain beginning at No. 10 and running towards No. 6.

In May, 1896, the portion of the drain opposite Nos. 9 and 10 was put in proper repair. In March, 1897, the appellant complained to the respondents' inspector that there was a stoppage in the drain opposite Nos. 6 and 7, and the inspector thereupon served a notice on the owner of Nos. 6 and 7 requiring the nuisance to be abated, but this was not done. The appellant thereupon, at the inspector's request, signed a complaint in writing to enable proceedings to be taken under sect. 41 of the Public Health Act, 1875, and thereupon the respondents passed a resolution to enable the drain to be opened opposite Nos. 6, 7, 8, 9, and 10. It was opened at Nos. 6, 7, and 8, and found to be choked with sewage, but it was not opened opposite 9 and 10. On March 25th, 1897, a joint notice was served on B. and the appellant, as the owners of Nos. 6, 7, 8, 9, and 10, requiring certain work to be done. Default being made, the respondents entered and did the work opposite Nos. 6, 7, 8, and 9, and further, in order to make a better fall to the public sewer, relaid so much of the drain as was opposite Nos. 6, 7, 8, and 9. An apportionment of the expenses so incurred was made and served on the appellant, and the present summons was issued to recover such apportionment.

The magistrates at the hearing made the order.

**HELD** (confirming the decision of the magistrates)—that the joint notice was good, and that it was not necessary to take up all the drain if a sufficient examination could be made otherwise. As to the relaying, that this was a question of fact for the magistrates and must be reconsidered by them, for, if this was an improvement of the system, the appellant ought not to be made to pay for it, for they could not order the appellant to do one work and charge him with another.

LANCASTER v. BARNES DISTRICT COUNCIL, [1898] 1 Q. B. 855; 62 J. P. 405; 67 L. J. Q. B. 744; 78 L. T. 355; 46 W. R. 623—Div. Ct.

**Rights and Duties—Continued.**

**18 Laundry Effluent — "Refuse" from a Manufactory or "Work" interfering with Treatment or Utilisation of Sewage—Bradford Tramways and Improvement Act, 1897 (60 & 61 Vict. c. cclx.), s. 45]**—A laundry company were charged with causing or suffering refuse from a manufactory or work that would interfere with the treatment or utilisation of the sewage of the city to flow or pass into the sewer of a corporation, contrary to the section in a local Act.

The magistrate found that the refuse from the defendants' premises did not interfere with the treatment or utilisation of the sewage of the city, and dismissed the informations. The following passage appeared in his judgment: "It was proved by the defendants and admitted by the expert witnesses for the corporation, that the laundry effluent was part of the ordinary sewage of the city, as being of the same nature as ordinary domestic sewage, and that if all clothes washing was done in private houses even more acid would have to be used than at present, the necessity and expense thereof being the difficulty alleged by the corporation in the treatment of the sewage."

**HELD**—that, without deciding whether the laundry was a "work" or its effluent "refuse" within the meaning of the section, the case was concluded by the finding of the magistrate, which was not vitiated by the above-mentioned passage in his judgment.

**GARFIELD v. YORKSHIRE LAUNDRIES, LD.,**  
[1905] 69 J. P. 411; 3 L. G. R. 1192—  
Div. Ct.

**19. Local Act—Construction of — Exemptions — Two Exemption Clauses—One only Referring to Successors in Business — Bradford Improvement Act, 1897 (60 & 61 Vict. c. cclx.), s. 45]**—By the Bradford Improvement Act, 1897, the sending trade refuse into any sewer of the corporation is prohibited; but there is a proviso that the persons named in the first schedule are not to be convicted until payment of compensation has been made for deprivation of the right of pouring trade refuse into the sewers in the manner therein provided. There is another proviso that the persons named in the second schedule, or their successors in business, shall not be convicted until compensation has been paid. There were twenty-five businesses comprised in the first schedule, thirteen of which had been acquired by the W. Company, but four of these had been discontinued. The W. Company claimed to be entitled to pour trade refuse into the sewers in respect of these nine businesses. Any other interpretation was, it was said, irrational. Taking a new partner into a firm would otherwise forfeit the right to compensation for the loss of the easement. The user could not be increased or used for a different kind of business, but the successors of the businesses specified in the schedule were entitled to the compensation mentioned in the Act.

**HELD**—that as the proviso limited exemption to the persons named, while there was another proviso exempting the persons named in the

second schedule and their successors in business, the successors in business of the persons named in the first schedule were not included in the exemption in the Act.

**WOOLCOMBERS, LD. v. BRADFORD CORPORATION, (1906) 70 J. P. 434; 1 L. G. R. 1038—**  
Eady, J.

**20. Negligence—Drainage Act—Injury caused by Negligence in the Execution of Statutory Powers—Drainage (Ireland) Act, 1863 (26 & 27 Vict. c. 88)]**—The defendants, a drainage board, constituted under 26 & 27 Vict. c. 88, for the purpose of draining their district, acting in pursuance of their statutory powers, deepened and widened the bed of the river Rathangan and, by the diversion of another river, increased its flow. They should have periodically cleansed the river bed, but thus they failed to do, and owing to this neglect, the river became choked up with mud, and after some heavy rains, overflowed its banks and flooded the plaintiffs' land.

The Court **HELD** that the defendants' statutory powers did not protect them from acts done negligently, but only from acts done under the statute with due and proper care, and they were liable to the plaintiffs.

**BLIGH v. RATHANGAN DRAINAGE BOARD,**  
[[1898] 2 Ir. R. 205—Q. B. Div. (Ir.)

**21. Pipe under Control of Highway Board Draining two Premises not in same Curtilage—Substitution of Rural District Council for Highway Board—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25]**—A pipe which, in 1894, was vested in or under the control of a highway board—an authority having the management of roads, and not a local authority under the Public Health Act, 1875—and was, therefore, not a sewer within the meaning of sect. 4 of that Act, did not become a sewer by virtue of sect. 25 of the Local Government Act, 1894, which enacts that the powers, duties and liabilities of highway boards are to be transferred to the rural district councils (sanitary authorities), and that highway boards are to cease to exist.

**WILLIAMSON v. DURHAM COUNTY COUNCIL;**  
**[ECCLESIASTICAL COMMISSIONERS v. DUR-**  
**HAM COUNTY COUNCIL, [1906] 2 K. B. 65;**  
**75 L. J. K. B. 498, 70 J. P. 352; 51 W. R.**  
**509; 95 L. T. 471; 4 L. G. R. 1163—Div. Ct.**

**22 Sewer — Lands — Easement — Reputed Owner or Occupier—Notice—Compensation—Costs—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 16, 32, 33, 308—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (c).**—Where an urban sanitary authority constructed a sewer under the bed of a goit, on which the defendant had a mill and a mill-pond to which water was supplied by the goit, without giving notice to the defendant as required by sect. 32 of the Public Health Act, 1875, and the defendant forcibly dug down to, broke, and plugged the sewer.

**HELD**—that the interest of the defendant was an easement, and so came within the definition



**Rights and Duties—Continued.**

of "lands" in sect. 4 of the Public Health Act, 1875, even if the defendant was not the actual owner, and the plaintiffs, therefore, had no authority to carry a sewer under the goit; but the defendant having cut the sewer, and thereby caused great inconvenience and risk of disease to the public, there would be no costs in the action; the defendant was within his rights in counter-claiming for damages, as the plaintiffs, by resisting his title had given him no opportunity of agreeing upon damages.

CLECKHEATON URBAN DISTRICT COUNCIL *v.* FIRTH, (1898) 62 J. P. 536—Kekewich, J.

**23 Sewers — Want of Repair — Accident — Liability of Sanitary Authority—Negligence—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 13, 15, 19.]**—A local sanitary authority in fulfilling their duty as to maintaining sewers under sects. 13, 15, and 19 of the Public Health Act, 1875, are not liable to an action for injury occasioned by the execution of their statutory duty unless it has been negligently performed.

In an action against an urban sanitary authority for damages for injury sustained by a horse while passing along a highway, owing to one of its feet going through the crust of the road into a hole underneath, it was proved that this hole was caused by a defect in a mortar joint in a sewer running under the highway, which defect was caused by rats working through the mortar. The sewer had been constructed by a private body, and had been taken over by the defendants many years before the accident. Under the weight of the horse the crown of the road gave in, thereby causing the injury. Nothing had occurred to give the defendants warning that there was anything wrong with the sewer, and there was no evidence of negligence on their part.

**HELD**—that, in the absence of negligence on the part of the defendants, the action was not maintainable. The responsibility of the defendants rested upon the Public Health Act, 1875.

*Bathurst Borough v. Macpherson* ((1879) 4 App. Cas. 256; 48 L. J. P. C. 61, 43 J. P. 827, 41 L. T. 778—P. C.) and dicta in *Sydney Municipal Council v. Bourke* ([1895] A. C. 433; 64 L. J. P. C. 140; 59 J. P. 659; 72 L. T. 605; 11 R. 482—P. C.) explained.

LAMBERT *v.* LOWESTOFT CORPORATION, [1901] 1 Q. B. 590; 70 L. J. K. B. 333; 65 J. P. 326; 49 W. R. 316; 84 L. T. 237; 17 T. L. R. 273—Div. Ct.

**24. Owner of Property outside District—Right to connect Sewers—Sewers not yet Constructed—Action for a Declaration—R. S. C., Ord. 25, r. 5—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 22.]**—An owner of land proposed to lay out some of it as a building estate, and gave notice to the authority of an adjoining district of his intention to connect his proposed sewer with their sewer. On their objecting, the owner commenced an action claiming a declaration of his right to connect under sect. 22 of the Public Health Act, 1875.

**HELD**—that although there is jurisdiction to make a declaratory judgment under Order XXV., r. 5, this jurisdiction must be exercised with caution, and that as the proposed sewer had not yet been constructed, and no houses yet built, it was undesirable to make a general declaration as to future rights, which might hamper an arbitrator, or Court of summary jurisdiction acting under sect. 22.

FABER *v.* GOSFORTH URBAN DISTRICT COUNCIL, [67 J. P. 197; 88 L. T. 549; 19 T. L. R. 435; 1 L. G. R. 579—Eady, J.]

**25. Vestry's Existing Sewer—Additional Sewer from adjoining Urban District—Injunction—No Practical Result—Public Nuisance.]**—Action by the plaintiffs, the Vestry of St. Mary, Islington, in the county of London, against the defendants, who are outside the county of London, for an injunction to restrain the defendants from permitting their drains and sewers to remain connected with the plaintiffs' sewers; also an injunction to prevent any future connection.

**HELD**—that the Court had no jurisdiction to compel the defendants to remedy the inconvenience caused by the connection of their drains and sewers with the plaintiffs' sewer; and the Court would not grant an injunction, the result of which would be to create a public nuisance.

ST. MARY, ISLINGTON, VESTRY *v.* HORNSEY [URBAN DISTRICT COUNCIL, (1899) 63 J. P. 488, 80 L. T. 746—Kekewich, J.]

**(b) Cesspools.**

**26. Conduit—Sewer—Local Bye-Law.]**—B., the owner of certain houses, constructed a series of cesspools for their drainage on his own land. He then constructed a conduit, which conveyed the overflow therefrom to a larger cesspool. He was summoned for constructing these cesspools so as to have an outlet into a sewer, viz., the conduit and the large cesspool, contrary to the local bye-law.

The magistrates were of opinion that the conduit, being used for the drainage of several dwelling-houses occupied by different persons, was a sewer, and that an offence had been committed.

**HELD**—that the magistrates were wrong, and that the appellant had not constructed these cesspools contrary to the bye-law.

BUTTON *v.* TOTTENHAM URBAN DISTRICT [COUNCIL, (1898) 78 L. T. 470, 19 Cox, C. C. 36—Div. Ct.]

**27. Drainage System—Ditch—Covered Drain—Pipes—System of Drainage laid on Land without Consent of Owner—Subsequent Consent of Owner—Vesting of Sewer in Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 317.]**—Sewage was conveyed from two points by pipes or underground drains to an open ditch on the same estate from which there was no outflow.

**Rights and Duties—Continued.**

**HELD**—that these connections did not constitute a sewer.

*Meador v. West Cowes Local Board* ([1892] 3 Ch 18, 61 L. J. Ch. 561; 40 W. R. 676; 67 L. T. 454) followed.

A system of drainage by agreement between two landowners was so constituted as to take drainage matter from a cess-pool which had formerly overflowed and created a nuisance. Pipes were laid above and below, and the cess-pool was converted into a sort of catchpit.

**HELD**—that the connection none the less constituted a sewer because a still existing cesspool had been converted into a kind of catchpit. A ditch used for the discharge of sewage matter may be a sewer.

If a man by way of trespass lays down a line of pipes to convey drainage matter on the land of another, and the landowner subsequently consents to such use of his land, a sewer will have been constituted that will vest in the local authority.

*PAKENHAM v. TICEHURST RURAL DISTRICT COUNCIL*, (1904) 67 J. P. 448, 2 L. G. R. 19—Buckley, J

**(c) Drainage and Sewerage.**

**28. Award—Permanent Scheme of Drainage—Restrictions as to Depasturing—Presumption of Lost Grant or Release of Forbidden Right of Depasturing—No Legal Origin—Evidence of Long-continued Practice**—The existence of a lost grant cannot be presumed unless the grant could have had a legal origin.

An Act provided for the inclosure and drainage of a particular marshy district of fen land, and contained a provision forbidding the pasturage of any stock, except sheep, on roads set out in a portion of the district. There was a further provision in the Act, which provided for the vesting in a person or persons to be nominated by the Inclosure Commissioners in their award—having the force of an Act of Parliament—of the property in the herbage on all other roads, both public and private, within the area to be drained. The award made under the Act designated the surveyor of highways for the time being for the area as the person in whom the herbage on certain roads, including Moor Road—the road in question—was to be vested, and went on to limit the purpose for which he might let the same to the pasturage of sound and healthy sheep. The question arose whether, having regard to the provisions of the Act and the award, it would have been legally possible for any person or persons to grant to the surveyor of highways the right to do what by those provisions is forbidden, namely, to let the herbage on the road in question for the purpose of depasturing, not only sheep, but also horses and cattle. There was evidence of a long-continued practice of letting the herbage on the road for the pasturage, not of sheep exclusively, but also of a limited number of horses and cattle. The question also arose whether that ought to be treated as evidence of a lost grant, which might have had a legal origin

The plaintiff was the occupier of an allotment adjoining the road called Moor Road, and the defendants were the rural district council, who were the successors of surveyor of highways, and the owner of horses and cattle which had been depastured on the road. The plaintiff claimed an injunction and damages.

**HELD**—that the provisions of the Act were intended, not as merely temporary arrangements for the drainage of the area to which it related, but as a permanent scheme for the drainage of that area, not only for the benefit of persons interested in it, but as part of a larger district already provided for by other Acts, which scheme was to provide in connection with those Acts for a complete and systematic drainage of the whole area down to the sea; that it was not competent for the owner of the soil of the Moor Road or any other person to grant the right of depasturing cattle and horses on it, because that would be distinctly contrary to the purpose of the Act; that the inference to be drawn from the legislation was that the provision for excluding cattle from the roads was intended to be a permanent feature of the scheme for the maintenance of the drainage of the area, and not temporary only; that a grant such as was suggested would have been illegal, whoever was supposed to have made it; and the plaintiff was entitled to maintain his action for some damages, as having been injured by the illegal action of the defendants.

Decision of Cozens-Hardy, J. ([1901] 1 Ch. 22; 70 L. J. Ch. 35, 65 J. P. 56; 49 W. R. 154; 83 L. T. 496; 17 T. L. R. 35) reversed.

*NEAVEVERSON v. PETERBOROUGH RURAL DISTRICT COUNCIL*, [1902] 1 Ch. 557; 71 L. J. Ch. 378, 66 J. P. 404; 50 W. R. 549; 86 L. T. 739; 18 T. L. R. 360—C. A.

**29 Discharge of Sewage upon Private Lands—Private Nuisance—Prescription—Right of Householders to drain into Sewers—Prohibition—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 21, 299.**—It would be highly dangerous to allow the trivial and occasional passage, along a natural channel, of water more or less contaminated, to ripen into a legal claim to pour sewage of all kinds and of indefinite amount along such natural channel. Where sewage is discharged by a sanitary authority upon private property so as to become a nuisance, no injunction will be granted against such authority which will interfere with the rights of a large number of householders (under sect. 21 of the Public Health Act, 1875) to connect their houses with the sewers of such authority, if such rights have been gained by prescription or the connections made with the consent or acquiescence of the sanitary authority, or which will prohibit such authority from permitting or allowing fresh connections to be made; but an injunction will be granted restraining the authority from directing or authorising any sewage or foul matter to flow or to be discharged from sewers or drains vested in them as such sanitary authority upon private property.

*Charles v. Finchley Local Board* (1883),

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23 Ch. D. 767; 52 L. J. Ch. 554; 47 J. P. 791, 31 W. R. 717, 48 L. T. 560) dissented from.

*Attorney-General v. Acton Local Board* (1882) 22 Ch. D. 221, 52 L. J. Ch. 108, 31 W. R. 153; 47 L. T. 510—Fry, J.) and *Attorney-General v. Clerkenwell Vestry* ([1891] 3 Ch. 527; 60 L. J. Ch. 788; 40 W. R. 185; 65 L. T. 312—Romer, J.) followed.

*Ainley v. Kirkheaton Local Board* ((1891) 60 L. J. Ch. 734; 55 J. P. 230—Stirling, J.) followed.

An application should have been made under sect. 299 of the Public Health Act, 1875, to the Local Government Board.

*BROWN v. DUNSTABLE CORPORATION*, [1899] 2 Ch. 378; 68 L. J. Ch. 498, 63 J. P. 519; 47 W. R. 538; 80 L. T. 650; 15 T. L. R. 386—Cozens-Hardy, J.

**30 Expenses—Special Drainage District—Assessment of Expenses on—Expenses of Forming Special District—Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 133**—Sect. 133 of the Public Health (Scotland) Act, 1897, provides that “where any special drainage district has been formed under this Act . . . the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special sewer assessment which the local authority shall raise and levy on and within such . . . special district . . .”

**HELD**—that where a special drainage district has been formed, the local authority is empowered by the section to levy an assessment upon the special district for payment of legal and other expenses incurred in connection with, but prior to, the formation of the district.

Decision of Ct. of Sess. (6 F. 553) affirmed.

*INVERARITY v. FORFARSHIRE COUNTY COUNCIL*, [1906] A. C. 354; 70 J. P. 509—H. L. (Sc.).

**31. New Drainage in Part found Necessary.**—By sect. 16 of the Glasgow Police (Amendment) Act, 1890, it is provided that where the drains of premises are proved to be defective the owner thereof shall be compelled on receiving an order to that effect from the Police Commissioners to carry out all necessary operations for removing defects of structure or to do all such acts as may be required to prevent risk to health; and that if he does not comply with the same the work may be executed by the Police Commissioners, who are empowered to recover the expenses so incurred as damages from the owner. The drains of a block of houses having been found to be in a defective condition, an order was given to the owner by the Commissioners to repair the same. This they failed to do, and the work was done by the Commissioners themselves, but instead of repaving the old drain they built a new one upon another site, having an outfall

into the main sewer, and then brought an action to recover the expenses so incurred. The Court of Sessions assailed the owner on the ground that a new system of drainage, such as that carried out by the Commissioners, was not warranted by the above section. The House of Lords remitted the case to the Court of Sessions to find whether or not in the opinion of the Commissioners the new drainage was a necessity. The Court found that part of the drainage had been considered necessary, but not the rest.

**HELD**—that the owner was only bound to pay for the part that had been considered necessary.

*GLASGOW CORPORATION v. M'OMISH*, [1898] A. C. 432—H. L. (Sc.).

**32 Intercepting Sewers—Right of Several Districts to Drain into—Parish added to one of the Districts—Right of Added Parish to Drain into Intercepting Sewers—Brighton Intercepting and Outfall Sewers Act, 1870 (33 & 34 Vict. c. c.), ss. 4, 36, 91—Hove Commissioners Act, 1873 (36 & 37 Vict. c. xciv).**—By an Act of 1870, intercepting sewers were constructed for Brighton and an adjoining district then under the control of the West Hove Commissioners and another similar body. Sect. 91 provided that, if at any time any local board, or body of commissioners, should be constituted for any district in which any part of the authorised sewers would be situate, having powers with respect to the sewerage or drainage of such district . . . such board or body should be entitled to participate in the benefits of the Act.

In 1873 the Hove Commissioners were constituted; and in 1893, by an order of the county council, the parish of A. was added to the urban sanitary district of Hove.

**HELD**—that the whole borough of Hove, including the parish of A., was entitled to drain into the intercepting sewers.

Decision of C. A. (67 J. P. 335; 19 T. L. R. 306) affirmed.

*CORPORATION OF HOVE v. BRIGHTON INTERCEPTING AND OUTFALL SEWERS BOARD*, (1904) 20 T. L. R. 760, 68 J. P. 565—H. L. (E.).

**33. New House—Combined Drain for Two Houses—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 25**—The respondent deposited with the appellants notice of intention to erect two houses in one block, and a block plan showing a combined drain for the two houses was attached to the notice. The notice and plan were disapproved by the appellants on the report of their surveyor and they made an order under the Public Health Act, 1875, s. 25, ordering that a separate drain should be made for each of the houses. The justices thought that the appellants were not entitled to take into consideration anything but size, level, materials, and fall, and that the appellants had not jurisdiction to order a separate drain for each house.

**HELD**—that the question was whether a house had been built without a drain constructed in a manner approved by the local authority; that sect. 25 was a distinct enactment that a person who erected a house must provide a drain for

**Rights and Duties—Continued.**

that house; and that the justices had overlooked the real question that they ought to have decided

WOODFORD URBAN DISTRICT COUNCIL *v.* STARK,  
[1902] 66 J. P. 536; 86 L. T. 685; 18 T. L. R.  
439—Div. Ct.

**34. New House—Necessary for the Effectual Drainage of such House—One Drain for Sewage only and another for Surface Water only—Discretion of Urban Council—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 25**—[Sect. 25 of the Public Health Act, 1875, enacts that "It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed, of such size and materials, and at such level, and with such fall, as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house."

HELD—that sect. 25 relates only to the requirements as to size, materials, level, and fall of the drain or drains necessary for each particular house, and the consideration by an urban council of the benefit of the district generally in respect of their system of sewage disposal does not come within sect. 25. Therefore where there are two sewers running down a road in which a new house is being built, one sewer for conveying surface water only and the other for conveying sewage only, the urban council cannot, under sect. 25, compel the owner of the house to make two separate drains, the sewage drain connecting with the sewage sewer, and the other drain with the other sewer, if one drain is sufficient for effectually draining the house.

MATHEWS *v.* STRACHAN, [1901] 2 K. B. 540; 70  
[L. J. K. B. 806; 65 J. P. 789; 49 W. R. 651;  
85 L. T. 68; 17 T. L. R. 619—Div. Ct.

**35. Private Drain—Draining Several Houses—Drain Emptying into Cesspool—Undertaking by Owner to treat Drain and Cesspool as Private, and to Cleanse Same—Nuisance at Cesspool—Liability of Owner as "Person by whose Act, Default, or Sufferance Nuisance Arises"—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 94, 95, 96.**—The appellant, before building certain houses, submitted plans showing a scheme of drainage, and the plans were accepted subject to the appellant entering into an undertaking with the local authority; accordingly a drain or sewer, with which each house was connected by a single pipe, was constructed along the middle of the road for a distance of about 1,200 feet, communicating with the surface by manholes, and terminating in a large cesspool constructed on the adjoining land of which the appellant was lessee in possession. Several of the houses were connected with the drain and were drained through the drain into the cesspool as the ultimate outfall. The appellant was not the occupier of any of the houses, but was, within the meaning of the Public Health Acts, the owner of six of them, and of the land on which the cesspool was

built; and in the undertaking given to the local authority, he undertook that the drains should, for all purposes of the Public Health Acts, be private drains, and that the drains and cesspool should be cleansed and maintained by him. A nuisance existed at the cesspool from the overflowing therefrom of sewage.

HELD, on the authority of *Meador v. West Cowes Local Board* ([1892] 3 Ch. 18; 61 L. J. Ch. 561; 40 W. R. 676; 67 L. T. 451—C. A.)—that the appellant was the person by whose act, default, or sufferance the nuisance arose, and that the obligation to clean out the cesspool and abate the nuisance was upon him, and not upon the local authority, notwithstanding that the drain received the drainage of more than one house.

Per Channell, J.—Even if the drain became a sewer within the meaning of the Public Health Acts by reason of its receiving the drainage of more than one house, yet, as between the immediate parties (the local authority on the one hand, and the appellant, who had given such an undertaking, on the other), the appellant would still be the person by whose act or default the nuisance arose, although third parties might have a right to say that as between them and the local authority the whole had vested in the local authority as a sewer, and that the local authority were liable to abate the nuisance.

BUTT *v.* SNOW, (1903) 89 L. T. 302; 67 J. P.  
[454—Div. Ct.

**36. Scouring and Cleaning of Rivers, Drains, &c.—Deposit of Mud and Sullage on Adjoining Lands—Compensation—Liability of Commissioners to Pay—Middle Level Acts, 1810 (50 Geo. 3, c. 125), ss. 32, 59; and 1844 (7 & 8 Vict. c. cvi.), s. 57.**—By the Middle Level Act, 1810, commissioners were appointed to cleanse and improve certain rivers and drains. Sect. 32 of the Act provided that the mud, &c., taken out of the rivers and drains should in all cases where the rivers and drains were not embanked be laid in such place as the commissioners in their discretion should think proper, and by sect. 59 the commissioners were empowered to enter upon the lands of any person adjoining or near to any of the rivers and drains to take and dig earth therefrom and "to do such other acts as may be necessary to carry into effect the purposes of this Act, making satisfaction to the party or parties injured thereby." The commissioners scoured certain rivers and deposited large quantities of mud and sullage on the adjoining lands, the owners of which claimed compensation for the injury caused to their lands by such deposit.

HELD—that sect. 32 of the Act did not empower the commissioners to deposit the mud and sullage compulsorily upon land without paying compensation, but merely authorised them to deposit it as they thought fit on places where they had a right to deposit it.

HELD, also, that sect. 59 authorised them to deposit it on adjoining lands, but on condition of paying compensation.

IN RE MOULTON AND OTHERS AND THE MIDDLE  
[LEVEL COMMISSIONERS, (1907) 71 J. P. 402;  
97 L. T. 391; 5 L. G. R. 961—Bray, J.

**Rights and Duties—Continued.**

**37. Sewage Purposes—Land not required for Purpose for which Acquired—Order for Sale—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175.]**—The T. urban district council had acquired certain land for sewage purposes, contemplating that part of it would not be so required, but would be sold under sect. 175 of the Public Health Act, 1875. The council subsequently became of opinion that all the land would be ultimately required for sewage purposes, and on a portion of it consequently retained and not immediately required, had dug a trench in which they had deposited dustbin refuse, and raised a mound. Over another portion they had constructed a temporary footpath and had placed benches on it for recreation; and it was alleged that they were entertaining a scheme for turning this portion into a public recreation ground with a lake, bathing-place, and promenade. The Attorney-General brought this action, at the relation of P., a resident in the district, claiming a declaration that the land was not required for the purpose for which it had been acquired under the Act, and should be sold, and an injunction restraining the council from using any portion of it as above described.

**HELD**—(1) that the land so acquired was in fact required for sewage purposes, and was not within sect. 175 of the Act; (2) that the defendant council had not so dealt with the portion of land on which they had made a trench and mound, &c., as to render it wholly unfit for sewage purposes, and that it ought not to be sold; (3) that none of the acts done by the council on the other portion of the land were other than of a temporary character, not interfering with its use when ultimately required for sewage purposes, and that the council were entitled so temporarily to use in any lawful manner any portion of the land not immediately required; but (4) that the contemplated erection of a bathing-shed, &c., would be beyond the legitimate temporary user of the land.

**ATTORNEY-GENERAL v. TEDDINGTON URBAN [DISTRICT COUNCIL, [1898] 1 Ch. 66; 61 J. P. 825; 67 L. J. Ch. 23; 77 L. T. 426; 14 T. L. R. 32; 46 W. R. 88—Romer, J.**

**38. Sewage — Right of Discharging — Permission by Owner of Land to Corporation to Discharge Surface Water on to Land—Sewage from Houses Discharged on to Land—Injunction—Costs]**—The corporation of C. had for many years by permission discharged surface water from a public road into a pond on the plaintiff's land through a drain belonging to the corporation. Subsequently, as the drain became offensive, the water was at the plaintiff's request diverted into a cesspool made by the corporation on his land. By direction of the corporation the defendant H. connected some newly-built houses belonging to him with the drain, and the sewage from these houses was accordingly discharged into the plaintiff's lands through the drain. No permission was given by the plaintiff for this to be done.

**HELD**—that the plaintiff was entitled to an

injunction against the corporation and H., restraining them from discharging the sewage on his land, and to a mandatory injunction to disconnect the houses from the drain, but that the corporation should pay the costs both of the plaintiff and H.

**GIBBINGS v. HUNGERFORD, [1904] 1 Ir. R. 211 [—C. A.]**

**39. "Sewer" — Sewage — Entry on Private Land, without Notice, for Erection of Pumping-Station — "Receiving, Storing, Disinfecting, Distributing, or otherwise Disposing of" Sewage — Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 27.]**—The plaintiffs sought to restrain the defendants from proceeding with the construction of a pumping-station—to lift and pump the sewage along a rising main to an outfall—in course of erection by them upon a strip of unenclosed or waste land alleged to belong to the plaintiffs or one of them. The defendants had entered upon the land in question without giving any notice to the plaintiffs. The question arose whether the pumping-station was a "sewer" within the meaning of sect. 16 of the Public Health Act, 1875, under which the defendants were empowered to carry a sewer under a turnpike road or street, or after notice into or under lands within their district, or was a work within the provisions of sect. 27 of the same Act adapted to be used for "receiving, storing, disinfecting, distributing, or otherwise disposing of" sewage.

**HELD**—that the pumping-station was not a "sewer"; that the words of sect. 27 applied to a case like the present; that what was being done was being done unlawfully, and that the plaintiffs had made out a case for an interim injunction.

**KING'S COLLEGE, CAMBRIDGE v. UXBRIDGE [RURAL DISTRICT COUNCIL, [1901] 2 Ch. 768; 70 L. J. Ch. 844; 85 L. T. 303; 17 T. L. R. 762—Byrne, J.]**

**40. Sewer—Laying of through Private Land — Compensation—Land Injurious Affected by other Works forming Part of same System on Land of other Owner—"Full Compensation" — Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 27, 308.]**—A local authority, under the powers conferred upon them by the Public Health Act, 1875, laid certain sewers through the claimant's land and paid compensation in respect thereof. The local authority then proceeded to construct on neighbouring land, not belonging to the claimant, a pumping station, reservoir, and outfall sewer, which, together with the sewers laid through the claimant's land, were intended to form one combined system of sewage works.

The claimant claimed compensation under sect. 308 of the Public Health Act, 1875, for injurious affection of his land by the construction of the pumping-station and reservoir on the adjoining land not bought from him.

**HELD**—that as the works were not being constructed on land belonging to the claimant, he was not entitled to recover compensation under sect. 308 of the Public Health Act, 1875,

**Rights and Duties—Continued.**

although such works formed one system with and were connected with the sewers laid through his land.

**HORTON v. COLWYN BAY AND COLWYN URBAN**  
[DISTRICT COUNCIL, [1907] 1 K. B. 14; 76  
L. J. K. B. 91; 71 J. P. 69; 96 L. T. 84; 26  
T. L. R. 75; 5 L. G. R. 22—Bigham, J.

**41. Sewer—Laying of Through or Under Towing Path of River—Interruption of Traffic—Consent of River Conservators—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 327.]**—The defendants resolved to construct a system of surface water drains in their district to discharge into the river Thames by means of an outfall drain, carried into, through, and under the towing path, the soil of which was vested in the plaintiffs, who were a body of persons entitled by virtue of an Act of Parliament to navigate on or use such river, or to receive tolls or dues in respect of the navigation thereon or use thereof. The special case stated that the execution of the works by the defendants would temporarily interfere with the traffic upon the towing path, but that it was the intention of the defendants to so carry out the works as not at any time to interrupt the traffic over more than one-half of the said path, and to avoid, as far as possible, any interference with the towing of vessels.

**HELD**—that, upon that statement, the execution of the works would interfere with the towing path so as to interrupt the traffic thereof within the meaning of sect. 327 (3) of the Public Health Act, 1875, and that under those circumstances, by reason of that section, the defendants had no right to carry the outfall drain into, through, or under the towing path, without first obtaining the licence and permission of the plaintiffs so to do, and submitting to such restrictions and agreeing to such terms and conditions as the plaintiffs thought proper to impose.

**THAMES CONSERVATORS v. WALTON-UPON-**  
[THAMES URBAN DISTRICT COUNCIL, (1907)  
71 J. P. 202; 96 L. T. 555; 5 L. G. R. 274—  
Phillimore, J.

**42. Sewer—Right of Support for—Mines and Minerals—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 15, 16, 175, 176, 308—Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37), ss. 2, 3, 4, 5.]**—By a provisional order confirmed by Act of Parliament on August 13th, 1875, the Local Government Board authorised the B. Corporation to put in force the compulsory powers of the Lands Clauses Acts with regard to certain lands which they required for sewage purposes.

On October 27th, 1874, the corporation gave to the plaintiffs' predecessor a notice to treat for some of his land (excepting the mines and minerals), and the question of compensation was referred to arbitration. On August 9th, 1876, the arbitrator made his award in respect of the lands (excepting all minerals lying within or under the same). The compensation having been paid, the lands, excepting all minerals

lying within or under the same, were conveyed to the corporation by two conveyances, dated May 9th, 1878, and April 5th, 1883; the conveyances contained a power for the owner to work the minerals by underground workings only.

On April 11th, 1876, the corporation gave notice to the plaintiffs' predecessor, under the Public Health Act, 1875, that they proposed and intended to construct an outfall sewer on certain other land in his possession, and on February 19th, 1878, the umpire made his award (purporting to be under sect. 308 of that Act) reciting an agreement that the landowner should have rights of herbage, passage and building over the land, and awarding that the corporation should pay a perpetual ground rent of so much per lineal yard for the sewer.

On August 25th, 1883, the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, was passed.

On July 14th, 1904, the B. N. Colliery Co., Ltd., the lessees of the mines, gave notice to the corporation that they intended to commence work within forty yards of the sewage works, and on July 15th the corporation gave notice that if the company proceeded to work they would demand compensation in respect of any damage to their sanitary works, and that they claimed that they had acquired a right to support in respect of the sanitary works before the passing of the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883.

In an action by the plaintiffs for a declaration that upon the true construction of the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, and of the other Acts of Parliament, and of the Provisional Order, awards and conveyances, the defendants were not entitled to have (1) the outfall sewer, or (2) the main sewage works, or either of them, supported by the underlying or adjacent minerals—

**HELD**—that the corporation acquired in respect of the lands conveyed for the purpose of the main sewage works a natural right of support by the subjacent minerals and the adjacent lands of the conveying parties for such land, and for any buildings or works reasonably in the contemplation of the parties when the land was conveyed.

That with regard to the outfall sewer the corporation had a right to support from the subjacent land, if not also from the adjacent land in the same ownership, which right must be considered to have been covered by the award.

*In re Dudley Corporation* ((1881), 8 Q. B. D. 86; 51 L. J. Q. B. 121; 46 J. P. 340; 45 L. T. 733) applied.

That the sewage works and outfall sewer were accordingly sanitary works in respect of which a right to support had been acquired before the passing of the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883, and in respect of which right no compensation was, at the passing of that Act recoverable; and that the sewage works and outfall sewer were, therefore, excepted by sect. 5 of the Act from the

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operation of the Act, and were entitled to the rights of support acquired in respect of them.

JARY AND OTHERS v. BARNSELY CORPORATION, [1907] 2 Ch 600; 76 L. J. Ch. 593; 71 J. P. 468; 97 L. T. 507; 23 T. L. R. 689; 5 L. G. R. 1145—Parker, J.

**43. Sewer—Tidal Stream—Expenses—Assessment**—“Valuation List for the Time being then in Force”—*Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 257.—A corporation were empowered by Act of Parliament to constitute a drainage district, and to direct the drainage or sewage thereof to be brought into any drain or sewer already formed or to be hereafter formed, and assess and apportion a due proportion of the cost amongst the owners of land within the district. The word “sewer” was therein interpreted as meaning a culvert or channel for the passage of water sewage or refuse, not being a drain as thereinbefore defined.

By another Act of Parliament the assessment aforesaid was to be made on the full net annual value as ascertained by the valuation list for the time being in force.

The corporation in constituting the drainage district directed the sewage should be brought into a tidal stream, which was somewhat polluted by sewage, and made an assessment on the persons who were owners of property in the district at the time of the completion of the works, using the assessment list then in force.

HELD—that, having regard to the language of the Acts, the corporation were justified in utilising the tidal stream as a sewer, and under sect 257 of the *Public Health Act, 1875*, a charge attached to the properties within the district for the expenses incurred from the date of the completion of the works; but that the assessment was improper, as not made upon the valuation list in force at the time of the making of such assessment.

HELD, also, that the mere fact that the corporation might have been influenced by other motives, in addition to their desire to deal with the drainage of the city, in forming the district, no improper motive being alleged or extra expense incurred, and the district having been recognised by Parliament, did not prevent the district from having been properly constituted.

NEWCASTLE-UPON-TYNE CORPORATION v. [HOUSEMAN, (1899) 63 J. P. 85—Byrne, J.]

**44. Sewer—Withdrawal of Notice to Arbitrate—Compensation—Jurisdiction of Arbitrators to award Costs**—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 16, 308.—A notice under sect. 16 of the *Public Health Act, 1875*, may be withdrawn by the local authority at any time before the works are commenced. On a submission to arbitration to assess the amount of compensation under sect. 308 of the same Act, due by reason of damage caused by the construction and execution of a sewer under sect. 16, the arbitrators have no jurisdiction to award compensation for damage merely caused by the giving of the notice under sect. 16 before the construction and execution

of the sewer is commenced, nor to award costs if the notice is withdrawn before the works are commenced.

DAVIS v. WITNEY URBAN DISTRICT COUNCIL, [(1899) 63 J. P. 279; 15 T. L. R. 275—C. A.]

**45. Sewering of Private Street—Street already Sewered** “to the satisfaction of” the Local Authority—*Notice to be Served on all the Frontagers—Public Health Act 1875* (38 & 39 Vict. c. 55), s. 150.—Houses fronting a street not repairable by the inhabitants at large were drained by means of various pipes laid by the owners, which pipes were vested in the local authority. There was no express approval of these pipes by the local authority, although their representative had advised as to the laying of the pipes. The local authority subsequently gave notice to all the frontagers, with one exception, under the *Public Health Act, 1875*, sect. 150, to sewer the street, and on default executed the works themselves, and apportioned the expenses. The apportionment was objected to and taken to arbitration, when £158 was awarded as the proportionate share of two of the frontagers. In an action by the local authority to enforce payment of the £158.—

HELD—that the street had never been sewered “to the satisfaction of” the local authority within sect. 150 either in fact or by implication of law, and that, although notice was, under sect. 150, necessary to be given to all the frontagers, yet the question was closed by the award of the arbitrator. The defendant frontagers were consequently held liable for the payment demanded.

HANDSWORTH URBAN DISTRICT COUNCIL v. [DERRINGTON, [1897] 2 Ch. 438, 61 J. P. 518; 66 L. J. Ch. 691; 77 L. T. 53, 13 T. L. R. 505, 46 W. R. 168—Kekewich, J.]

**46. Surface Water from Road—Right to Discharge into Natural Watercourse**—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 15, 16, 17, and 308.—The plaintiffs were the owners of an estate in the neighbourhood of a certain town, part of which estate was laid out for building, and which included a portion of the course of a small stream. Three roads upon this estate, situated within the natural watershed of the stream, and originally laid out by the plaintiffs, had been taken over by the defendants, the urban district council, after they had constructed a system of drains and sewers for them under the powers of the *Private Streets Works Act, 1892*. In the scheme originally proposed by the defendants the surface water from these roads was allowed to flow into the sewers, but, the Local Government Board having refused to sanction any scheme which did not provide a separate system for carrying off the surface water, the defendants had provided such a system by drains which discharged the surface water into the stream. The defendants’ drains were furnished with catch pits, the best known method of intercepting sand and silt. The plaintiffs nevertheless objected that the water so discharged carried with it a great quantity of sand, silt, and other solid matter washed off the roads,

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and was much more in quantity than would have naturally flowed into the stream, and that its discharge into the stream would injure the plaintiffs by causing floods and silting up the stream. They accordingly brought an action to restrain the defendants from permitting any water, sand, silt, or other solid matter to flow through their drains into the stream.

**HELD**—that sects. 15, 16, and 17 of the Public Health Act, 1875, clearly authorised the defendants in doing what the plaintiffs complained of; and that the plaintiffs must be content with the remedy by way of compensation afforded by sect. 308.

Decision of North, J. ((1897) 61 J. P. 472; 66 L. J. Ch. 517; 76 L. T. 486; 13 T. L. R. 359) affirmed.

**DURRANT v. BRANKSOME URBAN DISTRICT COUNCIL**, [1897] 2 Ch. 291; 66 L. J. Ch. 653; 76 L. T. 739, 13 T. L. R. 482; 46 W. R. 134—C. A.

**(d) Nuisances.**

**47. Adjoining Owners—Easement of Drainage—Notices to Owners by Local Authority to Abate—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 104—Right of Contribution at Common Law**—A man who does work for himself, and thereby indirectly benefits another, obtains no right of contribution against that other.

Notices under the Public Health Act, 1875, and the West Ham Corporation Acts, 1888, 1893, and 1898, were served by the local authority on the appellant and on the respondent, who were the owners of two adjoining houses, requiring them to abate a nuisance arising from the drains on their premises and to perform certain necessary works. The drainage of the respondent's house passed through the appellant's drain into a sewer. The appellant complied with the terms of his notice. The respondent took no steps to abate the nuisance, or to perform the necessary works.

**HELD**—that neither under sect. 104 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), nor at common law, had the appellant any right of contribution as against the respondent.

**REEVE v. SADLER**, (1903) 67 J. P. 63; 51 W. R. [603; 88 L. T. 95, 1 L. G. R. 441—Div. Ct.

**48. Drainage of Houses—Want of Structural Convenience—Liability of Owner—Discretionary Power of Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 15, 21, 94, 95.**—The appellants, who were the owners of twelve houses, were summoned by the respondents, the sanitary authority of the borough, for non-compliance with a notice to abate a nuisance caused by turning the slops and scullery water from the said houses into a drain constructed by the sanitary authority by the side of the highway in front of the said houses to receive the surface water of the highway, which emptied into an open ditch and caused the nuisance complained of. The plan of the houses deposited before they were built showed that the houses should have been drained into cesspools, but no

such cesspools had been constructed. No sewer had been made by the sanitary authority to drain the said houses. The houses were separately occupied, and not within the same curtilage. The justices made an order to abate the nuisance by cutting off the drain of the houses from the drain made to receive the surface water of the highway and making cesspools for the houses.

**HELD**—that the surface-water drain constructed by the sanitary authority, though for some purposes a sewer within sect. 4 of the Public Health Act, 1875, was not a sewer into which the appellants were entitled by virtue of sect. 21 to empty their drains, nor were the sanitary authority bound under sect. 15 to provide a sewer to drain the said houses, and further, that the nuisance was caused by the want of structural convenience within the meaning of sect. 94 of the same Act, and that the justices were, therefore, right in their decision.

**KINSON POTTERY COMPANY v. POOLE CORPORATION**, [1899] 2 Q. B. 41; 68 L. J. Q. B. 819; 63 J. P. 580; 47 W. R. 607; 81 L. T. 24, 15 T. L. R. 379—Div. Ct.

And see No. 53, *infra*.

**49. Insufficiency of Sewers—Flooding adjacent Land—Negligence.**—A local authority converted part of a watercourse running past the plaintiff's land into a covered sewer. Subsequently a number of subsidiary channels were made by them or by their leave for carrying water and sewage into this sewer. It was insufficient to receive all this liquid, and, in consequence, flooded the plaintiff's land.

**HELD**—that the authority had been guilty of negligence, and were liable in damages, it being no defence to say that before any work was done to the watercourse, the plaintiff's land was sometimes flooded with storm water from it, or that the work originally done was sufficient at that time, since now that additional channels had been constructed it was clearly insufficient.

Decision of Supreme Court of Victoria (29 V. L. R. 308) affirmed.

**HAWTHORN CORPORATION v. KANNALUIK**, [1906] A. C. 105; 75 L. J. P. C. 7; 54 W. R. 285; 93 L. T. 644; 22 T. L. R. 28—P. C.

**50. Owner required by Local Authority to do their Work—Work done under Compulsion or as Volunteer—Recovery of Expenses from Local Authority**—The surveyor of a local authority required the owner of a house, who was making certain alterations and who had submitted plans to the local authority for that purpose, to execute certain works, including the taking up and re-laying of a drain—which was a sewer—at the back of the house, and the construction of an interception trap, these latter works being works which the local authority were themselves liable to do. The owner did these works under protest, but by the direction and order of the local authority, though no actual steps had been taken to enforce their execution, and no legal proceedings had been taken or serious threats of such proceedings used. The owner having sued the



**Rights and Duties—Continued.**

local authority to recover the cost, on the ground that he was compelled by them to do work which the authority were legally compellable to do.—

**HELD**—that though there may be sufficient compulsion without legal proceedings, or the threat of such, to entitle a person to recover, there was not sufficient compulsion to prevent the owner being considered as a mere volunteer; that he was, therefore, in the execution of these works acting as a volunteer, and not under compulsion, and was not entitled to recover the expenses from the local authority

*North and Another v. Walthamstow Urban District Council* ((1898) 67 L. J. Q. B. 972; 62 J. P. 836—Channell, J., *see* PUBLIC HEALTH, No. 35) distinguished.

*ELLIS v. BROMLEY RURAL DISTRICT COUNCIL*, [(1899) 63 J. P. 711; 81 L. T. 224—Ridley, J.

*And see* PUBLIC HEALTH, No. 50.

**51 Person responsible for Nuisance—Public Health Act, 1875** (38 & 39 Vict. c. 55), ss. 4, 94, 95.]—The respondent sent his sewage into a covered ditch lying alongside a wall belonging to his premises and a highway under the control of the appellants into a catch-pit and thence to a spot where it was joined by a drain from another house; the drain subsequently continued through private property and emptied into a stream. The part above the catch-pit had been made by the owner or tenant of the respondent's premises. The part below the catch-pit had existed many years, and had never been repaired by the appellants. The catch-pit had been made by the tenant of some adjoining premises to prevent the surface water from the highway flooding his premises. The portion of the drain below the catch-pit leading under the highway became blocked for some reason, and a nuisance having arisen at the catch-pit by reason of the respondent's sewage collecting there, he was summoned as "the person by whose act or default the nuisance arose."

**HELD**—that it was no defence for him to show that the pipe was a "sewer", and, *semble*, under all the circumstances, it was not a "sewer."

*WINCANTON RURAL DISTRICT COUNCIL v. PARSONS*, [1905] 2 K. B. 34; 74 L. J. K. B. 533; 69 J. P. 242; 93 L. T. 13; 3 L. G. R. 771—Div. Ct.

**52. Sewer—Neglect to Cleanse Sewers—Action against Local Authority—Public Health Act, 1875** (38 & 39 Vict. c. 55), ss. 15, 19, 299.]—Where a local authority has neglected to perform the duty imposed upon them by sect. 19 of the Public Health Act, 1875, of properly cleansing the sewers vested in them, and damage is thereby caused to an individual, an action will lie against the local authority at the suit of the person injured. Sect. 299 of the Public Health Act, 1875, does not touch the duty of the local authority to use proper diligence in the management of existing sewers.

Decision of Mathew, J. ((1899) 60 L. J. Q. B. 949; 63 J. P. 726; 48 W. R. 191; 81 L. T. 225; 15 T. L. R. 513) affirmed.

*BARON v. PORTSLADE URBAN DISTRICT COUNCIL*, [CIL, [1900] 2 Q. B. 588; 69 L. J. Q. B. 899; 64 J. P. 675; 48 W. R. 641; 86 L. T. 363; 16 T. L. R. 523—C. A.

**(e) Vesting in Local Authority.**

**53 Channel at Roadside—Cleansing—Public Health Act, 1875** (38 & 39 Vict. c. 55), ss. 4, 19, 21, 42.]—A channel or gutter at the side of a road which drains the surface water from the roadway, and into which rain-water pipes from the roofs and curtilages of adjoining houses drain, may be a "sewer" within the meaning of sect. 4 of the Public Health Act, 1875, and the local authority may be liable for the cleansing of it.

*Per* Vaughan Williams, L. J. *Kinson Pottery Co. v. Poole Corporation* [(1899) 2 Q. B. 41; 68 L. J. Q. B. 819; 63 J. P. 580, No 48, *supra*], is not a decision that drains may be sewers for some of the purposes of the Public Health Act, 1875, and not of others.

*WILKINSON v. LLANDAFF AND DINAS POWYS RURAL DISTRICT COUNCIL*, [1903] 2 Ch. 693; 73 L. J. Ch. 8; 68 J. P. 1; 52 W. R. 50; 89 L. T. 462; 20 T. L. R. 30; 2 L. G. R. 174—C. A.

**54. "Sewer" — Railway — Accommodation Works—Sewer made for Draining Land—Public or Private Act—Railways Clauses Consolidation Act, 1845** (8 & 9 Vict. c. 20), ss. 1, 68—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 4, 13, *sub-s. 2*.]—Certain drains were constructed by a railway company under sect. 68 of the Railways Clauses Act, 1845 (which Act was expressly incorporated in the company's special Act), for the purpose of conveying surface water from lands adjoining the railway. These drains were, without the knowledge or consent of the company, used to some extent to convey sewage from several houses within the district of a rural sanitary authority.

**HELD**—that, although the drains were "sewers" within the Public Health Act, 1875, they were "sewers made and used for the purpose of draining land under a local or private Act of Parliament" within the second exemption in sect. 13 of that Act; that therefore they did not vest in the local authority; and that an injunction to restrain the user was rightly granted.

Decision of Stirling, J. ([1898] 1 Ch. 34; 62 J. P. 8; 67 L. J. Ch. 28; 77 L. T. 485; 14 T. L. R. 63; 46 W. R. 121) affirmed

*LONDON AND NORTH WESTERN RY. CO. v. RUNCORN RURAL DISTRICT COUNCIL*, [1898] 1 Ch. 561; 62 J. P. 643; 67 L. J. Ch. 324; 78 L. T. 343; 14 T. L. R. 331; 46 W. R. 484—C. A.

**55. Sewer—Sewer made by Person for his own profit—Highways Act, 1835** (5 & 6 Will. 4, c. 50), ss. 67, 68—*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 4, 13, 144.]—The defendants

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claimed a right to drain surface water from the highway into a pond on the plaintiff's land. From this pond to the highway a pipe had been laid many years since by a former owner for his own benefit, to obtain more water for his cattle. To this pipe other pipes had been joined in the highway by the defendants, and these actually did carry the surface water. In an action claiming an injunction to restrain the defendants from so draining the surface water —

**Held**—(1) that this system of pipes constituted a sewer within the meaning of sect. 1 of the Public Health Act. (2) That, having regard to sect. 13, *Minehead Local Board v. Luttrell* (70 L. T. R. 146) and *Ferrand v. Hiltas Land and Building Company* (69 L. T. R. 8), the exception in sub-sect. (1), "sewers made by a person for his own profit," was not restricted to direct money payment, but extended also to the case of those made by a landowner in order that the land might be rendered more beneficial, and that therefore this case fell within that exception. (3) That the pipes did not form a part of a system of drainage so as to fall within sects. 67 and 68 of the Highways Act, 1835.

Injunction granted accordingly, but limited to the case of doing the acts complained of without leave of the plaintiff, or in due exercise of the powers conferred by the Public Health Act, 1875.

**CROYSDALE v. SUNBURY URBAN DISTRICT COUNCIL.** [1898] 2 Ch. 515, 62 J. P. 520, 67 L. J. Ch. 585; 79 L. T. 26; 46 W. R. 667. Stirling, J.

Approved in next case, *infra*

**56. Sewer**—"Sewer made by any Person for his own Profit"—*Sewer Diverting Water from Quarry*—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13, sub-s. 1.—By sect. 13 of the Public Health Act, 1875, "all existing and future sewers within the district of a local authority . . . except (1) sewers made by any person for his own profit . . . shall vest in and be under the control of such local authority."

**Held**—that a sewer constructed by quarry owners for the purpose of preventing surface water entering their quarry and thereby more economically and conveniently working the quarry, was a sewer made by them for their profit, and that it did not vest in the local authority.

*Croysdale v. Sunbury-on-Thames Urban District Council* ([1898] 2 Ch. 515; 67 L. J. Ch. 585; 62 J. P. 520, 46 W. R. 667; 79 L. T. 26—Stirling, J., *supra*) approved.

Decision of Q. B. D. ([1899] 1 Q. B. 979; 68 L. J. Q. B. 652; 47 W. R. 560; 80 L. T. 392) reversed.

**SYKES v. SOWERBY URBAN DISTRICT COUNCIL.** [1900] 1 Q. B. 584; 69 L. J. Q. B. 464; 64 J. P. 340; 82 L. T. 177, 16 L. T. R. 225—C. A.

**SHANGHAI.**

*See* DEPENDENCIES AND COLONIES

**SHARES.**

*See* COMPANIES.

**SHEEP DIPPING.**

*See* ANIMALS, 12.

**SHEEP SCAB.**

*See* ANIMALS, 13.

**SHERIFFS AND BAILIFFS.**

*See also* BANKRUPTCY, COUNTY COURTS; DISTRESS; EXECUTION; INTERPLEADER; METROPOLIS, 105, PRACTICE AND PROCEDURE, PUBLIC AUTHORITIES.

**1. Execution on Goods of Third Person—Substantial Grievance—Damages against High Bailiff**—The goods of a third party cannot be taken in execution, even when on the premises.

The owner of goods wrongfully seized by way of execution by the high bailiff of a county court may recover damages against the high bailiff on an interpleader issue where the claimant has suffered a substantial grievance.

**LONDON, CHATHAM AND DOVER RY. Co. v. [Cable]**, (1899) 80 L. T. 119—Div. Ct.

**2. Execution—Sheriff's Fees—Seizure Withdrawn by the Authority of the Person who required the Writ to be Executed**—Where a sheriff, after a seizure of the execution debtor's goods under a writ of *fi. fa.*, withdraws from possession by the authority of the person at whose instance he was required to execute the writ he is entitled to bailiff's fee for executing the warrant, and bailiff's expenses while in possession of the goods.

A writ is executed when the goods of the execution debtor are *in custodia legis*.

**PIRIE v. STEWART**, [1899] 2 Ir. R. 546—[Kenny, J.]

**3. Execution—Fees—Possession Money—Writ of fi. fa.—Several Writs and one Seizure—Sheriff's Act, 1887 (51 & 52 Vict. c. 55), s. 20, sub-s. 2—Order of August 31st, 1888, under Sheriff's Act.**—A writ of *fi. fa.* was lodged by the defendants, who were judgment creditors, with the sheriff for execution. At that time the sheriff was already in possession of the judgment debtor's goods under a previous writ of *fi. fa.* With the

consent of all parties the sheriff remained in possession of the goods seized, and further writs of *fi. fa.* were subsequently issued on behalf of other judgment creditors. Subsequently the defendants ordered the sheriff to withdraw, which he did, and he was paid possession money by the other execution creditors. The sheriff claimed to recover possession money from the defendants.

**HELD**—that there having only been one seizure there was only one man in possession, and, as the sheriff had been paid possession money by the other execution creditors, he was not entitled to recover it from the defendants.

Under the order made under the Sheriffs Act, 1887, as to the various fees payable on writs of *fi. fa.*, the sheriff is entitled to the fee for poundage by way of reward, and to the other fees for his actual expenses.

GLASSBROOK *v.* DAVID AND VAUX, [1905] 1 [K. B. 615; 74 L. J. K. B. 492; 53 W. R. 408; 92 L. T. 299; 21 T. L. R. 276—Farwell, J.

4. *Execution—Removal of Chattels without Regarding Landlord's Claim for Rent—Measure of Damages*—9 Anne, c. 8 (*Corresponding English Act, Landlord and Tenant Act, 1709—8 Anne, c. 14 (c. 18 Statutes Revised)*).—Where cattle, exceeding in value one year's rent, were seized in execution by a special bailiff, who, after notice of a claim for rent by the landlord, removed them from the lands without paying a year's rent, and subsequently, after five or six days, returned them to the lands, on the amount of the claim being satisfied:—

**HELD**—that the landlord was entitled to damages, as in an action of tort, which were measured at the amount of the year's rent, of which he had been deprived.

WREN *v.* STOKES, [1902] 1 Ir. R. 167—C. A.

5. *Execution—Sheriff—Fi. fa.—Trespass to Land—Protection to Sheriff against Action for Trespass*.—A sheriff is not protected against an action for trespass if substantial grievance has been done to the person whose premises are wrongfully entered in the execution of a *fi. fa.*

DE COPPETT *v.* BARNETT AND OTHERS, (1901) [17 T. L. R. 273—C. A.

6. *Interpleader—Fees—Expenses of keeping Live Stock—Costs—Liability of Successful Claimant*.—An interpleader order directed the sheriff to sell certain live stock seized under a writ of *fi. fa.* unless security was given by the claimants. The claimants failed to give security, and the sheriff sold the live stock and paid the proceeds into Court. The interpleader issues were decided in favour of the claimants.

**HELD**—that the sheriff was entitled to be paid out of the fund in Court all costs of the interpleader order, and also all proper expenses of registering the live stock, but not his fees for executing the writ.

MALONE *v.* ROSS, [1900] 2 Ir. R. 586—C. A.

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7. *Sheriff—Execution—Notice of Bankruptcy Petition—Service of Notice—Time*.—Notice of a bankruptcy petition presented by or against the debtor is well served on the sheriff in accordance with sect 11 (2) of the Bankruptcy Act, 1890, if it is served at any time before midnight on the last of the fourteen days during which the sheriff is, by that section, bound to retain the proceeds of an execution levied on the goods of the debtor.

LOLE *v.* BETTERIDGE, [1898] 1 Q. B. 256; 67 [L. J. Q. B. 215; 77 L. T. 548; 5 Manson, 1; 14 T. L. R. 147; 46 W. R. 161—C. A.

## SHIPPING AND NAVIGATION.

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## I. OWNERSHIP AND CONTROL OF SHIP.

### (a) Action of Restraint.

1. *Bail Bond for Safe Return of Vessel—Forfeiture—Discretion of Court.*—A bail bond given in an action of restraint was conditioned for the safe return of the vessel to the port of Liverpool. On the termination of the voyage the vessel did not return to Liverpool, but put into the port of Dundee, outside the jurisdiction of the English Admiralty Court, whence she was sent under a charter-party on a fresh voyage.

On the application of the plaintiff, Barnes, J., made an order declaring the bond to be forfeited.

HELD—that the order was right.

Decision of Barnes, J. (81 L. T. 392; 8 Asp. M. C. 607) affirmed.

THE CAWDOR, [1900] P. 47; 67 L. J. P. 23; [48 W. R. 293; 81 L. T. 705; 9 Asp. M. C. 392—C. A.]

2. *Practice—Minority Owners—Value of Shares—Amount of Bail.*—In an action of restraint the amount of bail to be put in by the defendants is the same proportion of the whole value of the vessel as the number of shares held by the plaintiff bears to the whole number of shares in the vessel.

THE CAWDOR. (1898) 79 L. T. 357—Barnes, J.

### (b) Liability for Disbursements.

And see BILLS OF EXCHANGE, 8

3. *Bill drawn by Master for Coal supplied—Unsuccessful Defence to Action on Bill—Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 10—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167.*—A master drew a bill for coal supplied to his vessel abroad, and was sued upon it.

HELD—that the onus of defending the action on the bill was not put upon the master as master, and that, therefore, he had no lien for the costs incurred by him in unsuccessfully defending the action.

THE ELMVILLE (2), [1904] P. 422, 20 T. L. R. [783; 74 L. J. P. 69, 53 W. R. 287, 9 Asp. M. C. 606; 10 Asp. M. C. 23—Jeune, P.]

4. *Equitable Owners—Disbursements made on Authority of Managing Owner—Agency—Contribution by Co-owners.*—The managing owner of a ship, being the registered owner of certain shares therein, issued a circular inviting persons to purchase shares in the ship, the price to be paid by instalments. He afterwards executed a mortgage of all his shares to a banking company, by whom the same was duly registered. Subsequently the plaintiffs, on the authority of the managing owners as such and as agent on behalf of the other persons interested in the ship, made disbursements at a foreign port in respect thereof. The plaintiffs brought an action against the defendants as the registered and true owners of one sixty-fourth share in the ship, and as having given authority to the managing owner to navigate her on their behalf, to recover the amount of such disbursements. The plaintiffs having obtained judgment, the defendants claimed contribution from the persons who had entered into the contracts for the purchase of shares in the ship.

HELD—that there was a right of contribution against those persons.

Decision of Phillimore, J. (75 L. J. K. B. 359; 94 L. T. 849; 22 T. L. R. 358; 10 Asp. M. C. 247) reversed.

VON FREEDEN v. HULL, BLYTH & Co., (1907) [76 L. J. K. B. 715; 96 L. T. 590; 23 T. L. R. 335; 10 Asp. M. C. 394—C. A.]

5. *Liability of Shipowner to Broker Employed by Charterer.*—The charterers of a foreign ship instructed a shipbroker to do the ship's business at the port of loading. The shipbroker, having made disbursements and rendered services, brought an action against the foreign ship-owners for the amount of his outlays and his

**Ownership and Control of Ship—Continued.**

commission. The owners, who did not dispute the charges, but had a counter-claim against the charterers, pleaded that they were not liable to the pursuer on the ground that he had been employed by the charterers.

**HELD**—that the defenders' master having accepted the pursuer's services as shipbroker, and the defenders having got the benefit of the pursuer's services, they were liable to him for his disbursements and services on account of the ship.

**BARNETSON v. PETERSON**, (1908) 5 F. 86—Ct of Sess.

**6. Necessaries—Statement of Account—Appropriation of Payments—Rule in Clayton's Case ]—**

The rule in *Clayton's Case* (1 Mer. 572), as to appropriation of payments, is not an invariable rule of law, but the circumstances of a case may be looked at to see if the proper inference is that the parties intended the transactions to fall within the rule.

An account stated between the parties is only evidence of an appropriation, which may be rebutted.

An account made up and sent in after a payment, for the purpose of showing the balance due, in which the sum paid is credited at the foot of the whole account, cannot be treated as an appropriation of that sum to the earlier items of the account.

*Clayton's Case* (1 Mer. 572) discussed and explained.

Judgment of the Court below reversed.

**THE MECCA**, [1897] A. C. 286; Asp. M. L. C. [266; 66 L. J. (P. D. A.) 86; 76 L. T. 579; 13 T. L. R. 339; 45 W. R. 667—H. L. (E.)

**7 "Necessaries" — Premiums on Insurance Policies—Admiralty Courts Act, 1840 (3 & 4 Vict. c. 65), s. 6.]—**Premiums paid to underwriters by insurance brokers who have effected insurances on a ship are not "necessaries" within the meaning of sect. 6 of the Admiralty Courts Act, 1840, so as to give the brokers priority in respect thereof over mortgagees of the ship.

**THE ANDRÉ THÉODORE**, (1905) 93 L. T. 184; [21 T. L. R. 158; 10 Asp. M. C. 94—Barnes, J.]

**8. Necessaries supplied by Master's Order—Charterer—Liability of Owners.]—**Shipowners cannot be liable for necessaries unless they were supplied on their authority, or on the instructions of some one held out by them as having authority.

*The Wellgunde* was chartered by her owners to K., of Stettin, who, by the terms of the time charter-party, undertook to provide the vessel with coals, and to discharge all port and tonnage dues and expenses in connection with pilotage. The owners were liable for the wages and maintenance of the crew, as well as for insurance. K. sub-chartered *The Wellgunde* for a voyage to carry timber from Finland to Alexandria, and, in the course of that voyage, *The Wellgunde* put into West Hartlepool for bunker

coals, which were supplied and paid for by the plaintiff, who also defrayed certain expenses in connection with pilotage and port dues. The plaintiff had been requested by the agents of K. to provide the coals and to act as agents for the ship while she was in West Hartlepool, and, in accordance with instructions, he sent in his bill to K. K. did not pay the plaintiff, who then brought this action *in rem* against *The Wellgunde*.

**HELD**—that the plaintiff really supplied the necessaries entirely on the credit of K., the time charterer, to whom the plaintiff, in the first instance, applied for payment, and he, in fact, gave credit to K. and to him alone; that it made no difference that some of the amounts advanced were in respect of matters for which, as between the owners and the time charterer, the owners might ultimately be liable; and that the plaintiff failed in his action.

*The Great Eastern*, ((1868) L. R. 2 A. & E. 88; 17 L. T. (N.S.) 667) followed.

**THE WELLGUNDE**, (1902) 18 T. L. R. 719—[Barnes, J.]

**(c) Mortgage.**

**9. Charter-party and Agreement—Right of Mortgagor to deal with Vessel—Right of Seizure by Mortgagee—Counter-claim for Wages paid by Mortgagee on Seizure—Implied Request—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 34.]—**Section 34 of the Merchant Shipping Act, 1894, enacts that, "except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof."

The mortgagor has the right to deal with his property, provided that his dealings do not materially impair the security of the mortgagee, and his right so to deal is not limited to doing so by any particular form of contract, whether that of a charter-party or any other.

A limited company having purchased *The Heather Bell* from the defendant mortgaged the vessel to him to secure the instalments of the purchase-money with interest. The mortgage was registered on July 13th, 1900.

On August 29th the company, by a charter-party and agreement, agreed that plaintiff should use the vessel on the service between specified places, and that plaintiff should have a charge on the vessel (subordinated to that of the defendant) in respect of certain advances and payments made or to be made by him. On September 4th default was made in the payment of an instalment of the purchase-money, and the question arose whether the defendant was justified in taking possession of the vessel by virtue of the mortgage to him.

**HELD**—that the defendant had no right to interfere with the execution of the contract by taking possession of the vessel as against the person who was properly in possession under the charter-party, namely, the plaintiff.

**Ownership and Control of Ship—Continued.**

HELD, also, that the defendant, though he had no right to take possession, was entitled on his counter-claim to the wages paid by him to the master and crew on taking possession, as the defendant, in order to protect the property, had been compelled to pay and did pay by reason of the default of the plaintiff, who was legally liable.

On appeal (affirming decision of Jeune, P., [1901] P. 143; 70 L. J. P. 36; 49 W. R. 352, 84 L. T. 538; 17 T. L. R. 322, 384):—

HELD—that the agreement was not one to impair the security of the defendant, and, therefore, being entered into by the mortgagor under his powers as owner, as contemplated in sect. 34 of the Merchant Shipping Act, 1891, it was binding on the mortgagee; and that he was entitled to take the benefit of it, but he was not entitled to treat it as of no effect.

*Collins v. Lamport* ((1864) 34 L. J. Ch. 196; 11 Jur. 1, 13 W. R. 283; 11 L. T. (N.S.) 497; 2 Mar. Law Cas. (O.S.) 153) applied

THE HEATHER BELL, [1901] P. 272, 70 [L. J. P. 57; 49 W. R. 577, 84 L. T. 794; 17 T. L. R. 541; 9 Asp. M. C. 192, 206—C. A.]

**10. Charter-party impairing Mortgagee's Security—Carrying Contraband of War**—The plaintiffs were the trustees for debenture-holders in a company and as such were mortgagees of the ships and other property owned by the company. During the war between Russia and Japan the company, without notice to the plaintiffs, chartered three of their ships to carry cargoes of coal from Barry to Vladivostok, a port belonging to Russia the coals being destined for the Russian Government. Three-fourths of the freight was paid in advance but the company did not insure the ships against war risks, the rates for insurance being so high as to render it commercially impossible to insure. After the ships had started on the voyage and before their arrival the plaintiffs ascertained the nature of the charters and took possession of the managed property, and brought an action for a declaration that they were not bound by the charter-parties and bills of lading relating to the ships and the cargoes on board of them.

HELD—that, in the circumstances, the charter-parties impaired the plaintiffs' security, and were therefore not binding upon the plaintiffs, who were entitled to the declaration claimed.

*Collins v. Lamport* ((1861) 1 D. J. & S. 500—Lord Westbury) followed.

*The Celtic King* ([1894] P. 175; 63 L. J. P. 37, 70 L. T. 562—Baume, J.) discussed.

LAW GUARANTEE AND TRUST SOCIETY LD. v. RUSSIAN BANK FOR FOREIGN TRADE AND OTHERS, [1905] 1 K. B. 815, 74 L. J. K. B. 577, 92 L. T. 135, 21 T. L. R. 383, 10 Com. Cas. 159, 10 Asp. M. C. 11—C. A.]

**11. Invalid Mortgage—Registration—Powers of Court to Expunge Entry**—Where a transfer of an interest in a ship has been registered the Court has inherent power to expunge the entry,

if the transfer be void for fraud or some other reason.

BROND v. BROOMHALL, [1906] 1 K. B. 571; 75 [L. J. K. B. 548—Phillimore, J.]

**12. Mortgagee taking Possession—Freight already Earned, but not Paid—Assignee for Value has a Good Title to.**—When once freight has become due and payable, a mortgagee who subsequently takes possession of the vessel that has earned the freight cannot claim to have it paid by the charterers to himself as against an assignee for good consideration, even under an assignment executed after he took possession.

SHILLITO v. BIGGART AND ANOTHER, [1903] 1 K. B. 683; 72 L. J. K. B. 291; 51 W. R. 479; 88 L. T. 426; 19 T. L. R. 313; 8 Com. Cas. 137; 9 Asp. M. C. 396—Walton, J.]

**13. Right of Mortgagee to Take Possession—Circumstances Justifying.**—A mortgagee of a ship is entitled to take possession of her, although there has been no actual default under the mortgage, if the mortgagor is working her in such a way as to materially impair the security.

THE MANOR, [1907] P. 339; 96 L. T. 871—[C. A.]

**14. Shares in Vessel Mortgaged—Notice given to Managing Owners—Earnings in Hands of Managing Owners at Time of Notice—Title to such Earnings.**—The managing owners of a ship only distributed the earnings annually among the various shareholders, and they had some undistributed earnings in hand on November 25th, when they received notice that a shareholder had mortgaged his share to the plaintiff. The shareholder subsequently became bankrupt.

HELD—that as against his trustee in bankruptcy the plaintiff was only entitled to the mortgagor's share in the earnings of voyages completed after November 25th.

COUNTESSE ES-SARF v. WHIMNEY (1903) 88 L. T. 191; 19 T. L. R. 235, 9 Asp. M. C. 363—C. A.]

**15. Unregistered Mortgage—Contract to Sell to Part Owner without Notice—Purchaser to Apply Price in Discharging Vendor's Debt to Ship—Transfer Registered—Mortgagee's Right to Stop Purchase-money—Merchant Shipping Act 1891 (57 & 58 Vict. c. 60), ss. 83, 56, 57.**—The managing owner of a ship agreed to sell shares in it, of which he was registered owner, to other part owners, who were to apply the purchase-money in discharging his debts to the ship and only pay to him any balance. The shares were at once transferred to the purchasers by registered bill of sale. Before the purchasers could apply or pay the purchase-money they received for the first time notice of an earlier, but unregistered, mortgage. The mortgagees claimed the whole purchase-money.

HELD—that the mortgagees could not prevent the purchasers from discharging the vendor's debts to the ship. Under sect. 56 of the Merchant

**Ownership and Control of Ship—Continued.**

Shipping Act, 1894, the vendor as registered owner could "give effectual receipts" to the purchase-money, and could validly contract as to its application, therefore the purchasers had a contractual right to apply the money in discharging debts due to the ship in which they were interested.

*Black v. Williams* ([1895] 1 Ch. 408, 421, 64 L. J. Ch. 137; 43 W. R. 346; 2 Manson, 86—Vaughan Williams, J.) applied

*BARCLAY & Co., LD. v. POOLE*, [1907] 2 Ch. 284; [76 L. J. Ch. 488—Eady, J.

**(d) Sale.**

**16. Liabilities Incurred Prior to Sale—Managing Owners and Mortgagees—Maritime Liens—Division of Purchase-money**—An agreement was entered into between the managing owners of a British vessel and a British firm for the sale of the vessel to the firm, by whom she was duly taken over and worked. The managing owners held sixty-sixty-fourth shares in the vessel. On payment of a part of the purchase-money, eight shares were transferred by the vendors to the firm, and were then mortgaged by the latter. The firm suspended payment, and the vendors thereupon retook possession of the vessel. At the date of this resumption of possession the vessel was under a disadvantageous charter, and there were certain claims against her, which had arisen whilst she was under the management of the firm, and for which she was held liable in an action *in rem* by the master. The original vendors proceeded to repair the vessel, paid a sum to cancel the charter and also the amount found due to the master, and then sold the vessel to an Italian firm. Thereupon the owner of a share in the vessel and the mortgagees of the eight shares brought an action in the High Court claiming a declaration that the sale of the vessel was void and the register not closed, and asking for possession and the rectification of the register. The vendors intervened and settled the claim of the owner of the share. By consent a decree was made to the effect that judgment should be entered against the interveners in favour of the mortgagees for one-eighth of the purchase price, plus interest, less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs in the vessel. The amount of these deductions having been referred to the Registrar, assisted by merchants, to determine, he allowed the deduction of the amount paid by the interveners to clear off the maritime liens and a sum claimed as brokerage on the purchase-money, but disallowed the sum paid to cancel the charter and the cost of repairs.

**HELD**, by the President, that the interveners were not entitled to deduct from the purchase-money before dividing it with the mortgagees the amount paid in discharge of the liens, and that the mortgagees had not expressly requested them to discharge the liens, and no such request could be inferred.

**HELD**, further, that the deduction of the sum

claimed as brokerage was rightly allowed, as the decree by consent was in effect an acquiescence in the sale, that the deduction of the amount paid for the cancellation of the charter was rightly disallowed, as the mortgagees were not mortgagees in possession, and did not authorise the cancellation; and that the deduction claimed in respect of the repairs was rightly disallowed, as they were not done after, and in pursuance of, the agreement for the sale of the vessel to the Italian purchaser.

*The Orchis* (6 Asp. M. L. C. 501; 15 P. Div. 38) distinguished.

**THE RIPON CITY, OTHERWISE THE SILVIA**, [(No. 2), [1898] P. 78; 8 Asp. M. L. C. 391; 67 L. J. P. 30, 78 L. T. 296; 14 T. L. R. 219; 46 W. R. 586—Jeune, P.

**17. Inspection and Approval**—*Bonâ fide Exercise of Judgment—Reasonable Ground for Disapproval*.—An agreement for sale of a ship provided that the price should be "paid as follows: 10 per cent on approval of steamer, so far as can be seen without opening up" . . . and on the purchaser so approving and paying deposit the vendors "agree to open up engines, &c., for purchaser's inspection and approval . . . If steamer not approved, deposit to be returned immediately."

**HELD**—that a *bonâ fide* exercise of judgment entitled the purchaser to disapprove and to recover his deposit.

*HAEGERSTRAND v. ANN THOMAS STEAMSHIP Co., LD.*, (1905) 10 Com. Cas. 67—C. A.

**18. Transfer of Shares—Registration—Fees—Merchant Shipping (Mercantile Marine Fund) Act, 1898** (61 & 62 Vict. c. 44), s. 3, *Sched. I.*—By the Merchant Shipping (Mercantile Marine Fund) Act, 1898, s. 3 and *Sched. I.*, there is to be a payment of a fee "according to the gross tonnage represented by the ships or shares of ships transferred." Where one purchaser gets transferred to him by different persons a number of shares, those shares are not merely transferred by different documents, but each of those transfers is in fact a separate transaction, and in that sense a separate transfer. Therefore, where the plaintiffs purchased 58 shares in a ship at the same time from different persons by 20 different bills of sale, they ought to pay according to the scale on the gross tonnage represented by the shares in each transfer as a separate transaction, and as if they had not at the same time bought the others, and not to pay one fee upon the total tonnages represented by all the shares transferred.

**HARROWING STEAMSHIP Co. v. TOOHEY**, [1900] 2 Q. B. 28; 69 L. J. Q. B. 447, 82 L. T. 677; 16 T. L. R. 275; 9 Asp. M. C. 91—Kennedy, J.

**19. War—Ship Sold to Foreign Government for Naval Service—Contract to be Void if Delivery prevented by Foreign Government becoming Belligerent, and Deposit to be retained—Declaration of War—Declaration of Neutrality—Delivery of Ships prevented—Foreign Enlistment Act,**

**Ownership and Control of Ship—Continued.**

1870 (33 & 34 Vict. c 90), s. 8 (4).]—The Foreign Enlistment Act, 1870, s. 8, provides that "if any person within Her Majesty's Dominions, without the licence of Her Majesty" (*inter alia*) "despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State, such person shall be deemed to have committed an offence against this Act."

The plaintiffs, the Government of the United States, on April 21, 1898, entered into a contract for the purchase of two steamships from the defendants, to be delivered in New York by the defendants "as soon as possible." At that date it was anticipated that war would shortly break out between Spain and the United States, and the defendants knew that the ships were intended to be used in the naval service of the plaintiffs. The contract provided that in the event of the delivery of the ships being prevented by the plaintiffs becoming belligerents the contract was to be null and void, and the defendants were to return a deposit which was payable on the signing of the contract. On April 23rd before the ships had left this country reports were published in English newspapers stating as the fact was, that acts of hostility had taken place on April 22nd between Spain and the plaintiffs, but no formal declaration of war was made until April 26th, on which date Her Majesty's Government issued a declaration of neutrality.

**Held**—that a state of war existed between the United States and Spain on April 23rd and that the defendants had been "prevented," within the meaning of the contract, from delivering the ships and was entitled to retain the deposit.

UNITED STATES OF AMERICA v. PILLY, (1899)  
[17 W. R. 332, 15 T. L. R. 166; 1 Com. Cas. 100—Bigham, J.]

**II. SEAMEN.**

*And see* CRIMINAL LAW, 126: MASTER AND SERVANT.

**(a) Advance of Wages.**

**20 Advance Notes to Seamen—Assignment—Condition—Non fulfilment—Payment of Note by Owner's Agent—Liability of Owner.**—An advance note was given to A, a seaman, for a half-month's wages. The note was in this form, "Five days after the ship W. leaves P. pay to the order of A (provided he sails in the said ship and is duly earning his wages, according to his agreement," &c. It was directed to B & Co. the shipowners' agents at P., and there was a note upon it that it should at once be presented to B & Co. for acceptance. A transferred the note to C, who presented it to B & Co., by whom it was duly accepted. Four days after the W. left P. A was discharged. The master of the W. informed B & Co. that A. had been discharged within five days of sailing and directed them not to pay the note. B & Co. paid the note.

On an action by B. & Co. against the ship-owners for the amount of the note:—

**Held**—that, as A. was not earning his wages at the end of five days after the W. left P., the condition of the note was not fulfilled, and that neither the shipowners nor B. & Co. as acceptors were liable upon it.

BELLAMY & CO. v. LUNN & CO., (1897) 8 Asp. [M. C. 348; 77 L. T. 396—Div. Ct.]

**21. Agreement with Crew—Engaged at Foreign Port where there is a British Consular Officer—Advance Note of more than One Month's Wages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 124, 140.]**—When a seaman is engaged abroad before a British consular officer, as provided by sect. 124 of the Merchant Shipping Act, 1894 the provisions enacted by sect. 140 relative to agreements with the crew and the restrictions as to advance notes do not apply.

RICHIE v. LARSEN, [1899] 1 Q. B. 727, 68 [L. J. Q. B. 335; 17 W. R. 413, 80 L. T. 259, 15 T. L. R. 167; 1 Com. Cas. 129, 8 Asp. M. C. 501—Div. Ct.]

**22. Engaged Abroad—Parary Act, 1721 (8 Geo. 1 c. 24) s. 7—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) ss. 140, 163.]**—When a ship is in a foreign port, the master of the vessel can make a valid contract with a seaman whom he is there engaging for the homeward voyage for an advance to the seaman of any sum on account of his wages conditionally on his shipping. Such advance is not limited to one month's wages, and if the master pays the sum so advanced to the seaman, or to any person authorised by the seaman to receive it, he can at the end of the voyage deduct from the seaman's wages the whole sum advanced as such advances are not prohibited by sect. 163 of the Merchant Shipping Act, 1894 nor by sect. 7 of 8 Geo. 1, c. 24.

ROWLANDS v. MILLER, [1899] 1 Q. B. 735; 68 [L. J. Q. B. 338, 63 J. P. 407, 47 W. R. 687, 80 L. T. 290; 15 T. L. R. 216, 4 Com. Cas. 133, 8 Asp. M. C. 508—Div. Ct.]

**(b) Bonus.**

**23. Bonus for bringing Ship Home—Wages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) ss. 167, 142.]**—The managing owner of a ship, which was in Australia, told the master that if he stuck to the ship and brought her to this country he would be paid a bonus of £50.

**Held**—that the sum was recoverable as wages, and was the subject of a maritime lien.

THE ERMVILE (2), [1904] P. 122; 73 L. J. P. [120, 91 L. T. 380, 20 T. L. R. 783—Jenne, P.]

**24. Obligation of Seamen under Articles—Agreement by Master to Pay a Sum Independent of Wages—Justifications for Breaking Articles—Validity.]**—A steamship during her voyage to and when near Port Elizabeth struck on a reef, where she remained for some minutes, being got off under her own steam and towed into Port



**Seamen—Continued.**

*Elizabeth.* The crew asked for a bonus in respect of taking the vessel to sea. The master, the respondent, went ashore and endeavoured to obtain another crew, but was unable to do so. He then told the crew he would give them £14 each if they would go in the ship, independent of wages. It was afterwards found that the vessel was in fact seaworthy, and that the appellant, one of the crew who had signed articles for the voyage out and back, incurred no unusual risk or danger by proceeding on the voyage home.

**HELD**—that the agreement could not be enforced as the appellant could not insist on a fresh contract unless he showed a state of circumstances in which he would be justified in breaking his articles.

The law laid down in *Hartley v. Ponsonby* ((1857) 7 El. & Bl. 872; 3 Jur. (N.S.) 746; 26 L. J. Q. B. 322) approved.

*HOPKINS v. M'BRIDE*, (1902) 50 W. R. 255; 18 [T. L. R. 53—Div. Ct.

**(c) Effect of Carrying Contraband.**

**25. Agreement for Ordinary Voyage—Discovery by Crew that Cargo is Contraband of War for Belligerent Port—Refusal to proceed on Voyage—Termination of Service—Claim for Wages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 134, 158.]**—A seaman signed articles to serve on board a British ship for a voyage not exceeding two years to ports in the East, proceeding to Hong Kong, and thereafter trading to ports in any rotation and ending at a port in the United Kingdom. War then existed between Russia and Japan, and coal had been declared contraband of war. The vessel left with a cargo of coal to Hong Kong or Shanghai, as might be ordered at Singapore. On the voyage to Singapore the cargo was sold for Nagasaki in Japan, and on the arrival of the ship at Singapore the master received orders from the owner to go to Nagasaki instead of Hong Kong. At Singapore it first came to the knowledge of the crew that the ship was to go to Nagasaki instead of Hong Kong. They refused to proceed to Nagasaki, on account of the increased risk and danger in going to a belligerent port with contraband of war. It was then arranged by the master that the crew should remain at Singapore, and that he should call for them on his way back. He took another crew on board, went to Nagasaki, delivered the coal, and left that port, but on her way back the ship was driven ashore, was got off, and was taken to Hong Kong. It was not proved that she became a wreck. The seaman was sent home with the rest of the crew, and arrived in London. He claimed his wages up to the date of his arrival in London, upon the ground that the agreement was broken by the owner when the ship was ordered to Nagasaki. When he made the agreement he had no knowledge that he would be required to sail with contraband of war to a belligerent port.

**HELD**—that there having been no wreck or

loss of the ship which would terminate the service under sect. 158 of the Merchant Shipping Act, 1894, and there having been no termination by the discharge of the seaman under the terms of the contract, or under the provisions of the Act, either at home or abroad, the seaman was entitled to his wages up to the date of his arrival in London.

*LLOYD v. SHEEN*, (1905) 93 L. T. 174; 10 Asp. [M. C. 75—Div. Ct.

**26. Increase of Risk—"Loss" of Ship—Conditional "Release"—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 134, 136, 158.]**—A conditional release signed by a seaman is not a "release" within the meaning of sect. 136 of the Merchant Shipping Act, 1894.

The plaintiffs agreed to serve as seamen on board the defendants' ship on a voyage from Cardiff to Kiau Chiau and any ports within certain limits and home again. At this time war had broken out between Russia and Japan. The plaintiffs subsequently discovered that the ship was engaged in carrying contraband of war for Russia. When in the Far East on a voyage to Saigon, a port within the above limits, she was destroyed by an explosion. The plaintiffs were rescued and were sent home to Cardiff as distressed seamen, and at Cardiff they signed a conditional release without prejudice to their claim for damages and wages. The plaintiffs claimed wages down to the time of "final settlement," and damages for loss of their kit and for the hardship suffered. The defendants contended that the plaintiffs were only entitled to wages down to the date of the destruction of the ship, and were not entitled to damages.

**HELD**—that there was a "loss" of the ship, within sect. 158 of the Merchant Shipping Act, 1894, when she was destroyed; and that the plaintiffs were entitled only to wages up to that date.

Decision of Sutton, J. (23 T. L. R. 241) reversed.

*\*COLLINS AND OTHERS v. SIMPSON STEAMSHIP CO., LD.*, (1907) 24 T. L. R. 178—C. A.

**27. Increase of Risk—Capture of Ship—"Loss of the Ship"—Right to Wages—Damages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 34, 158.]**—The respondent agreed to serve as a seaman in a ship for two years, the engagement to end at a port of discharge in the United Kingdom or certain ports on the continent of Europe. During the two years the ship was, after the outbreak of war between Russia and Japan, chartered by the owners for six months to carry railway material from Japan to Korean ports. The owners knew, but the respondent did not, that railway material had been declared contraband of war. While carrying railway material she was captured by a Russian war vessel, and condemned as a prize, and the respondent, with the rest of the crew, were sent home. The respondent took out a summons against the owners, claiming damages for breach of contract and his wages up to the date when he arrived home.

**HELD**—that as the ship was captured owing

**Seamen—Continued.**

to the wilful action of the owners in carrying contraband of war, there was no "loss" of the ship within sect. 158 of the Merchant Shipping Act, 1894; that, therefore, the respondent's wages did not cease when the ship was captured, but were payable until he arrived home; and that, as the owners had, by agreeing to carry contraband of war, increased the risks and so altered the conditions of the voyage, they had committed a breach of contract for which they were liable in damages.

*Quære*, whether the word "loss" in sect. 158 would in any case include the capture of a ship for carrying contraband of war, which was not like a peril of the sea terminating the voyage.

THE AUSTIN FRIARS STEAM SHIPPING CO., LD.  
[v STRACK, [1905] 2 K. B. 315; 74 L. J. K. B. 683; 53 W. R. 661; 93 L. T. 169; 21 T. L. R. 556; 10 Asp. M. C. 70—Div. Ct.]

**29. Refusal to Proceed—Offence against Discipline—Order of Naval Court—Jurisdiction—Discharge of Seamen from Ship—Forfeiture of Wages—Contract—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) ss. 225, 483.**—Certain seamen who had shipped for a voyage from a port in the United Kingdom to Port Arthur and back, via ports in Japan, on arrival at a port in Japan objected to continue the voyage, upon the ground that the vessel was carrying contraband of war, unless some arrangement was made for indemnity to themselves and compensation to their wives and families in the event of their capture. A Naval Court was thereupon held under ss. 189–186 of the Merchant Shipping Act, 1894, which decided that the seamen were guilty of continued neglect of duty without good and sufficient cause, and the Court discharged the seamen from the ship and forfeited their wages. In an action in the High Court of Justice in England by the seamen to recover their wages—

**Held**—that the decision of the Naval Court, being made within its jurisdiction, was final and conclusive although the shipowners were not parties to the proceedings, and that it was a bar to the action.

The summons against the seamen recited that the offence of which they were accused was "continued wilful disobedience to lawful commands and continued wilful neglect of duty, an offence against sect. 225 of the Merchant Shipping Act, 1894, which is punishable on summary conviction."

**Held**—that, though the summons was for an offence under sect. 225 which was punishable summarily, the Naval Court could exercise all the powers conferred upon it by sect. 483.

Decision of Lord Alverstone C.J. (94 L. T. 445; 54 W. R. 182; 22 T. L. R. 103; 11 Com. Cas. 66; 10 Asp. M. C. 213) affirmed.

HUTTON v. RAS STEAMSHIP CO., [1907] 1 K. B. 531; 76 L. J. K. B. 562; 96 L. T. 515; 23 T. L. R. 295; 12 Com. Cas. 231; 19 Asp. M. C. 386—C. A.]

**30. Refusal to Proceed—Disclosure of Contraband during Voyage—Claim for Wages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 134, 164.**—The respondent, a seaman, signed articles at Glasgow for a voyage on the British steamship *Gogovale* not exceeding three years' duration to any port or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong via the Bristol Channel, and thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe within home trade limits as might be required by the master. At the time the articles were signed there was a state of war between Russia and Japan, and both parties had declared coal to be contraband of war. The vessel proceeded to Cardiff, and took in a cargo of coal. The appellant knew at that time that the destination of the cargo was the Japanese port of Sasebo, which is within the limits prescribed by the articles, but he did not disclose this to the respondent. On arriving at Hong Kong the respondent discovered the port of destination, and refused to proceed in the vessel. He was left at Hong Kong till the vessel returned, when he rejoined her and returned to Cardiff. The respondent claimed wages and maintenance during the time he was waiting at Hong Kong.

**Held**—that he was entitled to such wages and maintenance.

*Caine and Others v. Palace Steam Shipping Co., Ltd* (*infra*) followed.

Decision of Div. Ct. (70 J. P. 145; 91 L. T. 198; 22 T. L. R. 174; 10 Asp. M. C. 221) affirmed.

SIBERY v. CONNELLY, (1907) 96 L. T. 110, 23 T. L. R. 257; 10 Asp. M. C. 330—C. A.]

**31. Refusal to Proceed to Belligerent Port—Conviction—Right to Wages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) s. 134.**—Seamen agreed to serve on a voyage of specified duration to ports between certain degrees of latitude, ending at a port in Europe. The ship took in a cargo of coal at an English port. War had then been declared between two foreign powers, and coal had been declared contraband of war, and ships carrying it liable to seizure. During the voyage the seamen learned for the first time that they were expected to proceed to a foreign belligerent port within the above limits. On refusing they were left at a British colonial port, where they were convicted of impeding the voyage and imprisoned. In an action by the seamen against the owners of the vessel for wages from the time they were left behind until "final settlement" of their claim, and for damages—

**Held**—that as the character of the voyage was changed from an ordinary commercial voyage, for which the seamen had signed on to one involving increased risk the seamen were entitled to refuse to continue it, and were therefore entitled to their wages down to the date of the judgment, which was the "final settlement."

**Seamen—Continued.**

of the claim, that the conviction did not operate as an estoppel so as to bar them from making the claim.

Decision of Lawrence, J. (22 T. L. R. 816) varied.

Decision of C. A. ([1907] 1 K. B. 670; 76 L. J. K. B. 292; 96 L. T. 410; 23 T. L. R. 203; 12 Com. Cas. 96; 10 Asp. M. C. 380) affirmed.

CAINE v. PALACE SHIPPING Co., [1907] A. C. [386; 76 L. J. K. B. 1079; 23 T. L. R. 731—H. L. (E.)

**(d) Miscellaneous.**

**32. "Crimping" — Boarding Ships without Permission—Right to Trial by a Jury—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 218, 680—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17.]—Under sect. 218 of the Merchant Shipping Act, 1894, any person boarding a ship at the end of her voyage in contravention of that section is liable to a fine not exceeding £20, or at the discretion of the Court to imprisonment for any term not exceeding six months. By sect. 680, "an offence under this Act made punishable with imprisonment for any term not exceeding six months with or without hard labour, or by a fine not exceeding £100, shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts."**

**HELD**—that a person charged before a Court of summary jurisdiction with an offence under sect. 218 has a right to claim to be tried by a jury under sect. 17 of the Summary Jurisdiction Act, 1879.

REX v. GOLDBERG, [1904] 2 K. B. 866; 73 L. J. [K. B. 970; 20 T. L. R. 683; 68 J. P. 554; 91 L. T. 490; 20 Cox, C. C. 699; 10 Asp. M. C. 2—Div. Ct.

**33. "Crimping" — Foreign Ship—"At the end of her Voyage"—Merchant Seamen Act, 1880 (43 & 44 Vict. c. 16), ss. 5, 6—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 218, 219.]—By sect. 219 of the Merchant Shipping Act, 1894, the Crown may apply the provisions of sect. 218 to the ships of a foreign country as if the ships of that country arriving, about to arrive, or having arrived "at the end of their voyage" were British ships. Sect. 218 makes it an offence, where a ship is about to arrive, is arriving, or has arrived "at the end of her voyage," for any person not authorised by law to board the ship without the permission of the master before the seamen leave the ship at the end of their engagement, or are discharged.**

**HELD**—(1) that, though the language of sect. 6 of the Merchant Seamen Act, 1880, is not exactly similar, the provisions of the two Acts must be regarded as identical in their effect, and (2) a ship of a foreign country, to the vessels of which sect. 6 has been applied by Order in Council, comes within that section on her arrival at a British port, though her crew have signed on

for a voyage to that port and thence to other ports.

SOLICITOR TO THE BOARD OF TRADE v. [ABRAHAM, [1904] 2 K. B. 859; 73 L. J. K. B. 972; 68 J. P. 546; 20 T. L. R. 684; 91 L. T. 493; 20 Cox, C. C. 715; 10 Asp. M. C. 5—Div. Ct.

**34. Desertion — Extra Wages Paid to Substitute—Deduction in respect thereof—Payment through or in the presence of the Superintendent of Mercantile Marine — Penalty — Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 131, 221, 226, 232.]—A seaman deserted from vessel A. abroad and came home on vessel B. By reason of this desertion the owners of A incurred extra expense to the amount of 15s 3d. in providing a substitute, and they gave notice of the fact to the master of B. through the Shipping Federation, threatening to prosecute the seaman, in which case he would have forfeited all his wages. They offered, however, to accept the 15s 3d instead of prosecuting, and the seaman consented to allow this sum to be deducted from the wages due to him. The Superintendent of Mercantile Marine, believing this deduction to be illegal, refused to be a party to it and left the office; but the master, nevertheless, deducted the amount and paid the balance to the seaman.**

**HELD**—that the superintendent had acted properly, and that the master was rightly convicted for paying the man his wages otherwise than "through, or in the presence of, the superintendent."

KERSLAKE v. BOARD OF TRADE, [1903] 2 K. B. [453; 72 L. J. K. B. 829; 67 J. P. 356; 19 T. L. R. 583; 52 W. R. 127; 59 L. T. 534; 9 Asp. M. C. 491—Div. Ct.

**35. "Distressed Seaman"—Expenses of Maintenance—Receipt of Wages in excess of Expenses—Account of Expenses and Proof of Payment—"Sufficient Evidence"—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 190—193—Board of Trade Regulations, Nos. 86, 90, 95.]—For the purposes of sects. 190—193 of the Merchant Shipping Act, 1894, it is not a seaman's slender purse, but the fact that he has been cast from his ship in a foreign country, that makes him a "seaman found in distress abroad." Therefore a seaman may be a "distressed seaman" abroad within the meaning of sects. 190—193 of the Merchant Shipping Act, 1894, and the Board of Trade regulations made thereunder, though the wages due and paid to him abroad exceed the amount of the expenses incurred on his behalf in maintenance and passage home. It is in each case a question of fact.**

*Quære*, whether, in proceedings by the Board of Trade for the recovery of the expenses, the production of the account of the expenses and the proof of payment, as required by sect. 193, sub-sect. 3, are conclusive evidence of the right of the Board of Trade to recover the amount of the expenses; they are, however, sufficient evidence in the absence of any evidence that the seaman was not "in distress."

Decision of Bigham, J. (72 L. J. K. B. 697; 51

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W. R. 554; 88 L. T. 693; 19 T. L. R. 479; 8 Com. Cas. 285) affirmed.

**BOARD OF TRADE v. SAILING SHIP GLENPARK**, [Ld., [1904] 1 K. B. 682, 73 L. J. K. B. 315; 52 W. R. 646; 90 L. T. 360, 20 T. L. R. 321; 9 Com. Cas. 193; 9 Asp. M. C. 550—C. A.]

**36. Duty of Owners to Render Ship Seaworthy—Default—Liability.**—A ship owned by the defendants was chartered to carry maize in bulk from Liverpool to Galway, and by the charter-party the charterers were to supply sufficient bags for stowage of the cargo, if required. Most of the cargo, 632 tons, was loaded in bulk under the direction of a stevedore. The vessel arrived in Lough Swilly, having had fine weather all the way, and it was found there that she had a list to port, as to the extent of which the evidence varied from five to twenty degrees. Nothing was done to correct the list, and she left about eight in the evening and proceeded on her voyage. The list increased, and a gale of wind having sprung up, the vessel foundered. Seven of the crew were drowned. In an action under Lord Campbell's Act the jury found that all the necessary and reasonable precautions had not been taken to prevent the cargo from shifting as regards lashing and stowage, and that the vessel became unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly, that the list was caused by the cargo shifting by reason of the omission of proper precautions.

**HELD**—that there was evidence to sustain the verdict that the cargo was not properly loaded at Liverpool, and also that there was evidence to show that the ship was not seaworthy when she left Lough Swilly.

**CUNNINGHAM v. FRONTIER STEAMSHIP CO.**, [1906] 2 Ir. R. 12—C. A.]

**37. Engagement of Seaman for Foreign Ship—Licence of Board of Trade—Fine—Civil Debt—Merchant Shipping Act, 1891 (57 & 58 Vict. c. 60), s. 111 (1), (1), & 681 (1) (b), & 682 (2).**—A person who in an English port, engages or supplies a seaman to be entered on a ship in the United Kingdom without having a licence for the purpose from the Board of Trade, acts in contravention of sect. 111 sub-sect. 1 of the Merchant Shipping Act, 1891 and is liable to a fine under sub-sect. 4, notwithstanding that the ship for which the seaman is engaged or supplied is a foreign ship.

A fine recoverable under sub-sect. 4 is not a sum recoverable as a civil debt under sect. 682, sub-sect. 2, but is a fine inflicted as a punishment for an offence the proceedings in prosecuting which are those prescribed by sect. 681, sub-sect. 1 (b).

**REG. v. STEWART**, [1899] 1 Q. B. 961, 68 L. J. Q. B. 582, 63 J. P. 517; 47 W. R. 115; 80 L. J. P. 660; 8 Asp. M. C. 534, 15 F. L. R. 303—Div. Ct.]

**38. Injury in Service of Ship—Surgical and Medical Advice and Attendance and Medicine—**

*Expenses of Maintenance of Master until Cured or Brought Back to a Port—Liability of Owner of Ship—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 207.*—The plaintiff was engaged by the defendants as master of a schooner. While assisting in tacking the ship he fell and fractured his right leg in two places. He was taken back to Liverpool, where he remained for four months before he was able to return to his ship. He brought an action to recover the expenses of medical attendance and maintenance incurred in consequence of his injuries.

**HELD**—that a shipowner's liability in respect of an injured sailor ends when such sailor has been brought back to a home port.

Decision of Wills, J. ((1902) 18 T. L. R. 373) reversed.

**ANDERSON v. RAYNER**, [1903] 1 K. B. 589; 72 L. J. K. B. 292; 51 W. R. 369; 88 L. T. 313; 19 T. L. R. 297, 9 Asp. M. C. 385—C. A.]

**39. Intimidation—Seafaring Man out of Employment—Construction of Statute—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7—Merchant Shipping Act 1854 (17 & 18 Vict. c. 10)—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).**—Seafaring men are not as a class, excepted from the provisions of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). In construing sect. 16 of that Act the word "seamen" therein is to be taken to mean persons employed under and subject to the liabilities imposed by the Merchant Shipping Acts.

**REG. v. LYNCH AND JONES**, [1898] 1 Q. B. 61, 8 Asp. M. L. C. 363, 18 Cox. C. C. 677, 67 L. J. Q. B. 59, 77 L. T. 568, 11 T. L. R. 78, 46 W. R. 205—C. C. R.]

**40. Lascars—Crew Space—Ships Registered in England—Merchant Shipping Act, 1891 (57 & 58 Vict. c. 60), s. 210.**—A petition of right was presented by the petitioners, who were owners of ships trading between England, Australia and India. The crews of the ships were composed of European seamen and of a class of British subjects, natives of India, who were known as Lascars. The agreements with the Lascars were entered into in British India, and were in accordance with sect. 125 of the Merchant Shipping Act, 1894. The petitioners sought for a declaration that the crew space provided for the Lascars in their ships was regulated by the Indian Act of 1876 (amending the Indian Act, 1859) with which they alleged they had complied. It was contended for the Crown that the subject-matter was regulated by sect. 210 of the Merchant Shipping Act, 1891. These ships were registered in the United Kingdom in accordance with the provisions of the Merchant Shipping Act 1854, and the statutes amending the same.

**HELD**—that the petitioners since 1867 had been and were now bound to appropriate to the use of the Lascars the accommodation for seamen specified in sect. 210 of the Act of 1891 and the 6th Schedule as part of that section. Further,

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that by sect. 265 of the Act of 1894, the provisions of that Act relating to the accommodation for seamen must govern that matter, and not those of the Indian Acts.

**PENINSULAR AND ORIENTAL STEAM NAVIGATION Co. v. REX**, [1901] 2 K. B. 686, 70 L. J. K. B. 845, 85 L. T. 71; 17 T. L. R. 610; 9 Asp. M. C. 228—Mathew, J.

**41. Persuading Seaman to Desert—Foreign Seaman from Foreign Ship in English Port—Offence—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), s. 236, sub-s. 1.—It is not an offence under sub-sect. 1 of sect. 236 of the Merchant Shipping Act, 1894, to persuade in England a foreign seaman to desert from a foreign ship while such ship is lying in an English port.

**POLL v. DAMBE**, [1901] 2 K. B. 579; 70 L. J. [K. B. 721; 65 J. P. 774; 50 W. R. 28; 84 L. T. 870; 17 T. L. R. 590; 9 Asp. M. C. 220—Div. Ct

**42. Wilful Disobedience to a Lawful Command—Fishing Boat—Second Engineer—Failing to be on Board at a Specified Time—Desertion or Absence without Leave—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), s. 376, sub-s. 1.—The respondents preferred an information against the appellant, a second engineer of a fishing boat, under the Merchant Shipping Act, 1894, s. 376, sub-s. 1. The justices found that the appellant was under a running agreement for half a year, and that, while at work on board the vessel in a dry dock, he was ordered by the master to be on board at 6 a.m. on the following day, when she was to start on another voyage, and that he assented to that order, but that he did not go on board at all on the following day, and the vessel was delayed for some time while a substitute was procured.

**HELD**—that there was sufficient evidence that the appellant committed the offence of wilful disobedience to a lawful command during the engagement under sect 376, sub-s. 1 (d), although the disobedience amounted to the offence of desertion or absence without leave under (a) or (b) of sect. 376, sub-sect. 1. and that he was liable to imprisonment

**EDGILL v. J. AND G. ALWARD, LD.**, [1902] 2 [K. B. 239; 71 L. J. K. B. 690; 66 J. P. 760; 87 L. T. 121; 9 Asp. M. C. 341; 20 Cox, C. C. 302—Div. Ct.

**(e) Termination of Service.**

**43. Home Port—Agreement—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), ss. 113, 114 (1), (2), 115 (5).—A seaman signed an agreement at Cardiff for a voyage "to any port or place within the limits of 75 degrees north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe within home trading limits as may be required by the master." The ship sailed with a cargo from Cardiff to Malta, and from

Malta to the Black Sea, where she loaded a cargo for Southampton. On arrival at Southampton she discharged the whole of her cargo. The seaman thereupon demanded his wages on the ground that the voyage was at an end. The master refused, saying that he would have to go on to Cardiff as his port of discharge.

**HELD**—that by the agreement the master had the power of determining at what port within home trading limits the voyage was to end; and that the voyage was not at an end when the ship discharged her cargo at Southampton, the master having required the voyage to end at Cardiff.

Decision of C. A. ([1906] P. 103; 75 L. J. P. 31; 54 W. R. 335; 94 L. T. 528; 22 T. L. R. 255; 10 Asp. M. C. 235—C. A.) affirmed.

**BOARD OF TRADE v. BAXTER—THE SCARS—DALE**, [1907] A. C. 373; 76 L. J. P. 147; 97 L. T. 526; 23 T. L. R. 729—H. L. (E.).

**44. "Loss" of Ship—Capture and Destruction of Ship—Wages—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), s. 158.—By sect. 158 of the Merchant Shipping Act, 1894, "where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to the time of such termination, but not for any longer period."

**HELD**, by Ld. Alverstone, C.J., and Ridley, J., that a "loss" of the ship occurs when the ship ceases to exist as a ship, by Darling, J., that a "loss" occurs when the owner is permanently deprived of her.

A seaman agreed at New York to serve on board a British ship for a voyage, not exceeding three years' duration, to places including ports in Japan, Manchuria, and Siberia. At the time Russia and Japan were at war with each other, and the ship during the course of the voyage was captured by a Russian ship of war, and, after her crew were taken out of her, she was destroyed by the Russians. There was no evidence that the ship was carrying contraband of war, or that her capture was justified. The seamen were sent to England as distressed seamen, and claimed wages up to the time of their arrival in England.

**HELD**—that the ship was "lost" within the meaning of sect. 158 of the Act of 1894—per Lord Alverstone, C.J., and Ridley, J., at the time when the ship was destroyed, and that, therefore, the seamen were only entitled to wages up to that time, per Darling, J., at the time when the ship was captured.

**Austin Friars Steam Shipping Co. v. Struck**, ([1905] 2 K. B. 315; 74 L. J. K. B. 683; 53 W. R. 661; 93 L. T. 169; 21 T. L. R. 556; 10 Asp. M. C. 251—Div. Ct., No. 27, *supra*) distinguished.

**SIVEWRIGHT v. ALLEN**, [1906] 2 K. B. 81; 75 [L. J. K. B. 476; 70 J. P. 290; 54 W. R. 604; 94 L. T. 778; 22 T. L. R. 482, 11 Com. Cas. 167—Div. Ct.

**Seamen—Continued.**

**45. Termination of Service at Foreign Port—Maintenance and Passage Home—Consular Officer.**—*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 186. [—When a consular officer at a foreign port, acting under sect 186, subsect. 2 (d), of the Merchant Shipping Act, 1894, has named a sum which he deems sufficient to defray the expenses of the maintenance and passage home of a seaman whose service in a British ship has terminated at that port, and when the master of the ship has deposited such sum with the consular officer, the seaman has no further claim against the shipowners under that section.]

No appeal lies from the decision of the consular officer under this sub-section.

"Passage home" means the passage to the port at which the seaman was shipped, or to some other port in the United Kingdom agreed to by him.

Judgment of Collins, J. ([1897] 1 Q. B. 712, 2 Com. Cas. 156, 66 L. J. (Q. B.) 437; 76 L. T. 689, 13 T. L. R. 528; 45 W. R. 689) affirmed.

**EDWARDS v. STEEL, YOUNG & Co.,** [1897] 2 Q. B. 327; 8 Asp. M. C. 323; 2 Com. Cas. 272; 66 L. J. (Q. B.) 690; 77 L. T. 297, 13 T. L. R. 528, 45 W. R. 689—C. A.

**46. Termination of Service Abroad—Passage Home.**—*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 186, subsect. 2 (c). [—By sect 186 of the Merchant Shipping Act 1894, where the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's dominions the master shall, as one of several alternatives by subsect 2 (c), "provide him with a passage home."]

**Held**—that a 'passage home' means a passage to the port in Her Majesty's dominions at which the seaman was originally shipped or to some port in the United Kingdom agreed to by him.

Decision in *Edwards v. Steel* ([1897] 2 Q. B. 327, 66 L. J. Q. B. 690, 45 W. R. 689, 77 L. T. 297; 2 Com. Cas. 272—C. A.) followed.

Decision of Mathew, J. ([1899] 1 Q. B. 38, 68 L. J. Q. B. 38, 79 L. J. 111; 1 Com. Cas. 1) affirmed.

**PURVIS v. STRAITS OF DOVER STEAMSHIP Co.** [1899] 2 Q. B. 217, 68 L. J. Q. B. 925; 17 W. R. 630, 81 L. T. 35, 15 T. L. R. 130, 1 Com. Cas. 274, 8 Asp. M. C. 566—C. A.

**47. Termination of Service at Foreign Port—Sending Home—Port in the United Kingdom Agreed to by the Seaman.**—*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 186, subsect. 2 (a) (b). [—By sect 186 of the Merchant Shipping Act, 1894, where the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's dominions the master shall, besides paying the wages to which the seaman is entitled, either " (a) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in

the United Kingdom agreed to by the seaman, or (b) furnish the means of sending him back to some such port." Seamen agreed to serve on a British ship on a voyage from Newport, Mon., to Malta, and to end at a final port of discharge in the United Kingdom or continent of Europe between the Elbe and Brest inclusive; and it was agreed that when the seamen were discharged on the continent as above the master should furnish the means of sending them back to the nearest port in the United Kingdom served by regular steamers, and the seamen agreed to such nearest port as the port in the United Kingdom to which they might be so sent back. The voyage ended at Hamburg, and the crew were discharged, and the master paid the expense of sending them to Hull, which was the nearest port served by regular steamers. The seamen claimed that they were entitled to the expense of conveyance to Newport, the port of shipment.

**Held**—that "the port agreed to by the seamen" meant a particular defined home port, and not one of several ports which the master might select by terminating the voyage at a particular port on the continent; that the agreement therefore contained a stipulation which was inconsistent with the provisions of sect 186 and was void under sect 156 of the Act, and that the seamen were entitled to the expense of being sent back to Newport.

**ATTORNEY-GENERAL v. FARGROVE STEAM [NAVIGATION Co. LD]** (1907) 23 T. L. R. 230—Bry. J.

**III. HIRE OF SHIP****(a) Detention of Ship**

**48. Charterer at Liberty to Cancel Charter-party if Vessel not at Loading Port by a Certain Day—Impossibility of Performing Contract—Refusal to Proceed—Injunction.**—A charter-party was made between the plaintiffs and the defendants by which a certain vessel then at Delagoa Bay was to proceed to Bussorah and it was provided that the charterers should be at liberty to cancel the charter-party if the vessel was not there by a specified date. The vessel was detained at Delagoa Bay unloading cargo until it was impossible for her to go to Bussorah by the specified date.

**Held**—that the shipowners were bound to send the vessel to Bussorah, and that if they did not send her there, they must pay damages; but that as the charterers had refused and declined to say whether they would or would not load the vessel when she got to Bussorah and said that, if they did so the shipowners would have to accept a reduced rate of freight, they could not ask for an injunction to prevent the shipowners from sending their vessel upon any voyage except a voyage to Bussorah under the charter-party.

*De Mattos v. Gibson* (1899) 4 De G. & J. 276, 28 L. J. Ch. 165 and *Seaton v. Doxlands* (1861), 30 L. J. Ch. 457; 9 W. R. 218, distinguished.

**BUCKNALL BROTHERS v. TATUM & Co.,** (1900) [83 L. T. 121, 9 Asp. M. C. 127—C. A.]

**Hire of Ship—Continued.**

**49. Detention at Port of Loading—"Strikes, Lock-outs, Accidents to Railway"—"Other Causes beyond Charterers' Control"—Dismissal of Workmen from Factory.]**—By a charter-party it was agreed that the ship should proceed to a certain port and there load from the charterers' agents a cargo of petroleum in cases at a certain rate per day. Lay days for loading were to commence twenty-four hours after receipt by the charterers' agents of written notice of the steamer's readiness in berth to receive it, "strikes, lock-outs, accidents to railway . . . or other causes beyond charterers' control always excepted." The railway by which only oil for loading could be brought to the port was partially destroyed by floods, and, there being no oil at the port, the charterers' agents dismissed from their factory the workmen employed in packing the oil in cases. On the supply of oil by rail being recommenced, delay was caused in loading the ship by the necessity of getting the workmen together again and re-starting the work of packing. Further delay in loading the ship was also caused by the charterers' agents, in accordance with the practice of shippers at that port, first loading two other ships which had arrived previously to the steamer in question.

**HELD**—that the delay in loading which occurred after the recommencement of the supply of oil by rail was not covered by the exception clause, and that the charterers were liable to damages for detention.

**IN RE RICHARDSON AND SAMUEL & Co, [1898] 1 Q. B. 261; 8 Asp. M. L. C. 330, 3 Com. Cas. 79; 66 L. J. Q. B. 868, 77 L. T. 479, 14 T. L. R. 5—C. A.**

**50 "Detention by Average Accidents to Ship"—Time occupied in getting to Spot where Accident occurred—Hire during Time so occupied.]**—A charter-party provided that, in the event of loss of time from "detention by average accidents to ship," the payment of hire should cease from the time thereby lost. An average accident having occurred to the ship while on a voyage from Hamburg to New York, she put back to Queenstown for repairs. After being repaired the voyage was resumed.

**HELD**—that the charterer was liable to pay hire during the time occupied after leaving Queenstown in arriving back at the place where the accident had occurred.

**Judgment of Phillimore, J. ((1901) 6 Com. Cas. 253) affirmed.**

**VOGEMAN v. ZANZIBAR STEAMSHIP CO. LD, [(1902) 7 Com. Cas. 254—C. A.]**

**51. Detention by Ice—Breakdown of Steamer.]**—A steamship was chartered for two months for a voyage to Spain, thence to the Baltic and thence back to England; there was a special provision that detention by ice should be "for account of charterers, unless caused by breakdown of steamer." On the voyage from Spain to St. Petersburg she stranded and put into Copenhagen for repairs; she then proceeded, and, finding the

approaches to St. Petersburg blocked by ice, put into Reval, unable to proceed, but not herself frozen in, and remained there waiting for the port of St. Petersburg to reopen. But for the stranding and consequent delay she would have been early enough to reach and leave St. Petersburg before the port was closed by ice.

**HELD**—that the detention at Reval was a "detention by ice"; that it was caused by the "breakdown of the steamer"; and that therefore the hire ceased during its continuance.

**Decision of Ridley, J. (8 Com. Cas. 230) affirmed.**

**IN RE TRAAE (FOR THE OWNERS OF THE [RIKARD NORDRAAK] AND LENNARD & SONS, LD., [1904] 2 K. B. 377; 73 L. J. K. B. 553; 90 L. T. 407; 20 T. L. R. 394, 9 Com. Cas. 235; 9 Asp. M. C. 553—C. A.**

**52. Failure of Owners to Provide Ship—Damages Construction of Charter-party.]**—A charter-party provided that the *A*, "now trading and expected ready to load about 31d March," should "with all convenient speed sail and proceed to" *L* and there load. There was a clause that "in the event of any mishap entailing delay in arrival" at *L*, "beyond seven days of her expected readiness," the charterers might at their option cancel the charter.

**HELD**—that this clause did not protect the owners from an action for damages, they having booked other engagements for the *A* which did not permit of her reaching *L* within seven days of March 3rd.

**THOMAS NELSON & SONS v. DUNDEE EAST [COAST SHIPPING CO., LD, [1907] S. C. 927—Ct. of Sess.**

**53 Ship to "Proceed Immediately"—Deviation—Repudiation—Condition Precedent.]**—By two charter-parties of even date, a steamer was chartered to proceed on successive voyages to a port in America, and there load a cargo, and to proceed therewith to Rotterdam. The second charter-party contained a clause, that, on the completion of the first voyage, the steamer should "proceed immediately" to fulfil that charter-party. On the completion of the first voyage the steamer left Rotterdam and went to Cardiff to coal, and thence proceeded to America, where she arrived before the cancelling date provided by the charter-party. The charterers refused to load the steamer under the charter-party on the ground that, by reason of the steamer going to Cardiff, there had been a breach of the above clause.

**HELD**—that there had been no breach of the charter-party, it being the ordinary course of business for steamers proceeding from Rotterdam to America to go to Cardiff to coal.

**HELD**, also, that the above clause was not a condition precedent, the breach of which would entitle the charterers to repudiate the charter-party.

**FOREST OAK STEAM SHIPPING CO. v. RICHARD, [(1900) 5 Com. Cas. 100—Bigham, J.]**

**Hire of Ship—Continued.**

**54** "*To load always afloat*"—*Berth Ordered by Charterer—Detention by Neap Tides—Liability.*—A charter-party provided that a ship should proceed to the S. dock at M., or so near thereto as she might safely get, and there load a cargo in the customary manner, always afloat, as and where ordered by the charterers. At the time of making the contract both parties were aware that at neap tides there was not sufficient water in the dock for the ship to load always afloat. The ship arrived at the dock, and was ordered to a berth where she loaded part of her cargo, and then, in consequence of falling tides and danger of taking the ground, she had to leave the dock and wait till the next spring tides to return and complete her loading.

**HELD**—that the order given by the charterers was one which they were entitled to give under the charter-party, and that they were not liable for the detention of the ship by the want of water at the berth ordered.

Decision of C. A. ([1897] 2 Q. B. 485; 8 Asp. M. L. C. 325) affirmed.

**CARLTON STEAMSHIP CO., LD. v. CASTLE [MAIL PACKETS CO., LD.]**, [1898] A. C. 486; 67 L. J. Q. B. 795, 78 L. T. 661; 14 T. L. R. 469, 47 W. R. 65, 8 Asp. M. C. 402—**H. L. (E.)**

**(b) Exceptions in Charter-party**

**55** "*Accident Caused by Negligence*"—*Construction of—Negligence of Stevedores in Unloading—“Accidents”—Caused by Negligence . . . in the Navigation or Management of the Vessel or Otherwise.*—The plaintiffs' cargo in the defendants' vessel was damaged by the improper and reckless handling of the bags by the stevedores, who were the defendants' servants; the charter-party exempted defendants from liability for "all other accidents, even though caused by negligence . . . of servants of the owner in the management or navigation of the vessel or otherwise."

**HELD**—that "otherwise" covered the receiving and discharge of the cargo, and that, in spite of the recklessness of the stevedores, the loss of the plaintiffs' sugar from the bags was caused by "an accident" due to "negligence", and that the plaintiffs could not recover.

*In re Richardson and M. Samuel & Co.* ([1898] 1 Q. B. 261; 66 L. J. Q. B. 868; 77 L. T. 479, 8 Asp. M. C. 412—C. A. No. 49, *supra*), *Buerselman v. Bailey* ([1895] 2 Q. B. 301, 64 L. J. Q. B. 707; 43 W. R. 593, 57 L. T. 701; 6 Asp. M. C. 207—C. A.); and *Hamilton v. Pandorf* ([1887] 12 A. C. 503, 57 L. J. Q. B. 24; 52 J. P. 196; 72 L. T. 677, 8 Asp. M. C. 4—H. L.) considered.

Decision of Phillimore, J. ([1903] P. 35; 72 L. J. P. 11; 87 L. T. 656; 19 T. L. R. 106, 9 Asp. M. C. 358) affirmed.

**THE TORBRYAN**, [1903] P. 194, 72 L. J. P. 76; 52 W. R. 40; 89 L. T. 265; 19 T. L. R. 625; 9 Asp. M. C. 450; 9 Com. Cas. 1—C. A.

**56** "*Accidents to Hull*"—*Loss caused by Negligence of Stevedores.*—By a charter-party a ship was to load a cargo of wood, including a deck cargo, at a port abroad, and deliver the same in England. The charter-party contained an exception of "fire, barratry of the master and crew, pirates, collisions, strandings, and accidents of navigation, or latent defects in, or accidents to, hull [and] [or] machinery, [and] [or] boilers, even when occasioned by the negligence, default, or error in judgment of the pilot, master, or mariners, or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case, from want of due diligence by the owner of the ship, or by the ship's husband or manager." While loading the cargo, by the negligence of the stevedores, who were employed by the shipowner, the wood was so loaded on the deck that the stanchions gave way and part of the cargo was lost.

**HELD**—that this was an accident to the hull caused by the negligence of persons for whose acts the owner would be responsible, and that, therefore, the exception applied to relieve the shipowner.

Decision of Kennedy, J. (21 T. L. R. 54, 10 Com. Cas. 47) affirmed.

**WADE, SONS & CO., LD. v. COCKERLINE & CO.**, [(1905) 53 W. R. 420; 21 T. L. R. 296, 10 Com. Cas. 115—C. A.]

**57** *Damage to Cargo—Liability Excepted—Increase of Damage caused by Unseaworthiness—Liability of Shipowner for all Damage.*—A ship during the currency of a charter-party collided with a pierhead while going into dock, and the closet pipe was in consequence cracked, letting water into the between decks, and damaging the cargo stowed there. The shipowners were exempted by the charter-party from liability for this damage. There were old scupper holes in the between deck waterways from which the pipes to the bilges had been detached, and which had not been properly plugged. Owing to this defect the water got into the lower hold and did damage to the cargo there. The cargo owner claimed to recover the whole of the damage upon the ground that, as the ship was unseaworthy at the commencement of the voyage, the exceptions in the charter-party were gone.

**HELD**—that the cargo owner could only recover in respect of the damage to the cargo in the lower hold, which was caused by the unseaworthiness.

*Thorley v. Orchus Steamship Co.* (No. 123, *infra*) distinguished.

**THE EUROPA**, (1907) 21 T. L. R. 151—**Deane, J.**

**58** *Exemption from Liability for Unseaworthiness if Reasonable Means taken to prevent it—Exemption in respect of Damage "Capable of being Covered by Insurance, or which has been Wholly or in Part Paid for by Insurance"—Vessel Unseaworthy at Commencement of Voyage—Neglect of Shipowners.*—By a charter-party for the carriage of frozen meat shipowners were



**Hire of Ship—Continued.**

to be exempted from liability for unseaworthiness or unfitness provided reasonable means were taken to provide against unseaworthiness, and the shipowners were not to be liable for any damage to goods "which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance"; and at the end of a long clause which contained numerous exceptions, it was provided that the above-mentioned exceptions should apply, whether the same be directly or indirectly caused or should arise by reason of the neglect of certain persons for whose defaults the shipowners would otherwise be liable. In an action claiming damages against the shipowners for failing to carry the cargo safely, the jury found that the ship at the commencement of the voyage was, by reason of a defect on the refrigerating plant, unfit to carry her cargo safely to its destination; that reasonable means were not taken to prevent such unfitness, and that the neglect was the neglect of the shipowners, their officers and agents. The charterers were partly covered by insurance, and were paid the insurance moneys.

**HELD**—that the clause as to the insurance was not sufficiently clear to exempt the shipowners from liability for failure to take reasonable care, and that the exceptions at the end of the clause did not apply to liability for unseaworthiness.

*Price v. Union Lighterage Co.* ([1904] 1 K. B. 412, 73 L. J. K. B. 222; 52 W. R. 325, 89 L. T. 731; 20 T. L. R. 177, 9 Com. Cas. 120—C. A. See CARRIERS, 4) followed.

Decision of *Bray, J.* ([1906] 2 K. B. 804; 75 L. J. K. B. 921; 22 T. L. R. 826; 11 Com. Cas. 305) affirmed.

Decision of C. A. ([1907] 1 K. B. 769, 76 L. J. K. B. 411; 96 L. T. 402; 23 T. L. R. 302, 12 Com. Cas. 210; 10 Asp. M. C. 390) affirmed.

*JAMES NELSON & SONS, LD v. NELSON LINE* [(LIVERPOOL), LD (No. 2), [1908] A. C. 16; 77 L. J. K. B. 82; 97 L. T. 812; 13 Com. Cas. 104; 24 T. L. R. 114—H. L. (E.).

**59. "Fire Excepted"—Delay Caused by Fire—Claim for Demurrage—Exception held to Apply to Charterer as well as Owner**—A charter-party contained a clause "fire . . . excepted," but the word "mutually" did not appear in the clause. The owners made a claim for demurrage against the charterers, and it was found as a fact that there had been "a necessary delay" of ten days in consequence of a fire in the cargo, and a further delay of seven days, not absolutely necessary, but due to the charterers adopting a certain method of discharging in consequence of the fire; such method was not unreasonable under the circumstances, but entailed extra delay.

**HELD**—that in spite of the absence of the word "mutually" the exception of fire extended to protect the charterers as well as the owners, and they were not liable in respect of the ten days; but that they were not protected in respect of the seven days.

*Barrie v. Peruvian Corporation* ((1896) 2 Com. Cas. 50—Mathew, J.) followed.

*NEWMAN AND DALE STEAMSHIP CO. v. [BRITISH AND SOUTH AMERICAN STEAMSHIP CO.]* [1903] 1 K. B. 262; 72 L. J. K. B. 110; 87 L. T. 614; 8 Com. Cas. 87, 1 Asp. M. C. 351—Bigham, J.

**60. "Live Stock Charter-party"—Special Clause.**—The plaintiff claimed damages for breach of a contract for the carriage of a cargo of 164 cattle and 954 sheep in defendants' steamship from Buenos Ayres to this country. The contract, which was in the form known as a "live-stock charter-party," provided that water for the cattle and sheep on the voyage was to be provided by the steamer in accordance with the Argentine Government regulations. The effect of the exceptions in the charter-party was that the shipowners were not to be liable for damage resulting from the unseaworthiness of the vessel or from any negligence on the part of the captain or crew. The water supplied was insufficient in quantity and bad in quality.

**HELD**—that the effect of the exceptions was not to strike out the clause that water was to be provided, and that the defendants were bound to supply an adequate quantity of drinkable water.

*VALLÉE v. BUCKNALL NEPHEWS*, (1900) 16 [T. L. R. 362—Mathew, J.

**61. Negligence of Master—Exemption from Liability**—The charterers of a ship brought an action against the owners to recover damages for injury caused to a pier, the property of the plaintiffs, owing to the negligence of the defendants' servants. By the terms of the charter-party the captain was appointed by the owners, but was to be under the direction of the charterers. And it was expressly provided that the owner was not to be responsible for loss or damage of any kind arising from the neglect, default, or error in judgment of the pilots, master mariners, &c., &c., employed in or about the ship. The negligence alleged was that the ship was loaded with too great a weight of limestone in the after hold, before there was any placed in the former part, which enabled the latter to break away, and caused the after-part to shift, and beat against the pier.

**HELD**—that the defendants were not liable.

Decision of C. A., reversing *Kennedy, J.* ((1897) 14 T. L. R. 2) affirmed.

*RAYNES v. BALLANTYNE*, (1898) 14 T. L. R. 399—H. L. (E.).

**62. "Negligence of Owner's Servants"—Owner Liable for Personal Negligence**—Where the exceptions in a charter-party merely relieve an owner from liability for the negligence of his servants, he is liable in respect of damage due to his own personal negligence in allowing his vessel (otherwise seaworthy) to sail improperly laden.

*THE CITY OF LINCOLN v. SMITH*, [1904] [A. C. 250; 73 L. J. P. C. 45; 91 L. T. 206, 9 Asp. M. C. 586—P. C.

**Hire of Ship—Continued.**

63. "*Stoppage from Strikes*"—*Charter to become Null and Void—Construction.*—By a charter-party the cargo was to be loaded in 140 running hours commencing when written notice was given of the steamer being ready to load, provided that any time lost through strikes was not to be computed as part of the loading time, and, in the event of any stoppage from (*inter alia*) strikes continuing for the period of six running days from the time of the vessel being ready to load, the charter should become null and void, provided that no cargo should have been shipped on board previous to such stoppage.

HELD—that to avoid the charter the stoppage from strikes must have been in existence at the commencement of the loading time.

Decision of C. A. (18 T. L. R. 719; 7 Com. Cas. 213) reversed.

STEEL, YOUNG & CO. v. GRAND CANARY [COALING Co., (1904) 90 L. T. 729; 20 T. L. R. 542, 9 Com. Cas. 275, 9 Asp. M. C. 584—H. L. (E.).

**(c) Loading and Discharge of Cargo.**

64. "*Alongside*"—*Cargo to be taken from alongside at Merchants' risk and expense, according to the Custom of the Port—Custom of the Port of Grimsby.*—A charter-party provided that the cargo, which consisted of timber, should "be taken from alongside at merchants' risk and expense, according to the custom of the port." The vessel discharged at the port of Grimsby. By the custom of that port timber cargoes are taken from the ship's holds by means of the ship's winches and slings by stevedores employed and paid by the shipowner, and by them carried to the far side of the quay, about sixty feet from the side of the vessel, and there "lumped," or roughly piled. It was practically impossible to deposit the cargo on any other part of the quay.

HELD—that the shipowner was bound to carry the cargo across the quay and "lump" it at his own expense, and that such delivery constituted delivery "alongside" within the meaning of the charter-party.

STEPHENS v. WINTRINGHAM, (1898) 3 Com. Cas. 169—Bigham, J.

65. *Bunker Coal—Right of Shipowner to put Bunker Coal on Board—Coal for Subsequent Voyage—Expense of Lightening Ship to enter Port.*—By a charter-party a ship was to load in Australia a full and complete cargo, which the charterers bound themselves to provide, not exceeding what she could reasonably stow and carry over her tackle, apparel, provisions and furniture, and to proceed to certain ports in South Africa, "and there lighten at receivers' expense as much of the cargo as may be found necessary to allow steamer to enter at all times of high water such port according to its custom." The ship arrived at Durban in South Africa, and the charterers lightened her there so as to enable her to cross the bar at East London, her next

port. The shipowner, however, put 800 tons of bunker coal on board, and in consequence the ship on arrival at East London had to be further lightened to enable her to enter the port. Her last port in South Africa was Algoa Bay, and 120 tons of coal would have carried her from Durban to that port and back to Durban or Cape Town, where a new voyage to Australia was to begin. The 800 tons of coal put on board at Durban were mainly for the purpose of the new voyage.

HELD—that the shipowner was only entitled to put sufficient coal on board at Durban to enable the chartered voyage to be completed, the rest of the ship being at the charterer's disposal, and not to put coal on board for a future voyage, and that therefore he was liable to pay the expense of lightening the ship at East London.

Decision of Kennedy, J. ([1906] 1 K. B. 572; 75 L. J. K. B. 415; 95 L. T. 108; 22 T. L. R. 465; 10 Asp. M. C. 268; 11 Com. Cas. 117) affirmed.

DARLING & SONS v. RAEBURN, [1907] 1 K. B. [846; 76 L. J. K. B. 570, 96 L. T. 437; 23 T. L. R. 354, 12 Com. Cas. 262—C. A.

66. "*Cargo to be brought to and taken from alongside the Steamer at Charterers' Risk and Expense, any Custom of the Port to the contrary notwithstanding*"—*Exclusion of Custom*—By a charter-party a ship was to proceed to the Surrey Commercial Docks and there deliver a cargo of timber, "the cargo to be brought to and taken from alongside the steamer at charterers' risk and expense, any custom of the port to the contrary notwithstanding."

A custom of the port of London with regard to timber ships required the shipowner to place the timber either into barges or on to the quay.

HELD—that the custom of the port was excluded by the charter-party, and that the charterers were bound to pay the expense of taking the cargo from the ship's rail to the barges or on to the quay.

Decision of Mathew, J. ((1899) 15 T. L. R. 330, 4 Com. Cas. 209; 9 Asp. M. C. 55) affirmed.

BRENDA STEAMSHIP CO. v. GREEN, [1900] 1 [Q. B. 518, 69 L. J. Q. B. 445, 48 W. R. 321; 82 T. R. 66; 16 T. L. R. 226; 5 Com. Cas. 195, 9 Asp. M. C. 55—C. A.

67. "*Cargo to be taken from alongside at Consignee's Expense*"—"Custom of Port to be Observed"—*Custom to Raft Timber—Liability for Cost of Rafting.*—The custom of the port of B is to deliver timber to the consignee after it has been rafted and chained and officially measured. A charter-party provided that a cargo of timber should be "taken from alongside, always within reach of the ship's tackles at merchant's risk and expense; the custom of each port to be observed in all cases where not specially expressed."

HELD—that the consignee at B. could not

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insist on delivery log by log over the ship's side, and must pay for the expenses of rafting

**NORTHMOOR STEAMSHIP CO. v. HARLAND AND [WOLFF, LD., [1903] 2 Ir. 657—K. B. D.**

**68. Colliery Guarantee—Arbitration Clause—Incorporation into Charter-party—Repudiation of Charter-party by Charterer—Action by Shipowner**—A charter-party provided that a ship should proceed to a named port and "there load in the usual and customary manner a full and complete cargo of Ferndale coal, as ordered by the charterers, which they bind themselves to ship subject to colliery guarantee. . . . The vessel to be loaded as customary, but subject in all respects to the colliery guarantee." The colliery guarantee provided that any question arising under the guarantee should be referred to arbitration. After the ship had arrived at the port of loading, the charterers gave notice to the shipowners that they were unable to load. The shipowners brought an action claiming damages for the charterers' breach of the charter-party.

**HELD**, by A. L. Smith and Rigby, L.J.J. (Vaughan Williams, L.J. dissenting)—that the charterers had repudiated the charter-party, and that the shipowners' claim for damages was not a question arising under the colliery guarantee, and that the arbitration clause therefore did not apply.

**WEIR & CO. v. PIRIE & CO. (No. 2), (1898) 3 [Com. Cas 271—C. A.**

**69. Cost of Discharging—Upon what Quantity to be Paid—Chamber of Shipping, North-east Coast (Tees to Berwick) Coal Charter, Cl. 1 and 8.**—A charter-party provided that freight should be paid at a certain rate "per ton delivered, or on bill of lading quantity less 2 per cent., at receiver's option." It also provided that the consignee was "to effect the discharge of the cargo, steamer paying 1 fr. per ton." The receivers elected to pay freight upon the bill of lading quantity less 2 per cent.

**HELD**—that the charge of 1 fr. per ton was payable upon the bill of lading quantity less 2 per cent.

**THE HOLLINSIDE, [1898] P 131; 3 Com. [Cas 100; 67 L. J. P. 45; 14 T. L. R. 258; 46 W. R. 639—Div. Ct.**

**70. Damage in Loading—Stevordore appointed and paid by Shipper—Provisions in Charter-party—Liability of Owner.**—Where a charter-party provides that the "cargo on delivery alongside should be received by the master and be secured by ship's tackle and should be at vessel's risk, the dogs and chains on said cargo being also at vessel's risk, the ship to be responsible for any cargo lost from alongside, through negligence, and for salvage expenses on same," the owner is not relieved from liability for damage to cargo because the charter-party also provides that the shipper shall appoint and pay the stevedore to load the cargo.

**ANDERSON v. CRUNDALL & CO., (1898) 14 [T. L. R. 256—Bigham, J.**

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**71. Discharge at Customary Place in Port—Ship Carrying Explosives—Place appointed by Port for Discharge of Ship Carrying Explosives—Expense of Lighterage.**—By a charter-party a ship was to load a cargo, including explosives and machinery, and proceed to certain ports, among others Buenos Ayres (including Boca), and there deliver the cargo in regular turn at the customary discharging places named by the charterers' agents into lighters or alongside the wharf according to the custom of the port; the owners authorised the charterers to sign bills of lading for the cargo as usual, and agreed to abide by all the conditions thereof, and the cargo was to be brought to and taken from alongside at the charterers' risk and expense. By the bill of lading the cargo was to be discharged at the consignee's wharf at Boca, provided the same was available, otherwise lighters were to be provided by the consignees. At Boca a ship carrying explosives was only allowed to discharge at a certain wharf, and the ship therefore could not go to the consignees' wharf (which was available), and the consignees' goods had to be lightered there. In an action by the shipowner against the charterers to recover the expense of lightering—

**HELD**—that the shipowner was entitled to recover, either upon the ground that the charterers, when they signed the bill of lading, knew that the explosives were on board and that they could not perform the contract without breaking the port regulations, and were therefore imposing a liability on the shipowner which did not come within the above clause in the charter-party authorising the charterers to sign bills of lading; or upon the ground that the charterers had only the right to direct the ship to go to such discharging places as were customary, and that the customary place at Boca for discharging a ship with explosives was the wharf appointed by the port regulations.

**HULL STEAM SHIPPING CO. v. LAMPORT AND [HOLT, (1907) 23 T. L. R. 445—Channell, J.**

**72. "Full and Complete Cargo"—Cargo in Frozen Condition—Broken Stowage—Normal Winter Cargo.**—By a charter-party, dated December 22nd, 1897, the owners of a steamer chartered her to W. & Co., whose liability was assumed by the defendants, to load at Bangor, Maine, U.S., "a full and complete cargo of wet wood pulp which contains about 50 per cent. of water." The charter-party provided that should ice prevent the steamer from reaching Bangor the charterers were to load at Bucksport on the same terms. The cancelling date was January 10th, 1898. The charterers tendered for shipment a full cargo of wet wood pulp containing 50 per cent. of water, in a frozen condition, by reason whereof there was broken stowage and a shortage of 440 tons less than the steamer could have stowed if the pulp had not been frozen. Cargoes of wet wood pulp are always shipped at Maine in the winter in a frozen condition.

**HELD**—that the charterers having tendered a full and complete cargo of wet wood pulp in its normal winter condition, the shipowners were

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not entitled to dead freight or damages in respect of 440 tons.

Decision of C. A. ([1899] 2 Q. B. 364, 68 L. J. Q. B. 930; 81 L. T. 241; 15 T. L. R. 465; 4 Com. Cas. 307) affirmed.

**STEAMSHIP ISIS Co. v. BAHR**, [1900] [A. C. 340; 69 L. J. Q. B. 660; 82 L. T. 571; 16 T. L. R. 381; 5 Com. Cas. 277; 9 Asp. M. C. 109—H. L. (E.)

**73. "Load a Cargo of Ore, say about 2,800 Tons"—Limits Imposed.**—A charter-party provided that the ship should proceed to the port of loading, and there load "a cargo of ore, say about 2,800 tons, not exceeding what she can reasonably stow and carry, &c." The charterer provided a cargo of 2,840 tons, the actual capacity of the ship being 2,880 tons. The shipowners claimed to recover dead freight on 40 tons.

**HELD**—that the question of what was a "cargo" for the ship was in general a question of fact for the jury, but that there being no doubt that 2,840 was a "cargo" for the ship, and was within the limits imposed by the words "say about 2,800 tons," there was no question for the jury, and no evidence of any breach of the charter-party.

**Morris v. Levinson** ((1876) 1 C. P. D. 155; 45 L. J. C. P. 409, 24 W. R. 517; 34 L. T. 576) distinguished.

**MILLER v. BORNER & Co.**, [1900] 1 Q. B. 691, [69 L. J. Q. B. 429, 48 W. R. 588, 82 L. T. 258, 5 Com. Cas. 107, 9 Asp. M. C. 31—Div. Ct.

**74. "Load a Cargo of Steam Coal as Ordered by Charterers"—Subject in all respects to the Colliery Guarantee"—Strike Clause—Colliery on Strike.**—A charter-party provided that a ship should "proceed to such loading berth as the freighters may name, and there load a cargo of steam coal as ordered by charterers, which they bind themselves to ship (except in the event of strike of shippers' pitmen)." The ship was "to be loaded as customary, but subject, in all respects to the colliery guarantee in [ ] colliery working days, as may be arranged." The charterers subsequently purchased a cargo for the ship from the H. colliery. At a later date this colliery went on strike, after which the charterers tendered to the shipowners the guarantee given by the H. colliery, which was still on strike. By this guarantee the colliery owners undertook to load the ship in 20 days, provided that time lost through strikes should not be computed as part of the loading time. The shipowners refused to accept this guarantee. Steam coal could have been obtained from other collieries.

**HELD**—that under the circumstances the charterers, in tendering the guarantee of a colliery on strike, had not committed a breach of the charter-party, and that the shipowners were bound to accept the guarantee.

Judgment of Bigham, J. ((1899) 80 L. T. 19,

15 T. L. R. 158; 4 Com. Cas. 85; 9 Asp. M. C. 53) affirmed.

**DOBELL & Co. v. GREEN & Co.**, [1900] 1 [Q. B. 526; 69 L. J. Q. B. 451; 82 L. T. 314; 16 T. L. R. 204; 5 Com. Cas. 161; 9 Asp. M. C. 52—C. A.

**75. "Taken from Alongside"—Timber Cargo—Custom of Port of London—Discharge into Barges—Duties of Shipowners.**—A custom of a port that, in the case of a cargo of long lengths of timber, it is the duty of the shipowners to place the timber in barges brought alongside by the receivers of the cargo, is not inconsistent with a clause in a charter-party that the cargo of timber should be "taken from alongside the ship at merchants' risk and expense."

Decision of Collins, J. (1897) 2 Com. Cas. 70, affirmed.

**AKTIESELSKAB HELIOS v. EKMAN & Co.** [1897] [2 Q. B. 83; 8 Asp. M. C. 244; 2 Com. Cas. 163, 66 L. J. (Q. B.) 538, 76 L. T. 537 C. A.

**76. Trimming Ship—Loading Coal—"Self-trimmer"—Tariff Rate—Jurisdiction—Trimming Committee—County Court Judge.**—A cargo was to be trimmed according to the tariff rate of the port. *The Swindon* was a new vessel not included in the list of steamers in the list. By the rules, "any new steamers or boats not included in this list, but which may be of the same type as regards the work involved in trimming, shall be included in the corresponding group," and the rules went on to provide that "in the event of any question arising as to the proper classification of such steamer, or any other question as respects the application of the tariff generally," the same was to be settled by the Trimming Committee, whose decision was to be final. The question of the application of the tariff to *The Swindon* arose, and was referred for settlement to the Trimming Committee, and they had decided it.

**HELD**—that the county court judge had no jurisdiction to decide whether the vessel was a "self-trimmer."

Decision of Div. Ct. ((1901) 49 W. R. 631; 17 T. L. R. 595) reversed.

**THE SWINDON**, (1902) 51 W. R. 119; 18 [T. L. R. 681—C. A.

**(d) Miscellaneous.**

And see **BANKRUPTCY**, 181.

**76a. Charter-parties and Bills of Lading—Action against Foreign Vessel—Claim for Damages—Claim "as Charterers"—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 6**—An action was commenced *in rem* against the owners of the Spanish steamship *Ereza* for compensation for damage to cargo. The plaintiffs claimed in the writ "as charterers" of the ship and owners of the goods on board her. The owners of *The Ereza* appeared to the writ under protest, and on motion objected that, under sect. 6 of the Admiralty Court Act, 1861, as the owner of the ship was not

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domiciled in England or Wales, a proceeding in the Admiralty Court must be limited to a claim by the "owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales." On this ground they contended that the introduction of the word "charterers" rendered the writ bad, as the Act did not give the Court jurisdiction in respect of a claim for breach of charter-party. The plaintiffs urged that if they could not rely upon their position as charterers, they might lose the benefit of the clauses in the charter-party protecting them against the negligence of the servants of the shipowner.

HELD—that while, in the opinion of the Court, the plaintiffs could not sue as charterers, they would not be at the trial precluded from referring to the contract contained in the charter-party. Upon this the plaintiffs consented to strike out the words "as charterers."

THE EREZA, [1902] W. N. 234—Phillimore, J.

77. *Commission—Payment "on the Completion of Loading or should the Vessel be Lost"—Ship Lost on Intermediate Voyage.*—A charter-party provided that a ship "now at Philadelphia and chartered for Japan" should, after discharging at Japan, proceed to British Columbia, and there load a cargo for London. The charter-party contained the following clause:—"A commission of 3½ per cent. shall be paid to charterers . . . on amount of this charter-party on the completion of the loading, or should the vessel be lost." The ship was lost on the voyage from Philadelphia to Japan.

HELD—that the charterers were entitled to the commission payable to them under the charter-party.

*Sitson v. Ship Bareraug Co.* ([1896] 24 Ct. of Sess. Cas. 4th Series, 91) distinguished.

WARD & Co., LD. v. WEIR & Co., (1899) 15 [T. L. R. 383; 4 Com. Cas. 416—Mathew, J.

78. *Contract of Affreightment—No Necessity for Formal Charter-party.*—The execution of a formal charter-party is not essential to the formation of a binding and enforceable contract of affreightment.

RIDERI AKTIEBOLAGET NORDSTJERMAN v. [SALVESIN, [1904] 6 F. 64—Ct. of Sess

79. *Shipbroker—Engagement of Ship to load Cargo on Particular Date—Interposing other Ship—Delay—Duty of Broker to Owners.*—The defendants, a firm of shipbrokers, arranged a programme of vessels to load wool at Sydney during the Australian wool season, and they booked the plaintiff's vessel *A.* to load on December 17th; they were to receive a commission of 6 per cent. on the freight earned by her.

On November 12th, hearing that the *A.* was late, the defendants, without consulting the plaintiffs, arranged for the *W.* (due at Sydney on December 1st) to take the wool berth. Subsequently, the *W.* being late, they put the *E.* in before her, and then occupied the week December

17th to 24th in loading the *W.* The *A.* arrived on the 20th, and lost the greater part of her cargo in consequence.

HELD—that the question was whether the defendants had or had not used reasonable care in accepting the *W.* without reserving the right to postpone her, if she was late, to the *A.*; and that, as in the opinion of the Court they had only committed an error of judgment, they were not liable.

Decision of C. A. (20 T. L. R. 486) affirmed.

NITRATE PRODUCERS' STEAMSHIP CO. v. [GEORGE WILLS & Co., (1905) 21 T. L. R. —699—H. L. (E).]

**80. Spanish Export Tax—Liability to Pay.**

—By a charter-party a ship was chartered to proceed to a Spanish port and load a cargo of iron rails, "Spanish customs dues on cargo to be paid by steamer not exceeding 1s. per ton." There was a Spanish tax called a transport tax levied on goods carried oversea or imported or exported through the land customs houses. There was no other tax on iron rails.

HELD—that such tax was not a "customs due on cargo," and must be paid by the shipowner, although it exceeded 1s. per ton.

Decision of Channell, J. (23 T. L. R. 271) reversed.

REA v. THE LONDON TRANSPORT CO., LD.—[LONDON TRANSPORT CO., LD. v. BESSLER, WAECHTER & Co., (1907) 24 T. L. R. 133—G. A.]

**81. "Two Voyages per Month, Fortnightly."**

—The meaning of the words "two voyages per month, fortnightly," when used in a charter-party, is that a steamer or vessel must be supplied at intervals of about a fortnight, and not more than two a month.

THE MELROSE ABBEY, (1898) 14 T. L. R. 202 [Div. Ct.]

**(e) Payment of Freight.**

See also VII. MARITIME LIENS

82. *Advance Freight—Two-Thirds—Freight Paid Three Days after Sailing—Part of Cargo Destroyed by Fire before Sailing—Calculation of Advance Freight.*—A charter-party provided that freight should be paid "on final discharge" of cargo at certain rates per ton, the freight to be due and paid as follows:—Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo. The charter-party contained a marginal clause in these terms:—"In the event of the charterers not loading the vessel to her marks it is agreed that freight shall be paid on the basis of 4,350 tons, less (*pro rata*) freight on any quantity of cargo short delivered in San Francisco." Fire was, by the charter-party, mutually excepted. While the vessel was in course of loading on the Tyne a fire broke out on board and destroyed that part of the cargo which had

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been put on board. The vessel loaded the balance of her cargo and sailed on her voyage. The cargo provided by the charterers, including the portion destroyed by the fire, was not sufficient to load the vessel to her marks.

**HELD**—that advance freight was payable on 4,350 tons less the cargo destroyed by fire.

Decision of *Ld. Russell of Killowen, C.J.*, ([1899] 1 Q. B. 193; 68 L. J. Q. B. 170; 47 W. R. 365; 79 L. T. 596; 15 T. L. R. 69; 8 Asp. M. C. 470; 4 Com. Cas. 56) affirmed.

*WEIR & Co., v. GILVIN & Co.*, [1900] 1 Q. B. 45; 69 L. J. Q. B. 168; 48 W. R. 179; 81 L. T. 687; 16 T. L. R. 31; 5 Com. Cas. 40; 9 Asp. M. C. 7—C. A.

**83. Deck Cargo—Charterer having Option to Load Damaged Cotton on Deck—Liability for Reasonable Freight thereon**—A charter-party known as the 'Anglo-American Cotton Charter-Party' included the following provision: 'The charterer to have the option of shipping damaged cotton on deck, consistent with the seaworthiness of the steamer, such to be at the shipper's risk and expense' and the charterer to fully insure the freight thereon.

**HELD**—that the further provisions of the charter-party as to setting aside the various bills of lading freight as against the charter-party freight, and settling the balance by bills, or cash, did not exclude the charterer's liability to pay a reasonable freight on cotton so shipped.

Decision of *Ridley, J.* reversed.

*URSULA BRIGLE STEAMSHIP CO. v. RIPLEY*, (1903) 8 Com. Cas. 171—C. A.

**84. Freight at Rate per Ton of Gross Weight shipped—Payable on right and true delivery of Cargo—Loss of part of Cargo—Lump Sum Freight—Freight on Cargo delivered—Bill of Lading—Freight collected by Shipowner—Difference between Freight collected and Freight due for Cargo delivered—Recovery of Balance by Charterer.**—By a charter-party a cargo of sugar in bags was to be loaded at a named port and the ship so loaded was to proceed to another named port and there deliver the cargo 'agreeably to bills of lading on being paid freight in full of all port charges' at the rate of 10s. 6d. per ton of 20 cwt. gross weight shipped payable on right and true delivery of the cargo. Charterer's liability was to cease 'when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage.' Any difference between the charter-party and bills of lading freight was to be settled at the port of loading on clearance of the vessel if required by the master. The amount due under this clause was ascertained at the port of loading, and paid by the charterers to the shipowners. The vessel loaded a full cargo, but on the voyage she grounded, and a portion of the cargo was lost. The remainder was delivered at the port of discharge, and the bills of lading freight on the

whole cargo shipped was collected by the shipowners. In an action by the charterers to recover, as money received to their use, the difference between the freight so collected by the shipowners and the amount due to them under the charter-party in respect of the cargo delivered.—

**HELD**, by *Ld. Alverstone, C.J.*, and *Collins, M.R.* (*Romer, L.J.*, dissenting), that under the charter-party the shipowners were not entitled to a lump sum freight, and that the balance of freight in their hands could be recovered from them by the charterers.

*LONDON TRANSPORT CO., LD. v. TRECHMANN BROS.*, [1904] 1 K. B. 635; 73 L. J. K. B. 253; 90 L. T. 132; 9 Com. Cas. 133; 9 Asp. M. C. 518—C. A.

**85. Freight payable in advance**—By a charter-party it was provided that the charterer should pay freight 'at the rate of £70 per calendar month' and at and after the same rate for any part of a month, hire to continue until her re-delivery to the owner, payment for the said hire to be made in cash monthly in advance. It was also provided that the owner should have a lien upon cargoes and sub-freight for any amount due to him under the charter, and that the charterer should have a lien on the ship for all moneys paid in advance and not earned.

**HELD**, reversing the judgment of *Mathew, J.* (*dissentiente Smith, L.J.*)—that the charterer was bound to pay the full freight in advance at the beginning of each month although it might be probable that the hire would not continue for the whole month.

*TOWNELLER v. SMITH*, (1898) 2 Com. Cas. 258; 8 Asp. M. C. 327; 77 L. T. 277; 13 T. L. R. 560—C. A.

**86. Measurement of Hardwood Timber—Custom.**—A charter-party provided that a vessel should load a full cargo of Durrah wood for the United Kingdom, freight being payable at the rate of 3s. per load of 50 cubic feet delivered. Cargo to consist of 9 in. by 3 in. planks, of reasonable lengths, such as could go down ship's present hatchways. The cargo consisted of planks exceeding 9 in. by 3 in. by an average of about 4 in. By a custom of the hardwood timber trade, in measuring cross dimensions, fractions of quarter of an inch are disregarded.

**HELD**—that freight was payable upon the number of loads ascertained by measuring the cargo in the customary manner, and, assuming that there had been a breach of the obligation to load planks 9 in. by 3 in., the damages were measured by the difference, if any, in freight, which must be ascertained by measuring in the customary manner.

*Semble*, that the expression 'planks 9 in. by 3 in.' meant planks of those measurements when measured in the customary manner.

*YONG v. THE CANNING JARRAH TIMBER CO.*, [1899] 1 Com. Cas. 96—*Bigham J.*

**Hire of Ship—Continued.**

**87. Option to Pay Freight on Weight Delivered or Intake Weight—Time to Exercise Option.]—**By a charter-party it was agreed that the cargo should be delivered on being paid freight at the rate of 6s. 3d per ton delivered, or intake weight, less 2 per cent. at charterer's option

**HELD**—that if the shipowner insisted on his lien for freight, then it would be necessary for the charterers to exercise the option before they tendered the amount of freight sufficient to satisfy the lien, and that if the shipowner did not insist on his lien, then the charterers might exercise the option at the moment of payment.

Decision of Jeune, P. ((1902) 51 W. R. 88; 18 T. L. R. 198) affirmed

**THE DOWLAIS**, (1903) 18 T. L. R. 683—C. A.

**88. Shipping Order—Chartered Freight—Payment of Difference—Right of Shipper to withdraw Goods after Shipment.]—**By a forward freight contract, contained in a shipping order, C. D. & Co. agreed to provide tonnage at 16s. 6d. a ton for the carriage of 3,000 tons of wheat of the plaintiffs from Bombay to Liverpool. C. D. & Co. declared for the shipment of the wheat a steamer of the defendants, which had been chartered by M. & Co. to carry a cargo from Bombay to Liverpool at a freight of 30s. per ton, and half the space of which had been sub-let by M. & Co. to C. D. & Co. The plaintiffs knew that there was a charter-party, but not its terms. After 2,100 tons of the wheat had been loaded, the plaintiffs tendered to the captain for his signature bills of lading in which the freight was 16s. 6d. The captain refused to sign the bills of lading unless the difference between 30s. and 16s. 6d. was paid to him, in accordance with the terms of the charter-party. The plaintiffs declined to pay this, and demanded the return of their wheat. The captain retained the wheat, and sailed without signing any bills of lading for it. In order to get delivery the plaintiffs, under protest, took bills of lading in which the freight was 30s. At the time of the loading the captain had an opportunity of seeing the shipping order, but did not, in fact, do so.

**HELD**—that there was no contract by the defendants to carry the wheat at 16s. 6d., that the defendants were not bound to return the wheat to the plaintiffs; and that the plaintiffs were not entitled to recover from the defendants the excess above 16s. 6d.

**RALLI v. PADDINGTON STEAMSHIP CO.**, (1900) [5 Com. Cas. 124—Mathew, J.]

**89. Sub-Charter-party—Right of Shipowners to Claim from Indorsee of Bill of Lading Freight and Demurrage.]—**The plaintiffs as owners chartered their steamship *Wastwater* to G. and G. under a charter-party, which provided that the captain should sign bill of lading as presented without prejudice to the charter-party, and that the charterers' liability should cease when the cargo was shipped, the owner or master having an absolute lien upon cargo for the

recovery and payment of all freight, dead freight and demurrage. One of the firm of G. & G., purporting to act as agent of the steamer but without informing the plaintiffs, chartered her to a lumber company, who were ignorant of the original charter-party, by a charter-party which contained clauses similar to those of the original charter-party. The lumber company shipped a cargo of timber for which bills of lading were signed by the master as presented, by the terms of which the cargo was to be delivered at Liverpool to their order or assigns on payment of freight, without recourse to shippers as per second charter-party. T., a shipbroker, was appointed by one of the firm of G. and G. to act for the steamer in Liverpool as their agent, and T. was also appointed by the plaintiffs to act as their agent. The defendants were the indorsees of the bills of lading. The plaintiffs claimed freight and demurrage.

**HELD**—that the defendants were liable for freight and demurrage to the plaintiffs; and that T. did act as agent for the plaintiffs as well as agent for G. and G.

**WASTWATER STEAMSHIP CO., LD. v. T. B. [NEALE & CO.]**, (1902) 86 L. T. 266; 9 Asp. M. C. 282—Div. Ct

**(f) Period of Hire.**

**90. Cesser of Hire—Time Charter—Quarantine—"Restraint of Princes and Rulers."]**—A time charter contained a condition that payment of hire should cease during loss of time occasioned by certain specified circumstances (not including detention in quarantine). By a further clause "restraints of princes and rulers" were "mutually excepted." The vessel having been detained in quarantine, the charterers declined to pay hire for that period on the ground that quarantine fell within the exception of "restraints of princes and rulers."

**HELD**—that the charterers were liable for the hire during such period.

**AKTIESELSKABET LINA v. TURNBULL**, (1907) [8 C. 507—Ct. of Sess]

**91. Extension for Completion of Voyage.]—**Under a charter-party a ship was hired within certain limits for "a term of about six calendar months," from the date when she was placed at the charterers' disposal. The charter-party provided that, should the steamer be upon a voyage at the expiration of the term, the charterers were to have the use of the steamer at the same rate and conditions for such extended time as might be necessary for the completion of the contemplated voyage, and in order to bring the steamer to the port of re-delivery. The steamer came on hire on May 12th. On October 26th the charterers sent the steamer on a voyage within the prescribed limits, which it was obvious could not be completed so as to permit of the re-delivery of the steamer to the owners at the end of the period of about six months, and the steamer was, in fact, delivered to the owners nearly two months after the expiration of that period.

**Hire of Ship—Continued.**

HELD—that the charterers had not committed a breach of the charter-party.

DENE STEAM SHIPPING CO. v. BUCKNALL,  
[(1900) 5 Com. Cas. 372—Bigham, J.]

**92. Hire Fortnightly in Advance—Default in Payment—Right of Shipowners to Withdraw Vessel—Waiver of Punctual Payment.]—**A steamer was chartered for about nine months, payment of hire to be made fortnightly in advance, and in default of payment the owners to have the right to withdraw the steamer from the services of the charterers, the charterers to provide and pay for all coals, port charges, and certain other expenses, and the captain, although appointed by the owners, to be under the orders of the charterers, as regards employment. On June 21st, during the currency of the charter-party, a fortnight's hire became due, but was not paid. At that date the steamer was on a voyage to Stockholm, where she arrived on June 25th, and on June 27th proceeded to Helsingfors to load a cargo. While at Stockholm the master telegraphed to Helsingfors to order the cargo to be ready. On June 28th the owners gave notice to the charterers that the hire not having been paid, they withdrew the steamer from the charterers' service.

HELD—(1) affirming the judgment of the Div. Ct. that the owners were not obliged to make a demand for payment of hire before exercising the right of withdrawal, (2) reversing the judgment of the Div. Ct. that there was no evidence that the right of the owners to withdraw the steamer on the ground of non-payment of hire had been waived inasmuch as the acts done by the master were done by him in obedience to the directions of the charterers, and the shipowners had merely given the charterers an extra week within which they might have paid while the charterers, knowing they were in default, chose to go on.

Decision of Div. Ct. ((1901) 84 L. T. 653; 6 Com. Cas. 113—9 Asp. M. C. 186) affirmed in part and reversed in part.

TYLER v. HESSLER & Co. (1902) 86 L. T. 697,  
[18 T. L. R. 549, 7 Com. Cas. 166—C. A.]

**93. Hire for Twelve Months—Delivery of Vessel at Port in the United Kingdom at Charterers' Option—Vessel Discharging at Foreign Port after Expiration of Twelve Months—Delivery at Discharging Port.]—**A steamer was chartered for twelve calendar months, payment of hire to be at a certain rate per month, and at and after the same rate for any part of a month used to complete a voyage, hire to continue from the time specified for terminating the charter-party until the delivery of the steamer to the owners at a port in the United Kingdom in the charterer's option. The twelve months expired on August 12th. On August 18th the vessel finished discharging a cargo at Cronstadt, which had been carried under a sub-charter-party for a voyage from Cardiff to that port. The charterer intended that the vessel, after discharging at Cronstadt, should proceed to

Lulea in ballast, load a cargo there, and proceed therewith to Rotterdam and thence to Gravesend, where the vessel would be delivered to the owners, according to reasonable calculations, before September 12th.

HELD—that to send the ship to Lulea would be to cause her to commence a fresh voyage and that the owners were therefore entitled to have her redelivered to them at Cronstadt.

Decision of Div. Ct. ((1901) 6 Com. Cas. 220) affirmed.

IN RE ISTOK (OWNERS OF) AND DRUGHORN,  
[(1902) 18 T. L. R. 603; 7 Com. Cas. 190—C. A.]

**94. Monthly Hire—Punctual and Regular Payment—Breach—Waiver.]—**A steamer was chartered for three months at a monthly hire, payment to be made monthly in advance, and, "failing the punctual and regular payment of the hire," the owners were to be at liberty to withdraw the vessel from the services of the charterers. The second month's hire became due on July 12th, but was not then paid. The vessel arrived on that day at Wabana, Nova Scotia, where she loaded a cargo, and sailed on July 14th. The owners on July 14th gave notice to the charterers that they withdrew the ship, the hire not having been paid. The charterers on receipt of the notice tendered the amount of the hire, which the owners refused to accept.

HELD—that there had been a punctual and regular payment of the hire and if not, that the act of the captain in taking cargo on board when the hire was due and unpaid amounted to a waiver by the owners of their right to withdraw the steamer.

NOVA SCOTIA STEAM CO. v. STEPHENSON & CO.  
[STEAM SHIPPING CO., (1900) 5 Com. Cas. 106—Bigham, J.]

**95. Non-payment of Hire—Withdrawal of Ship.]—**A charter-party provided for the hire to be paid in cash monthly in advance. . . . in default of such payment . . . the owners shall have the faculty of withdrawing the vessel.

On September 11th a month's hire became due. On October 1st it was still unpaid, and the owners gave notice that they withdrew the vessel, which was then at sea.

On October 2nd the owners were paid and the vessel arrived.

On October 15th the master by the owners' orders withdrew the vessel.

HELD—that there was no withdrawal until October 15th, that on that date there was no justification for withdrawal, and that the shipowners were liable in damages for breach of the charter-party.

THE LANGFORD v. CANADIAN FORWARDING & EXPORT CO. (1907) 96 L. T. 559—P. C.

**96. Option of Charterers as to Port of Delivery.]—**A charter-party was expressed to be for "about six calendar months," hire to be paid per month or part of a month and to continue until redelivery of the steamer to the owner at a



**Hire of Ship—Continued.**

port in the United Kingdom or the United States. If the vessel was upon a voyage at the expiration of the named period, the charterers were to have the use of steamer until completion of the voyage and in order to bring her to a port of redelivery. If the charterers redelivered the steamer in the United Kingdom they were to pay a penalty of £50. At the expiration of six calendar months the vessel was on voyage to a port in the United States.

**HELD**—that the owner was entitled to redelivery of the steamer on completion of her voyage to such port, and that the charterers were not entitled to send her on a fresh voyage to, and to redeliver her in, the United Kingdom.

**BUCKNALL BROTHERS v. MURRAY**, (1900) 5 Com. Cas. 312—Mathew, J.

**(g) Warranties.**

**97. Breach of Warranty of Fitness for Service—Round Voyages at Monthly Hire—Obligation of Shipowner to supply Ballast.**—A ship was chartered for two or three round voyages, at charterers' option, freight for the hire to be paid at the rate of £1,050 per month. The ship being "in every way fitted for the service," was to be employed in the conveyance of merchandise <sup>and</sup> or passengers between certain named ports, and was to be placed "with clear holds at the disposal of the charterers at New York, they having the whole reach or burden of the vessel," proper and sufficient room being reserved to the owners for the officers, crew, tackle, &c. The owners undertook to maintain the ship in a thoroughly efficient state during the currency of the charter-party, and the captain was to be under the orders of the charterers as regards employment. The loading and discharge were to be carried out by and at the risk and expense of the charterers. The charterers sent the ship upon certain voyages without cargo, and it was necessary for the safety of the ship that ballast, in addition to the water ballast, should be provided.

**HELD**—that the charter-party did not amount to a demise of the ship, and that there was nothing in the charter-party to relieve the ship-owners from the duty of supplying such ballast as might be necessary for the proper navigation of the ship.

Decision of Bigham, J. (4 Com. Cas. 92) affirmed.

Decision of C. A. ([1900] 1 Q. B. 28; 69 L. J. Q. B. 193; 81 L. T. 553; 5 Com. Cas. 24, 9 Asp. M. C. 13) affirmed.

**WEIR & Co. v. UNION STEAMSHIP CO.**, [1900] [A. C. 526; 69 L. J. Q. B. 809; 82 L. T. 91, 5 Com. Cas. 363; 9 Asp. M. C. 111—H. L. (E.)

**98. Breach of Warranty of Fitness for Voyage and Service—Damages—Remoteness.**—The plaintiff chartered a ship from the defendants for a single voyage. By the charter-party the defendants warranted that the vessel was "in

every way fitted for the voyage and service, and to be so maintained by the owners." During the currency of the charter-party, a stevedore engaged on the ship in the work of unloading sustained injuries by reason of the defective condition of an iron ladder leading to the hold. The stevedore sued the charterer for damages. The charterer defended the action, and in so doing acted reasonably, and judgment was given against him for damages and costs on the ground that he had committed a breach of duty towards the stevedore in not making an inspection of the vessel before inviting the stevedore on board.

**HELD**—that the charterer's liability to the stevedore was the natural consequence of the defendants' breach of warranty; and that the charterer was entitled to recover from the defendants the damages and costs paid by him to the stevedore, and his own costs, as between solicitor and client, incurred in defending the action.

**SCOTT v. FOLEY, AIKMAN & Co.**, (1900) 16 [T. L. R. 55; 5 Com. Cas. 53—Bigham, J.

**99. Guarantee by Owner that Vessel shall Carry so much Dead Weight, and Provide so much Cargo Space—Breach of Guarantee—Right to Deduction—Principle of Deduction.**—The hire of a vessel for a voyage was £10,000; and the charter-party entitled the charterers to load any goods and lawful merchandise not exceeding what she could reasonably stow and carry; it then continued:—"The lump sum is based on owner's guarantee that the said steamer shall carry a dead weight of 6,000 tons of cargo when loaded according to Lloyd's Rules, exclusive of 1,100 tons of coal . . . and stores . . . ; and also that the steamer shall place at the disposal of the charterers for cargo not less than 8,450 tons of 40 cubic feet cargo space grain measurement; failing which, a *pro rata* reduction should be made.

The cubic space was provided and filled; but the 6,000 tons of cargo could only have been loaded by limiting the coals to 728 tons, which was not done.

**HELD**—that the charterers were entitled to deduct from the £10,000 £523, being the proportion corresponding to the difference between 7,100 (6,000 + 1,100) tons and 6,728 (6,000 + 728) tons.

**SOCIÉTÉ ANONYME UNGHERESE, & C. v. TYSER** [LINE, LD., (1903) 8 Com. Cas. 25—Kennedy, J.

**100. Indemnity Clause—Time-Charter—Liability.**—By a charter-party of a steamer it was stipulated that the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for the service, and that the charterers should provide and pay for all the coals required. The charter-party contained an indemnity clause providing "that the captain, although appointed by the owner, shall be under the orders and directions of the charterers as regards employment, agency, or other arrangement. Bills of lading are to be signed at any rate of freight the charterers or their agents may direct if without prejudice to this charter

**Hire of Ship—Continued.**

—the charterers hereby indemnify the owners from all consequence or liabilities that may arise from the captain doing so." It also contained an exceptions clause, excepting accidents of navigation although occasioned by the negligence of the master. While under the charter-party the vessel, owing to the negligence of the master, sailed from a foreign port with an insufficient supply of coal, and had in consequence to accept salvage services for which the shipowners were found liable. The vessel at the time of her disablement had on board goods belonging to sub-charterers, for which the master had signed bills of lading containing a similar exception of liability for negligence of the master in navigating his vessel. The sub-charterers having refused to pay any part of the loss, the shipowners brought an action of relief for the part of the salvage expenses, effecting to cargo, against the time charterers, founding (1) upon the indemnity clause, in respect that their liability arose from the captain having signed bills of lading in obedience to the instructions of the time charterers, and also (2) upon the exceptions clause in the time charter.

Held—that as regards the duty of sailing upon the voyage in a seaworthy condition the master was the servant of the shipowners and not of the charterers, and that the former were consequently liable for the whole loss caused by the negligence of this duty, and were not entitled to relief.

PARK v. DUNCAN & SONS, (1898) 85 Sc. L. R. [378—Ct. of Sess.

**101. Position of Ship—Now in Finland bound to London.**—*Breach—Increased Cost of Insurance—Damages.*—A charter-party dated March 10th, 1898, provided that a ship "now in Finland bound to London," should proceed to Archangel from London, and there load a cargo of timber for Great Yarmouth. The ship was at the date of the charter-party at Aland, a port in Finland, which is icebound until early in May. As soon as the ice broke up the ship was rigged, and on May 15th she proceeded under an earlier charter-party to Kotka, another port in Finland, where she loaded a cargo and then sailed to London. Having discharged her cargo, she proceeded under the charter-party of March 10th to Archangel loaded her cargo at that port and started on her return voyage on September 4th, at which date the rate of insurance on cargo from Archangel was eight guineas per cent. If the ship had, on May 15th, proceeded direct from Aland to London, she would have been in a position to leave Archangel on August 8th, when the rate of insurance was 60s per cent.

Held—that the words "now in Finland, bound to London," were a warranty that the ship was in some port in Finland, from which she was under engagement to proceed direct to London; that there had been a breach of the warranty, and that the charterers were entitled to recover as damages the difference between

the cost of insurance on August 8th and on September 4th.

ENGMAN v. PALGRAVE, BROWN & SON, (1899) [15 T. L. R. 113; 4 Com. Cas. 75—Kennedy, J.

**102. Seaworthiness—Voyage in Stages—Insufficiency of Coal.**—Where, in a contract for sea carriage, the voyage is such that it is not reasonably possible for the steamer to carry, in addition to her cargo, sufficient coals to take her from her port of loading to her ultimate destination, and the voyage is therefore, for coaling purposes, divided into stages, there is an implied warranty that the vessel shall, at the commencement of each stage, be seaworthy so far as regards the supply of coal necessary for that stage.

Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) L. R. 3 P. C. 234, 39 L. J. P. C. 53; 18 W. R. 769, 22 L. T. (N.S.) 559 and *Thin v. Richards* ([1892] 2 Q. B. 141; 62 L. J. Q. B. 39, 10 W. R. 617, 66 L. T. 581; 7 Asp. M. C. 165—C. A.) followed.

THE VORTIGERN, [1899] P. 140, 68 L. J. P. 19, 17 W. R. 137, 80 L. T. 382, 15 T. L. R. 259, 1 Com. Cas. 152, 8 Asp. M. C. 523 (C. A.)

**103. Seaworthiness—Defective Condition of Hook and Davit—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 158.**—The defective condition of a hook and davit does not constitute unseaworthiness, within the meaning of the Merchant Shipping Act, 1891, s. 458.

LIONARD & LEEYLAND & CO, (1902) 18 T. L. R. [727—Wills, J.

**104. Seaworthiness—"Charterers to Provide and Pay for all Coal."**—*Captain to "be under the Orders and Directions of the Charterers as Regards Employment, Agency and other Engagements."*—*Insufficiency of Coal.*—A steamship was chartered by the defendants to the plaintiffs for a round voyage from Liverpool to the River Plate and back. It was provided by the charter-party that the charterers shall provide and pay for all coal. . . . That the captain shall prosecute his voyage with the utmost dispatch. . . . That the captain (although appointed by owners) shall be under the orders and directions of the charterers as regards employment, agency and other arrangements. The plaintiffs claimed to recover extra expenses of the homeward voyage due to the master's negligently leaving the River Plate with an insufficient supply of coal.

Held (affirming Kennedy, J.)—that in a charter-party of this description there was, in the absence of express provision, a warranty of seaworthiness; that a mistake had been made either as to the quantity of coal used on the outward voyage or as to the amount consumed while the ship was in the River Plate, with the result that the ship left with an insufficient quantity of coal, and therefore there was a condition of things which rendered the ship unseaworthy; that neither the captain nor the

**Hire of Ship—Continued.**

owners were released by the provisions of the charter-party, as to the charterers providing and paying for coal, from the responsibility of seeing that the ship was in a seaworthy condition at the commencement of each stage of the voyage, it was the duty of the captain to ask the charterers to provide as much coal as would be required; and that there must be judgment for the plaintiffs.

Decision of Kennedy, J. ((1902) 18 T. L. R. 379) affirmed.

DAVID McIVER, SONS & Co., LD. v. TATE [STEAMERS, LD., [1903] 1 K. B. 362, 72 L. J. K. B. 253; 51 W. R. 393; 88 L. T. 182; 19 T. L. R. 217; 8 Com. Cas. 124; 9 Asp. M. C. 362—C. A.

**105 Seaworthiness—Cargo Damaged by Fire—“Fault or Privity” of Shipowner—Damage “by Reason of Fire”—Statutory Protection—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502 (1)**—The cargo of the plaintiff on board defendant's ship was damaged by fire due to the negligent overheating of a stove.

The defendant relied on the statutory protection given by sect. 502 (1) of the Merchant Shipping Act, 1894, in case of damage “by reason of fire.” The plaintiff alleged (1) that damage by smoke and water used to put out the fire was not damage “by reason of fire”; and (2) that the ship was unseaworthy in that the stove was improperly placed and insulated, that the defendant was “privity” to its situation, and that therefore he could not rely on the statutory protection.

**HELD**—(1) that damage by smoke and water was damage “by reason of fire”; and (2) that the stove was safe if properly used, that the ship was seaworthy, and that the defendant was not in “fault” or “privity” to the crew's negligence in overheating it.

THE DIAMOND, SPILLERS AND BAKER, LD. v. [ROBERTSON, [1906] P. 282, 25 L. J. P. 90; 95 L. T. 550; 10 Asp. M. C. 286—Deane, J.

**106. Unsafe Ladder—Accident to Stevedore's Labourer—Liability of Charterer**—A charterer of a vessel who contracts with a master stevedore to load her whilst in dock is under an implied duty to use all reasonable care to ascertain that the vessel and her appliances are reasonably fit and safe for the work which the stevedore and his men are to perform.

The defendant chartered a vessel under a charter-party, which provided that the vessel was in every way fit for service, and was to be so maintained by the owners. In an action by a stevedore's labourer to recover damages from the charterer for injury caused to the labourer by the slipping of a ladder improperly left unfastened by the owners of the vessel when she was placed at the charterer's disposal for loading:—

**HELD**—that, inasmuch as the plaintiff was on the ship in the course of fulfilling the contract in which he (or his master) and the defendant both had an interest, the defendant (the

charterer) was liable to him in damages, since the slightest examination would have shown that the ladder was unsafe, and the defendant had had an opportunity to make a cursory examination of the ship, but admittedly had not done so.

MARNEY v. SCOTT, [1899] 1 Q. B. 986; 68 L. J. [Q. B. 736; 47 W. R. 666; 15 T. L. R. 320—Bigham, J.

**107. Verbal Misrepresentation as to Carrying Capacity—Collateral Warranty.**—During negotiations for a charter-party the owner's agents falsely represented that the vessel had carried a certain quantity of cargo. The charterer, in reliance upon such statement, accepted a charter-party which contained no reference to the previous cargo.

**HELD**—that the charterer could recover damages for breach of a collateral verbal warranty.

HASSAN v. RUNCIMAN & Co., (1905) 91 L. T. [808; 10 Com. Cas. 19, 10 Asp. M. C. 31—Channell, J.

**IV. INCORPORATION OF CHARTER-PARTY IN BILL OF LADING.**

**108 “All other conditions as per Charter-party”—Submission to Arbitration—Staying Proceedings—“Court”—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4—“Legal Proceedings”—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 496, sub-s. 3**—The expression “legal proceedings” in sect. 496, sub-sect. 3, of the Merchant Shipping Act, 1894, means legal process taken to enforce the rights of the shipowner.

Where by a charter-party any dispute arising under the charter was to be settled by arbitration, and the charterer's liability was to cease on completion of shipment, the captain having a lien for freight, and goods were shipped under a bill of lading to be delivered to the charterer at the port of discharge, the bill of lading containing a clause, “All other conditions as per charter-party”:—

**HELD**—that the arbitration clause was not incorporated in the bill of lading.

*Quære*, whether the word “Court” in sect. 4 of the Arbitration Act, 1889, includes a county court.

RUNCIMAN & Co. v. SMITH & Co., (1904) 20 [T. L. R. 625—Div. Ct.

Overruled by *Temperley Steam Shipping Co. v. Smyth & Co* (No 110, *infra*)

**109. “All other conditions as per charter-party, including Negligence Clause.”**—A charter-party provided that “the steamer is in no way liable for the consequences of . . . perils of seas . . . neither is she answerable for losses occasioned by . . . unseaworthiness, or latent defect in hull, machinery or appurtenances, whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence.” Goods were shipped under a

**Incorporation of Charter-party in Bill of Lading**  
—*Continued.*

bill of lading which contained the words "all other conditions as per charter-party, including negligence clause." The goods were damaged by water entering through a small crack in a deck-plate

**HELD** (1) that as there had been bad weather causing straining sufficient to account for the crack, the case was *prima facie* one of the "perils of the seas," and that this inference had not been rebutted, and (2) that the bill of lading incorporated the whole clause set out, including exemption in respect of unseaworthiness unless due diligence was disproved (which it was not); and (3) that therefore the owner of the goods could not recover.

**THE NORTHUMBRIA**, [1906] P. 292; 75 L. J. P. [101; 95 L. T. 618; 10 Asp. M. C. 328—Dir. Ct

**110. Arbitration Clause—Cesser Clause—Dispute "in the loading" —Demurrage.]**—By a charter-party made at Buenos Ayres a steamer was chartered to carry a cargo of wheat from Bahía Blanca to a port in the United Kingdom at a certain rate of freight; the cargo to be loaded at a certain rate per day, demurrage being payable for time occupied beyond that allowed the charterers liability to cease upon shipment of the cargo, and the vessel to have a lien on the cargo for the bill of lading freight, dead freight, demurrage, and all other charges whatsoever. The charter-party by clause 39, provided that if the cargo could not be loaded by reason of riots or labour disputes the time so lost was not to be counted as lay days, and "should any dispute arise under this clause in the loading of the steamer, same to be settled in the Argentine Republic by "Arbitration." The cargo was shipped by the charterers under a bill of lading which made the cargo deliverable to them or their assigns they paying freight against delivery, the rate of freight to be in accordance with the charter-party or freight contract "all the terms and exceptions contained in which charter-party or freight contract are herewith incorporated and form part hereof" and the owner and master to have a lien on the cargo for the recovery of freight, demurrage, and all other charges whatsoever. The loading of the vessel was delayed beyond the lay days, and the shipowners at the port of discharge claimed a lien on the cargo for the amount due for demurrage and the charterers alleged that the delay was due to labour disputes within clause 39, and claimed to have the matter referred to arbitration.

**HELD**—that, as the charterers and the bill of lading holders were the same persons, the arbitration clause in the charter-party was incorporated in the bill of lading, and the matter should be referred to arbitration. Clause 39 is not confined to a dispute which must arise before the loading is complete. A dispute arises "in the loading" within the meaning of the clause if the loading is claimed by one party and denied by the other to have been delayed by one of the causes named in the clause and none

the less because the extent of the delay cannot be ascertained until the loading has been completed.

**Runciman & Co. v Smyth & Co.** (20 T. L. R. 625, No. 108, *supra*) overruled.

**TEMPERLEY STEAM SHIPPING CO. v SMYTH & CO.**, [1905] 2 K. B. 751; 74 L. J. K. B. 876; 93 L. T. 471; 21 T. L. R. 739; 10 Com. Cas. 301; 54 W. R. 150; 10 Asp. M. C. 123—C. A.

**111. Charterers' Duty to Present Proper Bills of Lading—Omission of Negligence Clause by Charterer—Loss by Negligence—Shipowner thus rendered Liable to Indorsee of Bill of Lading—Liability of Charterer to Shipowner.]**—The plaintiffs chartered a ship to the defendants under a charter-party which exempted the plaintiffs as owners from liability in respect of accidents of navigation, even if due to the negligence of the master, and provided that the master was to sign clean bills of lading without prejudice to the charter-party. The defendants presented to the master a bill of lading which in fact omitted the negligence clause, but which included the words "freight and all other conditions as per charter-party" and it was signed by the master. The ship having been totally lost, the indorsees of the bill of lading brought an action against the plaintiffs in which they proved negligent navigation and, in the absence of a negligence clause, recovered judgment. The plaintiffs then brought an action against the defendants, claiming to recover the amount which they had to pay to the cargo owners.

**HELD**—that, since the contract between the owners and charterers was that the former were not to be liable for the master's negligence, the charterers must indemnify them.

**Decision of Phillimore, J.** ([1906] 2 K. B. 792, 75 L. J. K. B. 878; 95 L. T. 611; 22 T. L. R. 821; 10 Asp. M. C. 310; 12 Com. Cas. 35; and the C. A. ([1907] 1 K. B. 809, 76 L. J. K. B. 550, 96 L. T. 129, 23 T. L. R. 271) affirmed.

**KRUGER & CO. LD. v MOIR IRVAN SHIP CO.**, [1907] A. C. 272, 76 L. J. K. B. 985, 97 L. T. 143, 23 T. L. R. 677—H. L. (E.)

**112. Conclusive Evidence—Captain to be Agent of Charterers in Signing Bills of Lading—Time Charter—Liability of Shipowner under "Conclusive Evidence" Clause.]**—If a master signs a bill of lading as master he binds the shipowner, but it is otherwise if he expressly contracts as agent for the charterers only, not purporting, and having no apparent authority, to bind the owners.

The defendants chartered a vessel to B. & Co. on a time charter, it being agreed that the master should sign bills of lading only on behalf of the charterers. During the currency of the time charter B. & Co. induced a stranger to grant them a voyage charter of the same vessel in which he purported to be the owner's agent, and which contained a "conclusive evidence" clause. Timber was shipped under a bill of lading incorporating all "terms and conditions of the voyage charter"; and the bill of lading was signed by the master "as agent for time

### Incorporation of Charter-party in Bill of Lading —Continued

charterers," the printed words "as master" being struck out.

There was a shortage of timber; and the plaintiff, the indorsee of the bill of lading, sued the owners, claiming that they were bound by the master's signature.

HELD—that the owners were not liable.

HARRISON v. HUDDERSFIELD STEAMSHIP CO.,  
[Ld., (1903) 19 T. L. R. 386—Walton, J.]

**113. Freight—Intake Quantity of Cargo.**—Pit props were shipped at Stettin for Cardiff under a bill of lading, which provided for payment of freight for the goods at the rate of 9s. 6d. "for every load of 50 English cubic feet, and all other conditions as per charter-party. . . Responsible for number of pieces, but not for quality or measurement." The charter-party provided that the vessel was to take a cargo not exceeding 1,100 loads of pit props and deliver the same "on being paid freight at the rate of 9s. 6d. sterling for every intaken load of 50 English cubic feet. The freight to be paid on unloading and right delivery of the cargo. . . Bills of lading to be conclusive evidence against the owners as to the quantity of cargo shipped."

HELD—that the clause in the charter-party as to the freight being payable on the intaken load was incorporated in the bill of lading, and freight was only payable on that quantity.

OOSTZEE STOOMVART MAATS v. BELL AND  
[HARRISON, (1906) 22 T. L. R. 643, 11 Com. Cas. 214—Bray, J.]

**114 "Freight and all other Conditions as per Charter-party."**—Goods were shipped under a bill of lading which contained the provision "Freight and all other conditions as per charter-party." The charter-party provided that the vessel was to load a full and complete cargo, "deck cargo included, at merchants' risk, and proceed to London and deliver the same." The goods were carried on deck, and were damaged on the voyage.

HELD (*dissentiente* Rigby, L.J.)—that the provision as to deck cargo being carried at merchants' risk was not incorporated in the bill of lading.

DIEDERICHSEN v. FARQUHARSON, [1898] 1  
[Q. B. 150, 8 Asp. M. L. C. 333, 3 Com. Cas. 87, 67 L. J. Q. B. 103; 77 L. T. 543; 14 T. L. R. 59; 46 W. R. 162—C. A.]

**115. Indemnity—Third-party Procedure.**—By a charter-party the shipowners were not to be liable for perils of the sea and other accidents of navigation even when occasioned by negligence, default or error in judgment of the master, mariners or other servants of the shipowners. By another clause in the charter-party the captain, although appointed by the owners, was to be under the orders and direction of the charterers as regards employment, agency or other similar arrangements. Bills of lading were to be signed at any rate of freight the

charterers or their agents might direct without prejudice to the charter, the charterers indemnifying the owners from all consequences or liabilities that might arise from the captain doing so. A parcel of corn was shipped under a bill of lading, by which the shipowners were not exempted from the same liabilities as under the charter-party. The corn was sea-damaged on the voyage, and the indorsees of the bill of lading sued the shipowners, alleging that the damage was caused by negligent loading. The shipowners served a third-party notice on the charterers claiming indemnity from them under the above clause in the charter-party.

HELD—that the shipowners were entitled to serve the third-party notice.

THE ARROYO, (1900) 16 T. L. R. 255—Div Ct.

**116 "Paying Freight, all other Terms, Conditions, and Clauses as per Charter-party."**—Goods, forming part of a cargo loaded under a charter-party of the plaintiffs' ship, were shipped under a bill of lading to be delivered to the order of M. or assigns, "he or they paying freight for the goods. . . all other terms, conditions, and clauses as per charter-party." The charter-party contained the following clause—"The ship to discharge in such berth or dock as ordered by charterers or their agents." On the arrival of the ship at the port of discharge, the defendant, the indorsee of the bill of lading, he being also the charterers' agent, ordered her to discharge in a certain dock, but she discharged in a different dock from that ordered, whereby the defendant suffered damage.

HELD—that the clause in the charter-party was incorporated into the bill of lading, and the plaintiffs were liable to the defendant for the damage suffered by him.

EAST YORKSHIRE STEAMSHIP CO. v. HANCOCK,  
[(1900) 5 Com. Cas. 266—Mathew, J.]

**117. Right of Captain to sue for Freight—Principal and Agent.**—The defendants chartered a ship to carry a cargo. The charter-party provided that the captain should sign bills of lading at any rate of freight without prejudice to the charter-party. A cargo was loaded, and bills of lading incorporating all the terms of the charter-party were signed by the captain of the ship. The defendants were the shippers and also the consignees and receivers of the cargo.

HELD—that the captain had signed the bills of lading merely as agent for the owners, and therefore he could not be sued, and he was not entitled to sue the defendants for freight.

REPETTO v. MILLAR'S KARRI AND JARRAH  
[FORESTS, LD., [1901] 2 K. B. 306; 70 L. J. K. B. 561; 49 W. R. 526; 81 L. T. 836; 17 T. L. R. 421, 6 Com. Cas. 129; 9 Asp. M. C. 215—Bigham, J.]

**118 "Shipped in good order and condition"—"Quality and measure unknown"—Goods Shipped in Damaged Condition—Estoppel—Liability of Shipowners to Endorsee of Bill of Lading—Harper Act of Congress, 1893—Measure of Damages.**—

**Incorporation of Charter-party in Bill of Lading**  
—*Continued.*

Goods were shipped at a port in the United States of America under a bill of lading which stated that they were "shipped in good order and condition," "quality and measure unknown," and subject to the provisions of the Harter Act of Congress, 1893. The bill of lading incorporated the terms of a charter-party, on the back of which was a form of bill of lading containing the above clauses. The bill of lading was endorsed to the defendants, the purchasers of the goods for value. Upon arrival the goods were found to be damaged, the damage having occurred before shipment. In an arbitration, as between the defendants and the shippers, an award was made in favour of the defendants for the amount of the damage done to the goods, but the defendants did not sue the shippers, who were foreigners, on the award, and the amount was not paid. In an action by the shipowners for freight (which was admitted) the defendants counter-claimed for the damage to the goods.

**Held**—that the statement in the bill of lading that the goods were shipped in good order and condition (though not amounting to words of contract) was made by the master within the scope of his authority and bound the shipowners, that it was not qualified by the subsequent words, "quality and measure unknown"; that the form of the charter-party did not compel the captain to sign an untrue statement in the bill of lading; that the untrue statement created an estoppel as against the shipowners; and that the defendants were entitled to recover from the shipowners the amount of the damage done to the goods, though they had obtained an award against the shippers which they had not enforced upon the ground that, though solvent, they were foreigners.

**CAMPANIA NAVIERA VASCONZADA v. CHURCHILL AND SIM**—**COMPANIA NAVIERA VASCONZADA v. BURTON & Co.**, [1906] 1 K. B. 237; 75 L. J. K. B. 94, 54 W. R. 406; 91 L. T. 59, 22 T. L. R. 85, 11 Com. Cas. 49; 10 Asp. M. C. 177—Channell, J.

**119. Sub-Charter—Bills of Lading Signed by Master—Owners to be Responsible for Short Delivery—Conclusive Evidence Clause.**—By an ordinary time charter, dated January 10th, 1900, the plaintiffs chartered a vessel to the defendant under which the captain, officers and crew were the servants of and paid by the owners, and the charterers were to pay for coals, port charges, &c., loading, stowing and discharging were to be under the control of the master, and the owners were to be responsible for the same. The master was to be under the orders and directions of the charterers as regarded employment, agency, or other arrangements. The charterers and [or] their agents were authorised by the owners to sign bills of lading on the forms generally in use by their (the charterers') line. The owners were to be responsible for short delivery of or damage to cargo, but that the charterers should pay half the claims for short delivery of cargo loaded in

the United Kingdom or on the Continent. The charterers exercised their option of sub-letting (as owners) the steamer to W. S. K. & Co. of Pensacola. By the sub-charter dated July 21st, 1900, the vessel was to proceed to Pensacola and there load from W. S. K. & Co. or their agent a cargo of pitchpine sawn timber and lumber, and carry the same to Bordeaux. The vessel was not to be responsible for any cargo until the same was taken hold of by her loading tackle. The vessel was to sign for and take charge of cargo when delivered alongside, but not to be held responsible for any loss from alongside or salvage expenses, provided the captain furnished a protest, showing the cause of loss. About 160 logs were lost from alongside before shipment by heavy weather. The master, without making any protest, signed clean bills of lading upon forms which contained a clause that "all the terms and exceptions contained in the sub-charter are herewith incorporated and form a part hereof." The endorsees of certain bills of lading made claims upon the defendants' agent in Bordeaux in respect of shortage. The defendants paid two claims and sought to recover the amount from the plaintiffs.

**Held**—that nothing was lost on the voyage, and the logs which were short never formed part of the cargo, and the plaintiffs could not possibly be liable to the defendants under the charter-party of January 10th, 1900, for short delivery of cargo; that the contract effected by bill of lading was one of carriage, and referred to goods actually carried, that the goods in question never were carried; that the charter-party of January 10th, 1900, did not make the defendants the shipowners during the period covered by it, and the endorsees of the bills of lading had no right of action against the defendants, that the carelessness of the captain in signing clean bills of lading did not seem to have been the cause of any real liability by the defendants to the endorsees of the bills of lading, and theirs having been either a voluntary payment or a payment to which they became liable only because they misdescribed themselves as "owners," it could not be recovered from the plaintiffs.

**THIN AND ANOTHER v. LIVERPOOL, BRAZIL, [AND RIVER PLATE STEAM NAVIGATION Co., LD.]**, (1902) 18 T. L. R. 226—Wills, J.

**120 Sub-charter—Lien for Freight—Goods of Subcharterer carried under Bills of Lading—Bills of Lading to be "without prejudice to this Charter"—Notice to Sub-charterer of Original Charter.**—Where a time charter, which allows sub-chartering, authorises the captain in general terms to sign bills of lading on behalf of the shipowners "without prejudice to this charter," these last words merely preserve the rights *inter se* of the shipowners and original charterers; they do not limit the authority of the captain by allowing him to sign only bills of lading which incorporate the lien on goods given to the shipowners by the original charter.

**Hansen v. Harrold Bros.** ([1894] 1 Q. B. 612) followed.

Therefore a sub-charterer's goods carried under

### Incorporation of Charter-party in Bill of Lading —Continued.

bills of lading are not subject to such lien, unless the bills of lading expressly incorporate the original charter: mere reference to it in the bills of lading, or knowledge of its existence, is not sufficient.

*Fry v. Chartered Mercantile Bank of India* ((1866) L. R. 1 C P. 689).

*Secus*, if the sub-charterer has notice of a charter, the terms of which are in fact inconsistent with the bill of lading, or are directed to be embodied therein, thereby limiting the captain's authority.

TURNER AND ANOTHER *v* HAJI GOOLAM [MAHOMED AZAM, [1904] A C. 826; 91 L. T. 216; 20 T. L. R. 599, 74 L. J. P. C. 17, 9 Asp. M. C. 588—P. C.

## V. CARRIAGE OF GOODS.

### (a) Deviation of Ship.

**121 Carriage of Cattle—Ship not to call at any Port—Exception of force majeure—Miscalculation as to Quantity of Coal—Calling at Port to take in Coal—Deterioration of Cattle.**—Cattle were shipped on board a steamship at Buenos Ayres for Deptford under a live stock contract which excepted the usual perils, and also excepted loss arising from *force majeure*, or from any negligence of the master, engineers, or other persons in the service of the shipowner, whether arising previously or subsequently to the vessel's sailing, or by unseaworthiness or unfitness of the ship or any part of her equipment at or after the commencement of the voyage. By a subsequent clause the vessel was to have liberty to deviate "for the purpose of saving life or property, but not to call at any port or ports before landing her live stock except in case of *force majeure*."

The vessel sailed from Buenos Ayres intending to call at St. Vincent to take in coal for the voyage from there to Deptford. After leaving Buenos Ayres it was found that she had not sufficient coal to take her to St. Vincent, and she accordingly called at Pernambuco and took in coal there. On arriving at Deptford the vessel was detained in quarantine, Pernambuco being a prohibited port, and the cattle suffered deterioration in consequence.

HELD—that by the contract the vessel was not to call at any port before landing her live-stock, except in the case of *force majeure*; that the deficiency of coal owing to the miscalculation as to the quantity to take the vessel to St. Vincent was not a case of *force majeure*, the vessel and cargo being in no danger; and that, therefore, the shipowner was liable for the deterioration of the cattle.

YRAZU AND ANOTHER *v* THE ASTRAL [SHIPPING CO., [1904] 20 T. L. R. 153; 9 Com. Cas. 100—Walton, J.

**122. Customary Route—From Bari to Liverpool—Via Constantinople.**—There were shipped in good order and condition 142 casks of olive oil

under bills of lading at Bari, in the Adriatic, in the defendants' steamship *Vera* and the goods were to be delivered under the contract in like good order and condition at Liverpool unto order. The bills of lading were endorsed to the plaintiffs who had bought the oil. Under the bill of lading the ship was "to proceed to her port of destination first, returning to or staying at any port in any order in Black Seas, Levant, Adriatic, Mediterranean, Egypt, Africa, Portugal, Spain, Belgium, Germany, France, Ireland, or Great Britain for the purpose of trading, or for any other purpose whatever in any order or rotation and whether in or out of the customary or advertised routes, without the same being deemed a deviation." The vessel first completed her outward voyage from Liverpool by proceeding to Frume, and other Adriatic ports, and thence to Constantinople, where the homeward voyage began.

HELD—that the "voyage from Bari to Liverpool" must be understood in a business sense; that, as the jury had found, Constantinople was on the customary route from Bari to Liverpool; and that there had been no deviation from the voyage.

EVANS, SONS & CO. *v* CUNARD STEAMSHIP [CO., LD., (1902) 18 T. L. R. 874—Wills, J., Liverpool Assizes.

**123. Limitation of Liability in Bill of Lading.**—A bill of lading for the carriage of goods from Cyprus to London exempted the shipowners from liability for loss or damage arising from any act, neglect or default of . . . stevedores . . . in the management, loading, stowing, discharging, or navigation of the ship, or otherwise. The ship deviated from her voyage, and on her arrival in London the goods were damaged by the stevedores in unloading them.

HELD—that the deviation deprived the shipowners of the stipulations in the bill of lading limiting their liability, though the damage did not occur during, or owing to, the deviation.

*Bahian v. Joly, Victoria & Co.* ((1890) 6 T. L. R. 345—C. A.) followed.

Decision of Channell, J. ([1907] 1 K. B. 243; 76 L. J. K. B. 106; 23 T. L. R. 89, 12 Com. Cas. 51) affirmed.

JOSEPH THORLEY & SONS, LD., *v* ORCHIS [STEAMSHIP CO. LD., [1907] 1 K. B. 660, 76 L. J. K. B. 595; 96 L. T. 488; 23 T. L. R. 338; 12 Com. Cas. 251—C. A.

**124. Trans-shipping Goods to another Steamer.**—Goods were shipped on board a general ship under a bill of lading for carriage from the Persian Gulf to London. The bill of lading gave the ship liberty to proceed to or call in any order for any purpose at any port or ports whatsoever, and to deviate for any purpose, with liberty at any port to ship the whole or any part of the goods by any other steamship, or transship or land or store and thence re-ship on the same or any other steamship. Perils of the sea were among the excepted perils. The ship also carried cargo for Cardiff and the United States.

**Carriage of Goods—Continued.**

The ship sailed from the Persian Gulf bound in the first instance for London. The goods in question were damaged by perils of the sea before the ship arrived at Oran. On arrival at Oran the ship was ordered to proceed to Cardiff direct, and on her arrival there the London cargo was trans-shipped into another steamer and taken to London. The goods owner claimed for the damage to the goods upon the ground that the shipowner, by altering the destination of the vessel at Oran and by trans-shipping the goods at Cardiff, had lost the right to rely upon the exceptions.

**HELD**—that the shipowner was entitled under the terms of the bill of lading to act as he had done, and could rely upon the exceptions.

**HADJI ALI AKBAR & SONS, LD. v. THE ANGLO-ARABIAN AND PERSIAN STEAMSHIP CO., LD.**, (1906) 95 L. T. 610; 22 T. L. R. 600; 11 Com. Cas. 219; 10 Asp. M. C. 307—Bigham, J.

**(b) Discharge of Cargo.**

**125.** "*As fast as Steamer can deliver or Goods will be Warehoused at cost of Consignees—Option of Shipowner as to Remedies.*"—A bill of lading provided that goods were to be "taken from the ship by the consignees at their expense immediately after arrival, and as fast as steamer can deliver, or the same will be trans-shipped into lighters, or landed, or warehoused at the expense and risk of the consignees."

**HELD**—that this provision did not prevent the shipowner from exercising his ordinary remedy in case of undue delay—an action for damages in respect of his ship's detention; but that it merely gave him an alternative remedy, available at his option.

**THE ARNE**, [1904] P. 151, 73 L. J. P. 34, 90 [L. T. 517, 20 T. L. R. 221, 9 Asp. M. C. 565—Div. Ct.

**126.** *Cargo of Coals Wetted—Damage to Ship and Danger of Cargo—Discharge of Cargo—Ship Repaired—Refusal of Master to Reload Cargo.*—A vessel laden with coals having encountered very heavy weather put back for a port of refuge. Partly to effect the necessary repairs and partly because the coal, in consequence of being wetted, had become heated, it was found necessary to discharge the cargo. The repairs having been completed, the plaintiffs insisted that the cargo should be carried on. The master refused to do so. It was proved that the cargo was not fit to be carried on at any time prior to the issue of the writ (issued for breach of contract), that afterwards it became fit to be carried on provided the cargo had eliminated from it a large proportion of small coal. But the master, having regard to the danger which was to be anticipated of spontaneous combustion, would not have been justified in taking the risk of re-shipping the cargo.

**HELD**—that the master was justified in his refusal, and was not bound to wait for weeks, or it might be months, to ascertain whether the

cargo would be fit at some future date, when something had happened in the way of further drying, or something had been done to it in the way of screening, and that the plaintiffs were not entitled to recover.

**NOTAR v. HENDERSON** ((1872) L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; 20 W. R. 443; 26 L. T. (N.S.) 442—Ex. Ch.) observations in, applied.

**THE SAVONA**, [1900] P. 252; 69 L. J. P. 95; [49 W. R. 303—Barnes, J.

**127.** *Delay in Unloading—"Goods to be received . . . continuously."*—A bill of lading provided that the cargo was to be received by the consignees "immediately the vessel is ready to discharge and continuously at all such hours as the Customs House authorities may give permission for the ship to work, any custom of the port to the contrary notwithstanding."

**HELD**—that the true construction of the bill of lading was that as soon as the ship was ready to discharge the consignees must not delay the ship by not being ready to take delivery of the cargo, but must be ready to take continuous delivery; and that it was an absolute obligation to take delivery in that manner; and that the case must go back to Mathew, J., to determine whether the ship was ready to discharge cargo.

Decision of Mathew, J. ((1900) 16 T. L. R. 401) reversed.

**MACLAY AND OTHERS v. SPILLER AND BAKER**, [LD, (1901) 17 T. L. R. 391; 6 Com. Cas. 217—C. A.

**128.** *Delivery of Goods—What amounts to—Custom.*—The pursuers brought an action for balance of freight for the carriage of certain bales of jute, and the defenders maintained that they were not liable, on the ground that the jute was damaged after it was delivered over the ship's side and while the pursuers were responsible for its safe keeping. Under the terms of the bills of lading the pursuers were bound to deliver the goods in like good order and condition as they were shipped, the delivery to be "from the ship's tackles, where the responsibility shall cease. . . . The goods to be taken delivery of from the steamer immediately she is ready to unload." The defenders endeavoured to establish a custom of the port by which they were entitled, notwithstanding the above terms, to have it held that the goods were still undelivered in the hands of the shipowners, although they had been separated from the ship's tackles.

The Court held that this defence was precluded by the authority of the *British Shipowner Co. v. Gramond* (3 R. 968) which related to a discharge of a cargo of jute at the same port and in which the same custom was pleaded unsuccessfully, and that that decision was conclusive on the point that the alleged custom did not affect or vary the general rule according to which delivery of each bale was complete as soon as it passed over the ship's side into the hands of the harbour porters employed by the consignee—although in that case the condition in bill of lading was only "delivery as customary" and not that the ship's



**Carriage of Goods—Continued.**

responsibility should cease or delivery being free from the ship's tackles.

**KNIGHT STEAMSHIP CO. v. FLEMING DOUGLAS**  
[Co., (1898) 25 R. 1070; 35 Sc. L. R. 834—  
Ct. of Sess.]

**129 Discharging at Unsuitable Place—Consequent Injury to Barge—Liability of Cargo-owner who has stipulated for delivery there**—The defendants employed the plaintiff, a barge-owner, to convey stone and deliver it upon the bank of a river to which they had access by special permission for that occasion. There was no defined landing place, but barges could and did discharge there by means of planks laid upon trestles.

The master of the plaintiff's barge, by the advice of her pilot and a fisherman, selected a berth, with the result that she settled down on uneven ground and was strained.

**HELD**—that the defendants had made no express or implied representation that any particular berth was a safe one; that the master was the proper person to select a suitable berth for his own barge; and that, therefore, the defendants were not liable for the injury to the barge.

*The Moorcock* ((1889) 14 P. D. 64; 58 L. J. P. 73; 37 W. R. 489, 60 L. T. 634; 6 Asp. M. C. 373—C. A.) distinguished.

**PARKER v. PLOMESGATE RURAL DISTRICT**  
[COUNCIL, (1904) 9 Com. Cas. 107—Walton, J.]

**130. Goods to be Received by the Consignees "Immediately after Arrival of Steamer"—Delay in making Report at Custom House—Obligation of Consignee to Receive Goods before Report—Custom of Port of London.**—Goods were shipped from Messina to London under bills of lading which provided that they should "be received by the consignees as fast as steamer can deliver them night and day and immediately after the arrival of the steamer, or the same will be . . . warehoused by the agent of the ship at the expense and risk of the receivers of the goods." The ship arrived, and before she was reported at the Custom House in accordance with the Customs Consolidation Act, 1876, the goods, the consignees not being present to receive the same, were landed and warehoused. The practice in the Port of London is that when a Custom House officer is present upon the quay the permission of the Custom authorities to discharge the cargo before report is assumed by the master, unless such permission is actually refused or the discharge forbidden. The consignees subsequently paid the warehouse charges under protest, and claimed to recover them from the shipowners.

**HELD**—that, inasmuch as the possibility that the goods would be permitted to be landed before the ship was reported must be taken to have been within the contemplation of the parties at the time the contract was made, there was an obligation upon the consignees under the bills of lading to be ready to receive the goods before the ship was reported and that therefore they

were not entitled to recover the amount of the warehouse charges.

**MAJOR AND FIELD v. GRANT**, (1902) 18 T. L. R. [742; 7 Com. Cas. 231—Kennedy, J.]

**131 Overcarriage of Goods—Liberty to overcarry "if in opinion of Master discharge cannot be effected without undue detention"—Discharge really rendered impossible by delay at previous Port owing to Negligence of Shipowner's Agents.**—The plaintiff shipped goods by the defendant's ship from Australia to Cape Town, the vessel being at liberty to overcarry "if, in the opinion of the master, discharge cannot be effected without undue detention." Want of care on the part of the owner's agents at Durban delayed the vessel, and in consequence she arrived at Cape Town too late to take the berth reserved for her, and the master thought it necessary to overcarry.

**HELD**—that the master had exercised an honest judgment; and that, under such a clause, his decision was final, unless the undue detention, which he was seeking to avoid, was the result of some act or default for which the owner was responsible: that in the present case the plaintiff was entitled to damages for overcarriage, because the detention would have been due to the negligence of the owner's agent at Durban.

Decision of Kennedy, J. (88 L. T. 863, 19 T. L. R. 509) affirmed.

**SEARLE v. LUND**, (1904) 90 L. T. 529; 20 [T. L. R. 390; 9 Asp. M. C. 557—C. A.]

**132. Sale of Grain Cargo in Bags—Discharge Overside—Weighing Grain on Board—Dock Company's Charges—Liability of Consignee not wanting Grain to be weighed—Custom.**—The plaintiff shipowners alleged that, by a custom of the Port of London, when a grain cargo in bags was discharged overside, it was the duty of the consignee to give an order to the dock company to weigh the cargo on board and to pay the dock company's charges for so doing.

**HELD**—that there was no such custom as alleged.

Judgment of Bigham, J. ((1900) 5 Com. Cas. 343) affirmed.

**MARWOOD v. TAYLOR**, (1901) 17 T. L. R. 565; [6 Com. Cas. 178—C. A.]

**133. Stipulation as to Discharge—Intended Breach by Shipowner—Interim Injunction.**—An interim injunction granted restraining shipowners from discharging part of a cargo in a particular dock contrary to the terms of the bills of lading.

**WOOD v. ATLANTIC TRANSPORT CO.**, (1900) 5 [Com. Cas. 121—Mathew, J.]

**c) Documents of Title.**

**134. Consent of Sellers to Buyer's Possession of Bill of Lading—Draft non-accepted—Indorsement of Bill of Lading to Sub-Buyer—Stoppage in transitu—Bona fides—Notice—Sale of Goods Act**, 1893 (56 & 57 Vict. c. 71), s. 25, sub-s. 2, s. 47—

**Carriage of Goods—Continued.**

*Factors Act*, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 1, ss. 9, 10.]—The sellers of copper forwarded to the buyer the bill of lading indorsed in blank, under which the copper had been shipped, and a bill of exchange for the price for the buyer's acceptance. The buyer, when he received the document, was about to become bankrupt. He did not accept the bill of exchange, but indorsed the bill of lading to the plaintiffs, with whom he had previously entered into a contract for the sale of copper, and the plaintiffs paid him the price in good faith and without notice. The sellers stopped the goods *in transitu*.

**HELD**—that the buyer had obtained possession of the bill of lading with the consent of the sellers within the meaning of sect. 25, sub-sect. 2, of the Sale of Goods Act, 1893, and that the plaintiffs, who took the bill of lading in good faith and without notice, had a title to the goods which defeated the sellers' right to stop the goods *in transitu*.

Judgment of Mathew, J. ([1898] 2 Q. B. 61, 67 L. J. Q. B. 625; 79 L. T. 55; 14 T. L. R. 426, 3 Com. Cas. 197; 8 Asp. M. C. 415) reversed.

**CAHN v. POCKETT'S BRISTOL CHANNEL STEAM** [PACKET CO., [1899] 1 Q. B. 643, 68 L. J. Q. B. 515; 47 W. R. 422; 80 L. T. 269; 15 T. L. R. 247; 4 Com. Cas. 168; 8 Asp. M. C. 516—C. A.

**135. Deposit of Insurance Policy—Security for Advance by Bank.**—Where a person makes an advance against bills of lading and policies of insurance upon a shipment of goods, there is no doubt that, apart from special circumstances, such an advance would be made upon the terms that the person making the advance was to hold as security, until his advance was repaid, the bills of lading and the policies in order that he might be secure as to placing himself in funds to satisfy his advance.

Decision of Bigham, J. ((1897) 14 T. L. R. 94) affirmed.

**SCHENKER, WALFORD & CO. v. NEDERLANDSCHE** [BANK EN CREDIET VEREENIGING VOOR ZUID AFRIKA, (1898) 14 T. L. R. 524—C. A.

**136. Payment against Surrender of Documents—Erasures and Alterations in Documents—Tender—Refusal—With Inspection or Inquiries.**—A contract was made for the shipment of wheat from New Orleans to Hamburg, and the contract provided that the documents—and these were the documents that were to be handed to the purchaser—shall consist of a bill of lading, policy of insurance and certificate of inspection. The bill of lading and certificate of inspection, as tendered, were in accordance with the facts, the wheat represented by the bill of lading being in fact in holds 3 and 4, and the wheat the subject of the certificate of inspection being also in fact in holds 3 and 4. The shippers' clerk had discovered that the figures 2 and 3 had been erroneously inserted in the bills of lading, and

altered those figures to 3 and 4. It was after such alteration that the bills of lading were signed by the ship's agent on behalf of the ship. A similar alteration in the certificate of inspection was made before the same had been put in circulation. The certificate of insurance as originally prepared stated the wheat insured to be in holds 3 and 4, and such certificate was unaltered. The buyers refused to accept and pay for the documents, because of erasures and alterations therein.

**HELD**—that the documents ought to have been accepted by the buyers; that the buyers ought to have looked at the documents, and then to have made inquiries how the erasures and alterations were made, and to see whether they could come to the conclusion that it was an honest transaction.

**IN RE SALOMON & CO AND NAUDSZUS AND** [ANOTHER, (1899) 81 L. T. 325; 8 Asp. M. C. 599—Div. Ct.

**(d) Exceptions in Bill of Lading.**

**137. "Accidents of the Seas"—Severity of Weather—Closing of Ventilators—Damage to Cargo by Heat—Proximate Cause.**—A cargo of maize was shipped on board a steamship to be carried across the Atlantic under bills of lading, excepting (*inter alia*) "accidents of the seas." The ship was fit to carry the cargo, which was properly stowed. During the voyage the ship encountered a storm of exceptional severity and duration, owing to which her ventilators were necessarily closed, for a prolonged period, for the safety of the ship. As a result, the heat, generated in the usual course of the voyage of a steamship, was prevented from escaping and damaged the cargo.

**HELD**—that the severity of the weather was the direct cause of the damage to the cargo, that this damage was therefore covered by the exception in the bill of lading, and the shipowner was not liable therefor.

**THE THRUNSCOE**, [1897] P. 301; 8 Asp. [M. C. 313; 66 L. J. P. 173; 77 L. T. 407; 13 T. L. R. 566; 46 W. R. 175—Div. Ct.

**138. "At Merchant's Risk"—Exception of Negligence or Error of Judgment—Goods Damaged by Recklessness in Discharge—Liability of Shipowner.**—Goods were shipped under a contract which contained exceptions of liability for damage or loss, whether on shore, or ship, lighter, or hulk, arising from negligence, barratry, or error of judgment of the master, mariners, engineers, or any other persons in the employment of the shipowner. In the margin of the contract the words "Carried entirely at merchant's risk" were written. The goods were damaged through the reckless conduct of the stevedores, who were employed by the shipowner, in discharging the goods into lighters.

**HELD**—that the words "at merchant's risk" did not cut down the special exceptions; that damage caused by recklessness, which was an error of judgment or negligence of a bad kind,

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came within the exceptions; and that therefore the shipowner was not liable.

BRISCOE & Co. v POWELL & Co. (1905) 22 [T. L. R. 128—Channell, J.

139. "Defects latent on beginning Voyage or otherwise"—*Patent Defects.*—Exceptions in a bill of lading must be clear and unambiguous if the shipowner is to be relieved from the liability which he has otherwise undertaken therein.

One of the exceptions in a bill of lading was of "all loss or damage arising from accidents to or defects latent on beginning voyage or otherwise, or to hull, tackle, boilers or machinery, or their appurtenances."

HELD—that the words "or otherwise" could not be read as including patent defects.

Judgment of Bigham, J. [(1898) 1 Q. B. 645, 67 L. J. Q. B. 514; 78 L. T. 197; 14 T. L. R. 269; 3 Com. Cas. 109; 8 Asp. M. C. 351] affirmed

OWNERS OF CARGO ON BOARD S.S. WAIKATO [v. NEW ZEALAND SHIPPING Co., [1899] 1 Q. B. 56; 68 L. J. Q. B. 1; 79 L. T. 326; 15 T. L. R. 33; 4 Com. Cas. 10; 8 Asp. M. C. 442—C. A.

See No. 149, *infra*.

140. "Management" — *Incorporation of the Harter Act (Act of Congress of U.S.A., Feb. 13th, 1893)—Negligence in the "Management of the Vessel."*—A ship experienced bad weather, and the fore-castle got flooded. Thereupon the boatswain, in order to clear it of water—especially, no doubt, because the fore-castle formed his own quarters—endeavoured to clear the pipe, which, if it had been clear, would have carried off the water. But he did it negligently, because he made a hole in the pipe instead of cleaning it of the obstacle. The shipowner was exempted from all liability for "damage or loss resulting from faults or errors in navigation or in the management of the said vessel."

HELD—that the boatswain's act was done in the management of the ship. The object was to clear the fore-castle of water—that is to say, to render the fore-castle habitable for the crew—to make the ship fit for the purpose for which it was intended. The shipowner was therefore exempt from liability.

*The Glenochil* ([1896] P. 10; 65 L. J. P. 1; 73 L. T. 416, 8 Asp. M. C. 218—Div. Ct.) followed.

THE RODNEY, [1900] P. 112; 69 L. J. P. 29; [48 W. R. 527; 82 L. T. 27; 16 T. L. R. 183; 9 Asp. M. C. 39—Div. Ct.

141. "Management"—*Failure of Refrigerating Machinery—Consequent Damage to Cargo—Fault or Error in "Management of Vessel"*—*Harter Act (U.S.A.), 1893, s. 3.*—Butter was shipped from New York under a bill of lading, which incorporated sect. 3 of the Harter Act to the effect that, if the owners of a vessel transporting merchandise to or from any port in the

U.S. shall exercise due diligence to make the vessel in all respects seaworthy, equipped, and supplied, neither the vessel nor her owners shall be liable for damage or loss resulting from faults or errors in navigation or management of the vessel. Damage was caused to the butter by negligence in the management of the refrigerating machinery, which was used for cooling the whole vessel, and not only the butter.

HELD—that the loss resulted from a fault or error in the management of the vessel, and that sect. 3 of the Harter Act excluded any liability on the part of the shipowners

"Faults or errors in the management" of a vessel include improper handling of a ship as a ship affecting the safety of the cargo.

*Owners of Cargo on Maori King v. Hughes* ([1895] 2 Q. B. 550; 64 L. J. Q. B. 744; 44 W. R. 2, 73 L. T. 141—C. A.) applied.

Decision of Kennedy, J. [1903] 1 K. B. 114; 72 L. J. K. B. 87; 52 W. R. 85; 87 L. T. 717, 19 T. L. R. 67; 8 Com. Cas. 74; 9 Asp. M. C. 347] affirmed.

ROWSON v. ATLANTIC TRANSPORT Co., [1903] 2 [K. B. 666; 72 L. J. K. B. 811; 89 L. T. 204; 19 T. L. R. 668; 9 Asp. M. C. 458; 9 Com. Cas. 33—C. A.

142. "Neglect and Default of Master in the Navigation of the Ship"—*Rights of Part Owner of Ship who is also Master.*—Among the exceptions in a bill of lading was "the neglect or default of pilot, master, or crew in the navigation of the ship."

HELD—that this clause enured to the benefit of a part owner of the ship, who was also the master for the voyage mentioned in the bill of lading.

WESTPORT COAL Co., LD. v. MCPHAIL, [1898] [2 Q. B. 130; 8 Asp. M. L. C. 378; 3 Com. Cas. 140; 67 L. J. Q. B. 674; 78 L. T. 490; 14 T. L. R. 388; 46 W. R. 566—C. A.

143. *Negligence Clause—"Heat"—"Decay"—"Sweating"—Marginal Clause—Liability of Shipowner.*—Various kinds of grain were shipped under bills of lading which contained the following exceptions. (1) Act of God, enemies, &c.; (2) loss, damage, or injury arising from sweating . . . decay . . . heat, fire on shore or at sea; (3) that the master and owners shall not be responsible for any loss or injury from any of the causes above mentioned, or for any loss or injury arising from the perils or accidents of the sea, whether any of the perils causes or things above mentioned . . . be occasioned by negligence. The bill of lading under which some maize was shipped contained a marginal clause excepting "damage by heating or any other damage."

HELD—that "above-mentioned" in the latter part of the third exception did not refer to matters specified in clauses 1 or 2 or the marginal clause; and that the owners were not protected from liability in respect of improper storage.

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Meaning of "heat," "decay," and "sweating" considered.

THE PEARLMOOR, [1904] P. 286; 73 L. J. P. [50; 90 L. T. 319; 20 T. L. R. 199; 9 Asp. M. C. 540—Barnes, J.

**144. "Perils of the Seas and Navigation"—Wrong Valve opened by Mistake—Incurison of Sea Water—Damage to Cargo—Liability of Ship-owners.]**—Goods were carried in a ship of which the defendants were time-charterers under a bill of lading which contained the following clause: "Loss or damage resulting from any of the following perils (whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise howsoever), excepted namely . . . collision, stranding, or other peril of the seas, rivers, or navigation." The engineer, being desirous of admitting water to a ballast tank for the purpose of the work of discharging the cargo, by mistake opened the wrong valve, with the result that water flowed into a carrying part of the vessel, thereby causing damage to the cargo.

HELD—that the defendants were protected from the liability by the above clause.

BLACKBURN v. LIVERPOOL, BRAZIL AND RIVER [PLATE NAVIGATION Co., [1902] 1 K. B. 290, 71 L. J. K. B. 177; 50 W. R. 272; 85 L. T. 783; 18 T. L. R. 121; 7 Com. Cas. 10; 9 Asp. M. C. 263—Walton, J.

**145. "Providing, Despatching and Navigating the vessel or otherwise"—Dog Lost through Negligence in Exercising.]**—A dog was shipped under a bill of lading which relieved the shipowner from liability from loss or damage arising from any act, neglect, or default of the masters, officers, crew or any servant of the shipowner in "providing, despatching, and navigating the vessel or otherwise." The dog was lost on the voyage in consequence of it being turned loose for exercise without supervision.

HELD—that, even assuming that there had been negligence in losing the dog, the shipowners were protected from liability by the words "or otherwise."

PACKWOOD v. UNION CASTLE MAIL STEAM-SHIP Co., LD., (1904) 20 T. L. R. 59—Walton, J.

**146. "Refrigerator Bill of Lading"—Two Clauses—Construction—Warranty of Seaworthiness.]**—A "refrigerator bill of lading" under which meat was shipped contained two "exception" clauses; the first, in large type, excepted damage from failure of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatever . . . or any neglect of the master or officers. The second, in small italics, contained exceptions which were only to protect the shipowners "if reasonable means have been taken to provide against such defects and unseaworthiness."

The meat was damaged in consequence of the improper use by the shipowners of a disinfectant before the voyage began.

HELD—that, upon the true construction of the bill of lading, the second clause qualified the general words of the first, and that (if this were not clear), at any rate, the shipowners had not used words sufficiently precise to protect them from the consequences of negligence, and that they were liable for the damage.

Decision of C. A. ([1904] 1 K. B. 319; 73 L. J. K. B. 240 52 W. R. 439; 90 L. T. 187; 20 T. L. R. 184; 9 Com. Cas. 126; 9 Asp. M. C. 513) affirmed.

ELDERSLIE STEAMSHIP Co., LD. v. BORTHWICK, [1905] A. C. 93; 74 L. J. K. B. 338; 53 W. R. 401, 92 L. T. 274, 21 T. L. R. 277; 10 Asp. M. C. 25, 10 Com. Cas. 109—H. L. (E.)

**147. Refrigerating Machinery—Defect in—Seaworthiness—Ship fit to carry Cargo—Bad Stowage.]**—Fruit was shipped under bill of lading which excepted (*inter alia*) loss or damage from decay resulting from bad stowage, insufficiency of ventilation or temperature of holds, whether occasioned by the negligence or error in judgment of the master, officers, engineers, crew or other persons in the service of the shipowners, and whether before or after the commencement of or during the voyage, or from defects, latent or otherwise, in hull, tackle, machinery, refrigerating or otherwise, (whether or not existing at the time of the goods being loaded or at the commencement of the voyage), or from failure or breakdown of machinery, insulation, or other appliances refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of the shipment of the goods or not, or for the consequences of any act, neglect, default, or error of judgment of the master, officers, refrigerating engineers, crew, or other persons in the service of the owners, or from any other cause whatsoever.

On the voyage the fruit was damaged owing to the cases having been stowed by persons, for whose acts the shipowners were responsible, too close to the top of the hold, thus making it impossible for the refrigerating machinery to properly ventilate the hold and regulate the temperature.

HELD—that the damage was caused by "bad stowage" within the meaning of the exceptions, and that, therefore, the shipowners were not liable.

Decision of Channell, J. (21 T. L. R. 438) affirmed.

BOND, CONNOLLY & Co. AND OTHERS v. [FEDERAL STEAM NAVIGATION Co., LD. (1906) 22 T. L. R. 685—C. A.

**148 "Restraint of Princes, Rulers and People"—Alleged Prohibition by Law of Imports—Ill-founded Fear—Premature Refusal by Shipowner to Complete Voyage.]**—Rice was shipped at Rangoon on board the defendants' steamship for carriage to Galatz, under bills of lading which contained the exception, "restraint

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of princes." On June 18th, the ship being then at Beyrout, the defendants were informed by a Government official at Galatz that the importation of rice from Rangoon into Roumania was prohibited by the law of that country, and that if the ship came to Galatz the discharge of the rice would not be permitted. The law of Roumania did not, in fact, prohibit the importation of rice. On June 23rd, by the orders of the defendants and contrary to the expressed wish of the plaintiffs, the indorsees of the bills of lading, the ship proceeded to London, where the rice was discharged and sold at a loss.

**HELD**—that the defendants were not justified in treating the contract as being, on June 23rd, impossible of performance, and were liable in damage for the non-delivery of the rice at Galatz.

BRUNNER v. WEBSTER, (1900) 16 T. L. R. 217, [5 Com. Cas. 167—Kennedy, J.]

149. "*Unseaworthiness*"—*Unfitness of Ship to Receive Cargo—Liability of Shipowners*—In the case of carriage of goods by sea the law places certain obligations upon the shipowner which will always bind him, unless there are in the contract of carriage clear words, which, without any ambiguity, relieve him from his common law liability.

A bill of lading contained the exception "loss or damage resulting from . . . the consequence of any . . . injury to or defect in the hull, tackle, boilers, or machinery, or their appurtenances . . . notwithstanding that the same may have existed at, or at any time before, the loading or sailing of the vessel . . . and whether . . . the loss or injury arising therefrom be occasioned by . . . the unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness."

Sheepskins shipped under the bill of lading were damaged by fresh water which escaped from a broken pipe. It was admitted that the vessel was not fit to receive cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against such unfitness.

In an action by the endorsee of the bill of lading against the shipowners to recover the amount of damage to the sheepskins:—

**HELD**—that the latter part of the clause relating to unseaworthiness was a qualification over-riding the exceptions before-mentioned, and that the common law warranty of "fitness" was left untouched; and that therefore the defendants were liable.

*Waikato v. New Zealand Shipping Co* ([1899] 1 Q. B. 56; 68 L. J. Q. B. 1; 79 L. T. 326; 5 Asp. M. C. 442—C. A., No. 139, *supra*) approved.

Decision of Wills, J. (8 Com. Cas. 1) reversed.

RATHBONE BROS. v. DAVID McIVER, SONS & [Co., (1903) 72 L. J. K. B. 703; 52 W. R. 68; 89 L. T. 378; 19 T. L. R. 590, 8 Com. Cas. 303; 9 Asp. M. C. 467—C. A.]

**(e) Freight.**

150. "*To be paid on Delivery in Cash, without Deduction, on Gross Weight at Queen's Beam*"—*Custom as to Ascertaining Amount of Freight—Contradiction*.—Wool was shipped in Australia for delivery in this country under bills of lading which provided that freight was "to be paid on delivery in cash, without deduction, on gross weight at Queen's beam." The shipowner alleged that by the custom of the trade the consignee had the option of having the goods weighed at his own expense, or of taking the goods without weighing at the bill of lading weight, *plus* two per cent.

**HELD**—that there was no such custom as alleged, and, that if there had been such a custom, it would have been bad in law as contradicting the express terms of the bill of lading, and that the defendant was only liable to pay freight on the actual weight of the goods which must be ascertained at the plaintiffs' expense or upon the bill of lading weight, if it was thought fit by the parties to take that.

GULF LINE v. LAYCOCK, (1902) 18 T. L. R. 14; [7 Com. Cas. 1—Kennedy, J.]

151. *Carriage of Cattle—Surplus Fodder for Cattle—Argentine Government Regulations*.—The defendants shipped sheep and cattle from the River Plate to Liverpool and Deptford on board the plaintiffs' steamers at different times during the years 1895-1899. By the Argentine Government regulations, a supply of fodder equal to thirty days' consumption, with five days extra for emergencies, was required to be carried for every head of live stock shipped to Europe from the Argentine Republic. The original contract provided that any surplus fodder remaining on board on arrival at Liverpool beyond what was *necessary* for a full supply according to the Argentine Government regulations, freight was to be paid on such surplus at 10s. per ton weight or measurement. The contract was renewed in 1898, with this difference, that the rate of freight for surplus fodder, whether hay or bag seed, was to be 20s. per ton. The bills of lading contained the following clauses: "On arrival at destination surplus over and above five days' feed to pay freight, hay 20s. . . . per ton," . . . "all other conditions as per freight contract dated in London May 17th, 1898" "Steamer supplies . . . conveyance for all articles *necessary* freight free."

**HELD**—that the plaintiffs in rendering their accounts could charge freight on all fodder discharged by the ship, deducting therefrom the five days' full supply required by the Argentine Government, as the arrangement to pay freight was not intended to come into effect until the arrival of the ship, and "necessary" meant "necessary in fact for the purposes of the voyage," and referred to the actual quantity of fodder consumed and not the requirements of the Government at the port of shipment; and that the bill of lading was conclusive that the

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freight on hay was to be calculated per ton weight instead of measurement.

**BRITISH AND SOUTH AMERICAN STEAMSHIP [Co., LD. v. ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY, LD., (1902) 18 T. L. R. 382—Wills, J., Liverpool Assizes.**

**(f) Miscellaneous.**

**152. Alteration of Contract in Charter-party and Bills of Lading—'Manchester excepted'—Meaning of.]**—A contract provided for the sale of a cargo of wheat shipped *Vanduaara* at a price including freight and insurance to any safe port in the United Kingdom, payment to be made in exchange for shipping documents. *The Vanduaara* was at the time chartered for a voyage from Portland, Oregon, to discharge at a safe port in the United Kingdom. Manchester excepted. The cargo of wheat was loaded under bills of lading, which were also for a safe port in the United Kingdom, Manchester excepted. The buyers declined to take up the shipping documents on the ground that the words "Manchester excepted" constituted a material alteration of the contract. An arbitration was held, in which the arbitrators found that the words "port of Manchester," in a commercial sense, only included Manchester and the waters adjacent thereto and that in that sense Manchester was not a safe place for *The Vanduaara*.

**HELD**—that the alteration of the contract by the insertion of the words "Manchester excepted" in the charter-party and bills of lading was not a material alteration, by reason of the fact that Manchester in its commercial meaning was not a safe port for *The Vanduaara*, and that the buyers were therefore not entitled to reject the shipping documents.

The decision of the Div. Ct. ((1899) 80 L. T. 188, 4 Com. Cas. 119, 8 Asp. M. C. 503) affirmed.

**IN RE GOODBODY & CO. AND BALFORTH WILLIAMSON & CO., (1900) 82 L. T. 484, 5 Com. Cas. 59, 9 Asp. M. C. 69—C. A.**

**153. Custom of Port—Whether Inconsistent or not—Charges for Stowing in Transit Shed—Mersey Docks Bye-laws—Mersey Docks Act's Consolidation Act, 1858.]**—sect. 35 of the Mersey Docks Act, 1858, allows goods to be landed and deposited in the "transit sheds," merely upon giving notice to the customs officer, and without formal entry. The goods when piled in the sheds, can be more easily sorted, and are then entered, and delivered to the various consignees in complete parcels, and, at the same time, the ship avoids delay in the process of unloading.

**HELD**—that the master porter's charge for trucking goods from the ship, and piling them in the shed is not included in the 'all-round' charge made in accordance with the schedule to the bye-laws.

The provision as to transit sheds has given rise to a custom of the port of Liverpool, whereby in discharging dried fruit cargoes the charges for trucking to, and piling in, the transit sheds are always borne by the ship.

**HELD**—that this custom is not inconsistent with provisions in a bill of lading, whereby currants are to be delivered to the consignee from the ship's deck, and are to be entered, landed and warehoused at his expense, if he is not ready to take delivery from the deck.

The true view is: not that the custom contradicts the bill of lading, but that both parties tacitly agree to annex to the bill of lading an incident advantageous to each of them, viz. that delivery shall be made and taken in a substantiated manner.

**CARDIFF STEAMSHIP CO. LD. v. JAMIESON, (1903) 88 L. T. 87, 19 T. L. R. 159, 9 Asp. M. C. 367—Div. Ct.**

**154. Damage to Ship—Putting into Intermediate Port—Duty to take Care of Cargo—Duty to Trans-ship Cargo.**

**HELD**—on the facts, that the shipowner, whose ship was obliged, owing to damage sustained on the voyage, to put into an intermediate port, ought to have discharged the cargo of maize there, and to have trans-shipped it into another ship for conveyance to its port of discharge, and not to have kept the cargo on board, and that he was therefore liable for the damage to the maize caused by keeping it in the ship's hold.

**HANSEN v. DUNN, (1900) 22 T. L. R. 458, 10 Com. Cas. 100—Kennedy, J.**

**155. Delay—Goods for British Troops—Shipment of other Goods for Enemy—Negligence and Breach of Duty—Vessel Arrested in Prize Court—Fall in Market Value—Measure of Damages.]**—The plaintiff's goods were shipped at New York for British troops on board the defendants' steamship for carriage to Algoa Bay. The defendants allowed to be shipped on the same vessel goods mainly consisting of bread stuffs for the Queen's enemies in the Transvaal. The vessel sailed after war had been declared. The agents of the ship knew the true character of the goods and the intention with which they were shipped. The vessel was arrested on her arrival at Algoa Bay and taken to Cape Town, and there detained for just four months. The plaintiffs claimed damages from the defendants for delay in the delivery of the goods shipped by them.

**HELD**—that even if the findings of the Prize Court at the Cape that "there was reasonable and probable cause for seizing the ship, that there was certainly carelessness in taking the cargo on board at New York," were not conclusive, the course which the defendants took in carrying enemies' goods without the knowledge and consent of the other shippers was a breach of duty towards them, and was in effect to court detention, even if they had a well-founded hope of being able to give such explanations to the authorities as would avoid the condemnation

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of the ship; they took the risk of escaping detention without consulting the plaintiffs on the matter; that the defendants were *prima facie* liable to the plaintiffs for late delivery, and could not rely upon an exception to excuse them from the consequences of a peril which their own negligence had contributed to bring about; that they were therefore liable; and that the damages were to be measured by the difference between the higher market rates at the time the goods ought to have been delivered and the less market rates at the time when they were delivered, as the fall in the market value was not accidental but inevitable.

Decision of Mathew, J. ((1901) 17 T. L. R. 739) affirmed.

DUNN v. BUCKNALL BROS; DUNN v. DON-  
[ALD CURRIE & CO., [1902] 2 K. B. 614;  
71 L. J. K. B. 963, 51 W. R. 100; 87 L. T.  
497; 18 T. L. R. 807; 9 Asp. M. C. 336; 8  
Com. Cas. 33—C. A.]

**156. Lighterman—Liability—Common Carrier—Policy on Goods "without Recourse to Lightermen"—Rate of Freight—Implied Contract—Barge left Unattended—Negligence**—The plaintiffs agreed verbally with the defendant that he should lighter the plaintiffs' goods from the Lea Cut to steamers in the Thames, at a low rate of freight. No express contract was made as to the terms of carriage, but it was known to both parties that the plaintiffs intended to insure the goods, and they were, in fact, insured by a policy expressed to be "without recourse to lightermen." It is a common practice for lightermen on the Thames to contract on the terms that they shall not be liable for any insurable risks, or that they shall only be liable for the negligence of themselves or their servants.

**HELD**—that the contract between the plaintiffs and the defendant was subject to an implied condition that the defendant should not be liable for any damage to the goods caused by risks which could be insured against.

A barge was left for the night properly moored at a private wharf in the Lea Cut, but without a watchman; she was not leaking, and was exposed to no obvious danger.

**HELD**—that the fact of the barge being left unattended did not constitute negligence.

THOMAS & CO. v. BROWN, (1899) 4 Com. Cas. [186—Mathew, J.]

**157. Passengers' Luggage—Conditions on Ticket—Injury to Luggage—Fitness or Seaworthiness of Ship**—Owing to want of space on a steamer, certain luggage was stowed in a lavatory. The water was cut off from this lavatory, but it was not cut off from the adjoining one; and the Judge found as a fact that, having regard to the possibility of water overflowing from the next lavatory, the ship, in sailing with the luggage so stowed, was not seaworthy, in the sense that she was not properly fit to carry out the contract of carriage. The plaintiff's luggage

was, in fact, damaged by an overflow from the next lavatory.

**HELD**—that the defendants were not protected by a clause on the ticket exempting them from liability in respect of loss or injury "caused by unseaworthiness or unfitness of the ship, provided that reasonable diligence has been used to render the ship at starting seaworthy and fit for the voyage," and that the plaintiff could recover.

Decision of Bigham, J. ((1903) 19 T. L. R. 123; 8 Com. Cas. 96) affirmed.

UPPERTON v. UNION CASTLE MAIL STEAMSHIP  
[Co., LD., (1908) 89 L. T. 289; 19 T. L. R. 687; 9 Asp. M. C. 475; 9 Com. Cas. 50—C. A.]

**158. Theft of Goods Shipped for Carriage—Negligence of Officers**—The plaintiffs sued to recover the loss of a quantity of gold coins which were stolen from a box shipped by them for carriage on the steamer *Hohenzollern*. The box was delivered to the purser of the vessel and placed by him in the mail room, to which access was obtained by iron double doors, opening outwards, secured by a bolt at the top, another at the bottom, and two locks—and also by a hatchway in the top of the room secured by a padlock. The purser kept the keys of the hatch and doors, and the captain had a duplicate key of the hatch padlock. The theft was committed by the quartermaster, who managed to displace the two bolts of the door while working in the mail room. If the bolts were drawn, the doors, though locked, could be pulled open outwards.

**HELD**—that these facts disclosed a case of negligence.

THE PRINZ HEINRICH, (1898) 14 T. L. R. 48—  
[Barnes, J.]

**(g) Short Delivery.**

**159. Bill of Lading—Estoppel**—The owners of a ship were held not to be precluded from showing that part of the goods were not shipped on board the vessel, when, looking at the whole of the bill of lading, there was no clear statement as to the exact quantity received.

LOHDEN & CO. v. CALDER & CO., (1898) 14  
[T. L. R. 311—Bigham, J.]

**160. Bill of Lading to be Conclusive Evidence of Quantity Delivered to Vessel—Different Kinds of Timber—Short Delivery of some Kinds—Over-delivery of others—Adjustment of Cross-claims—Freight Over-paid—Shortage—Value of Timber Over-delivered**—A timber cargo (freight calculated at so much per fifty superficial feet) was shipped under a charter-party, which made the "bills of lading conclusive evidence against the owners as establishing quantity delivered to ship." The bill of lading showed the number of pieces of, and the number of superficial feet in, each kind of timber, and also the total number of pieces, and total number of superficial feet. On arrival, the deals were short of the bill of lading figures, while the scantlings and boards were in excess.

**HELD**—that the bill of lading bound the owners as to the amount of the different kinds

**Carriage of Goods—Continued.**

of timber, and not only as to the total amount; that the consignees were entitled to allowance in respect of the shortage of deals, and, having accepted the excess of boards and scantlings, must give credit for the value of such excess. Further, that the consignees were entitled to rebate in respect of the freight of deals not in fact delivered, such rebate to be calculated by finding the average number of superficial feet per deal as shown by the bill of lading, and thus determining the superficial area of the 1,200 deals short delivered.

*Spaight v. Farnworth* ((1880) 5 Q. B. D. 115; 49 L. J. Q. B. 346; 28 W. R. 508; 42 L. T. 296—Bowen, J.) approved.

*MILITERRANEAN AND NEW YORK STEAMSHIP CO., v. A. F. & D. MACKAY*, [1903] 1 K. B. 297; 72 L. J. K. B. 117—C. A.

**161** "*Marked and Numbered as in Margin*"—*Goods wrongly Marked—Evidence of Shipment of Goods—Conclusiveness of Bill of Lading—Bills of Lading Act, 1855* (18 & 19 Vict. c. 111). § 3.]—By sect. 3 of the Bills of Lading Act 1855, every bill of lading in the hands of an indorsee for valuable consideration representing goods to have been shipped on board a vessel is made conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped.

The plaintiff was indorsee for valuable consideration of a bill of lading signed by the defendants in these terms:—"Shipped on board *The Ipswich* 1076 carcasses frozen lambs, being marked and numbered as in the margin. The marks and numbers in the margin were:—The Sun Brand, Canterbury, N. Z. Lamb 622 & 608 carcasses." The bill of lading contained the clause:—"The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." Of the 608 carcasses shipped under this bill of lading 102 were, in fact, marked 522 and not 622. There were no other carcasses marked 522 or 622 on board. The first figure of the number 622 had no distinctive value as regards the market for the meat which was, as a commercial article, unaffected in character or value whether it was marked 622 or 522. The carcasses marked 522 were, on the arrival of the ship tendered to the plaintiff as part of his consignment. The plaintiff refused to accept them and brought an action for damages for non-delivery of 102 carcasses.

**HELD**—that the defendants were not liable.

By A. L. Smith, M.R. on the ground that they were exempted from liability by the clause in the bill of lading, as the carcasses, their marks not corresponding with those in the bill of lading, were not 'correctly' marked within the meaning of that clause.

By Collins and Romer, L.JJ., on the ground that sect. 3 of the Bills of Lading Act, 1855 did not stop the defendants from showing that the

carcasses tendered were in fact part of the goods shipped under this bill of lading, the difference in the marks affecting merely the identification and not the identity of the goods.

Judgment of Kennedy, J. ([1900] 1 Q. B. 714; 69 L. J. Q. B. 419; 82 L. T. 327; 16 T. L. R. 230; 5 Com. Cas. 179; 3 Asp. M. C. 39) affirmed.

*PARSONS v. NEW ZEALAND SHIPPING CO.*, [1901] 1 Q. B. 518; 70 L. J. K. B. 404; 49 W. R. 355; 84 L. T. 218; 17 T. L. R. 274; 6 Com. Cas. 41; 9 Asp. M. C. 170—C. A.

**162** *Short Delivery to Holder of One of Several Bills of Lading—Conversion—Property Passing—Measure of Damages*—L. loaded a quantity of barley on a ship belonging to H., and received bills of lading which provided that any shortage should be borne proportionately by each receiver. The ship was unable to load the whole of the barley, and L. agreed to indemnify the holder of the bills of lading. One bill of lading came into the hands of B. who handed it to M., and M. advanced £5,057 16s. 1d. upon it. M. received less than the quantity of barley covered by his bill of lading, as the holders of the other bills got full delivery from the agents of H., and he called upon B. to make good the deficiency, which B. did by making certain payments and delivering some barley. M. sold the barley, and tendered to B. an account showing a balance remaining due on the transaction from B. of £12 1s. 9d. Afterwards B. failed owing M. some £1,651.

**HELD**—that, as between M. and H., M. had the full property in the barley covered by his bill of lading and that H. had been guilty of a conversion, but that M. could only recover £12 1s. 9d. as damages.

*MONTGOMERY v. HUTCHINS*, (1906) 91 L. T. 7207; 10 Asp. M. C. 223—Bry J.

**163** *Undivided Portions of a Bulk Cargo—Proportions of Shortage and Damage—Damaged Cargo not properly Apportioned amongst Holders of Bills of Lading—Duty and Liability of Shipowner*—Bills of lading for undivided portions of a bulk cargo of grain had a clause providing that each bill of lading should bear its due proportion of shortage, damage and sweepings. The first consignee got delivery of none but sound grain another consignee was therefore called on to accept more than his due proportion of unsound grain, he refused, and sued the shipowner for short delivery.

**HELD**—that there was no duty on the shipowner to apportion the grain, and that the action failed.

*GRANGE & CO. v. TAYLOR*, (1904) 52 W. R. 129; 90 L. T. 186; 20 T. L. R. 346; 9 Com. Cas. 228; 9 Asp. M. C. 559—Rigby, J.

**(h) Through "Bill of Lading."**

**164** *Incorporation of Terms—Arrival of Goods to be notified to Consignee—Liability of Shipowner for not Notifying*—The plaintiffs despatched under a through bill of lading goods to



**Carriage of Goods—Continued.**

their own order from San Francisco to Philadelphia for carriage to London by the defendants' line of steamships. The bill of lading, so far as regarded the carriage from Philadelphia to London, was signed by the defendants' agent. The bill of lading provided that the defendants should notify the plaintiffs of the arrival of the goods in London, and that the goods were subject to all the conditions expressed in the regular forms of bills of lading in use by the defendants' line. The regular form of bill of lading provided that any freight not paid within seven days of the final discharge was to bear interest at the rate of 5 per cent. per annum, and that no claims should, under any circumstances whatever, attach to the steamer, her owners or agents, for failure to notify the consignee of the arrival of the goods. The defendants did not notify the plaintiffs of the arrival of the goods in London, and in consequence the plaintiffs did not take delivery of them for some time.

HELD—that the notification clause in the regular form of bill of lading relieved the defendants from liability if they failed to carry out the obligation imposed by the through bill of lading to notify the arrival of the goods.

**E CLEMENS HORST CO. v. THE NORFOLK AND [NORTH AMERICAN STEAM SHIPPING CO., Ltd., (1906) 22 T. L. R. 403, 11 Com. Cas. 141—Kennedy, J.**

**165. Land and Sea Carriage—Lien for Freight paid for Land Carriage—Non-arrival of Goods at Port of Destination.]—**Goods were consigned from an inland town in America by railway to Montreal and thence by steamer to London under a through bill of lading at an inclusive rate of freight. The bill of lading contained conditions with respect to the service until delivery to the steamer at Montreal, one condition being that that part of the contract was executed and all liability thereunder terminated on delivery to the steamer, and the inland freight charges were to be a first lien due and payable by the steamship company. The bill of lading also contained conditions with respect to the service after delivery at Montreal until delivery in London, one condition being that the property covered by the bill of lading was subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company. This latter form of bill of lading contained a clause that when goods were carried at a through rate of freight the inland proportion thereof was due on delivery of the goods to the ocean steamship, and the shipowner was to have a first lien on the goods in whole or in part until payment thereof. The goods were delivered to the steamer, and the steamship company paid the inland freight due for the railway carriage. On the voyage to London the steamer ran ashore, but the cargo was salvaged. Part of the goods were damaged and were sold, and the rest were transhipped and brought to London. The steamship company claimed, in addition to the freight payable on the goods delivered in London, a lien on the goods for the inland freight paid by

them for the railway carriage in respect of the goods not delivered in London.

HELD—that the steamship company were entitled to the lien claimed.

Decision of Div. Ct. (75 L. J. P. 70; 95 L. T. 395; 23 T. L. R. 564, 10 Asp. M. C. 281) affirmed.

**THE HIBERNIAN, TASKER & CO. v. ALLEN [BROS. & Co., [1907] P. 277; 76 L. J. P. 122; 97 L. T. 363; 23 T. L. R. 519—C. A.**

**166. Railway and Sea Carriage—Bill of Lading Weight greater than Gross Weight Delivered—Payment of Freight on Bill of Lading Weight—Recovery of Over-payment in respect of Inland Freight.]—**Certain parcels of hay of which the plaintiff was consignee were respectively delivered to railway companies at certain places in the United States of America, to be carried to New York and thence by the defendants to London under through bills of lading signed by an agent "on behalf of carriers severally but not jointly." By the terms of the through bills of lading, with respect to the service until delivery at New York, all liability under the contract terminated on delivery of the property to the steamships at New York, and the inland freight was a first lien, due and payable by the defendants; and, with respect to the service after delivery at New York and until delivery at London, payment of freight was to be made on the gross weight landed from ocean steamships unless otherwise agreed or so provided in the bill of lading, or unless the carriers elected to take the freight on the bill of lading weight. The through freight was made up by the railway companies in America after the transport rates of the defendants had been ascertained.

HELD—that (1) upon the construction of the bills of lading if there was no election to take the bill of lading freight, and the defendants demanded too much before the goods could be obtained by the plaintiff, they would be liable to be sued for the return of the excess of freight paid in excess of the overweight, and would not be entitled to say to the plaintiff that he must recover from the land carriers in America so much as represented the overcharge for the inland carriage. (2) Upon the facts as the plaintiff, although he objected, had paid the bill of lading through freight and had accepted a rebate of the ocean freight only, in all cases where the bill of lading freight was greater than the quantity delivered, he was not entitled to recover the overpayment for inland freight as having been made under a mistake of fact.

**KITTS v. ATLANTIC TRANSPORT CO., (1902) 18 [T. L. R. 739; 7 Com. Cas. 227—Kennedy, J.**

**167 "To be forwarded at Ship's Expense and Owner's Risk"—Negligence in Transhipment—Negligent Stowage—Liability of Shipowner.]—**Goods shipped on board the V., bound from A. to B., were "to be forwarded at ship's expense and owner's risk" to C. Part was damaged by negligent handling in transhipment and part by negligent stowage on the vessels in which the goods were carried to C.

**Carriage of Goods—Continued.**

**Held**—that the owners of the *V.* were liable for the first part of the damage and not for the second.

ALLAN BROS & CO. v. JAMES BROS & CO.,  
[1898] 3 Com. Cas. 10—Bigham, J.

**(1) Warranties.**

**168. Fitness to receive Cargo—Duration and Extent of Warranty—Incorporation of Harter Act—Effect of Warranty.**—In a contract for the sea-carriage of goods there is *prima facie* implied an absolute warranty that, at the time when the goods are shipped, the vessel is fit to receive them, the warranty does not continue in force after the goods are shipped.

The incorporation in a bill of lading of the Harter Act does not substitute for such warranty a duty merely to exercise due diligence.

Goods shipped under a bill of lading, which incorporated the Harter Act, were damaged through the following chain of events: an engineer, who had opened a seacock to fill a tank, failed to screw it down tight, water thus continued to flow into a valve chest and ultimately forced out some defective packing beneath the lid of such chest, thence the water flowed into the hold, and through a sluice door, which the engineer had improperly closed, into the hold where the goods were.

**Held**—that the failure to close the seacock and sluice door, occurring after the goods were on board, did not amount to breaches of the implied warranty; but that the defective packing of the valve chest, which was defective at the date of loading, was such a breach.

McFADDEN v. BLUE SEAR LINE, [1905] 1 K. B. 697, 71 L. J. K. B. 123, 53 W. R. 576, 93 L. T. 52, 21 T. L. R. 315; 10 Com. Cas. 123 10 Asp. M. C. 55—Channell, J.

**169 Implied Warranty—Fitness to carry particular Cargo—Bullion.**—Bullion was shipped under a bill of lading upon a vessel which had a bullion room, and the contract was entered into with the knowledge and upon the footing that there was a bullion room for the safe carriage of bullion.

**Held**—that there was an implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves.

Decision of Mathew, J. (2 Com. Cas. 228; 13 T. L. R. 590), affirmed.

QUEENSLAND NATIONAL BANK CO. LD. v. PENINSULAR AND ORIENTAL STEAM NAVIGATION CO., [1898] 1 Q. B. 567, 8 Asp. M. C. 338, 3 Com. Cas. 51; 67 L. J. Q. B. 402; 78 L. T. 67; 14 T. L. R. 166, 46 W. R. 324—C. A.

**VII. DEMURRAGE.****(a) Averaging Days.**

**170 Dispatch-money—Averaging Days for Loading and Discharging.**—A charter-party

provided that a cargo of iron ore should be loaded and discharged at the rate of 200 tons per twenty-four hours; charterers to have the option of averaging days for loading and discharging in order to avoid demurrage . . . Dispatch-money to be paid for any time saved in loading . . . to be settled in the loading port.

The charterers, having saved time at the loading port, agreed with the captain the amount of dispatch-money for such time, and indorsed it on the bill of lading as an advance of freight. At the port of discharge the lay-days were exceeded. The charterers (by their agent, who defended and accepted liability) claimed to average the days of loading and unloading.

**Held**—that as the charterers had exercised their option by treating dispatch-money as an advance of freight at the loading port, they were not entitled to average the days for the purpose of avoiding demurrage at the port of discharge.

OAKVILLE STEAMSHIP CO. v. HOLMES, [1900] 48 W. R. 152, 16 T. L. R. 54, 3 Com. Cas. 18—Bigham, J.

**171. Reasonable Despatch—Average Rate—Dublin—Discharge as Customary.**—There is no established custom of the port of Dublin to discharge cargoes of steamers at an average rate of 350 tons per day, calculated on the whole period of discharge. A charter-party which provides that the cargo is "to be discharged as customary for steamers at port of discharge," is in effect an open charter-party under which it is the right of the ship and the duty of the consignee to have the cargo discharged with reasonable despatch. The giving of reasonable despatch is a requirement which the consignee is bound to satisfy *de die in diem*. He cannot by working *extra hard* on one day, entitle himself to idle on another day, and if he has done more than an average quantity at the beginning of the discharge, he cannot on that account relax the measure of reasonable diligence towards the end.

ABERDEEN GLEN LINE STEAMSHIP CO. v. MACKEN, THE STEAMSHIP "GATHLOCH," [1899] 2 Ir. R. 1—C. A.

**(b) Colliery Guarantee.**

**172 Arbitration Clause—Incorporation into Charter-party—Claim by Shipowner for Demurrage—Stay of Action.**—A charter-party provided that a ship should proceed to a named port, and there load in the usual and customary manner a full and complete cargo of Ferriale coal, as ordered by charterers, which they bind themselves to ship subject to colliery guarantee . . . The vessel to be loaded as customary, but subject in all respects to the colliery guarantee. The colliery guarantee provided that any question arising under the guarantee should be referred to arbitration. The ship-owners commenced an action against the charterers for demurrage at the port of loading.

**Demurrage—Continued.**

HELD—that the arbitration clause in the colliery guarantee was incorporated into the charter-party, and that the action must be stayed.

WEIR & Co. v. PIRIE & Co. (No. 1), (1898) 3 [Com. Cas 263—C.A.]

173. "*Colliery Working Day*"—A charter-party provided that a ship should proceed to a named port and there load "in the usual and customary manner always afloat in days to be arranged colliery working days, as per colliery guarantee form," a cargo of coal. The colliery guarantee provided for the loading of the ship in fifteen days, and contained certain exceptions as to time, which were "not to be computed as part of the aforesaid loading time, unless used," including holidays, time from 5 p.m. on Saturday until 7 a.m. on Monday, and any time lost through strikes causing a stoppage at the colliery. The colliery guarantee also provided that "for the purposes of this guarantee all holidays and full-day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding and to end at 7 a.m. the working day following such holiday or stoppage"; and that demurrage, if any, was to be at certain specified rates per day, "demurrage to be in accordance with the above scale payable per colliery working day, or in proportion for any part of a day, which for the purpose of computation shall be divisible in twenty-four parts." The parties had agreed that demurrage at the port of loading should be payable at a certain rate other than that specified in the scale in the colliery guarantee. In an action by the ship-owners claiming demurrage at the port of loading:—

HELD, affirming the judgment of Bigham, J. (3 Com Cas 280)—that in computing the time for which demurrage was payable, the time after 5 p.m. on the days preceding, and the time before 7 a.m. on the days succeeding, Sundays and holidays did not count.

CLINK v. HICKIE, BORMAN & Co., (1899) 15 [T. L. R. 408; 4 Com. Cas. 292—C. A.]

Overruled by *Saxon Ship Co., Ltd. v. Union Steamship Co., Ltd.*, *infra*.

174. "*Colliery Working Day*"—*Exceptions—Strike—Contract of Sale—Breach—Time for Delivery—Measure of Damages.*—The defendants chartered the plaintiffs' ship to load a cargo of coal. The charter-party provided that the ship should proceed to a named dock and there load a cargo of coal in twelve clear working days (Sundays and holidays excepted) "subject to the conditions of the colliery guarantee," "demurrage at loading port as per colliery guarantee." The colliery guarantee provided for the loading of the ship in twelve days, and contained certain exceptions as to time, which were "not to be computed as part of the aforesaid loading time, unless used," including all holidays whereby work was suspended at the docks or colliery, time from 5 p.m. on Saturday until 7 a.m. on Monday, and any time lost through

strikes causing a stoppage of the colliery. The colliery guarantee also provided that "for the purpose of this guarantee all holidays and full-day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding, and to end at 7 a.m. the working day following such holiday or stoppage"; and that demurrage, if any, was to be at certain specified rates per day, varying in proportion to the tonnage of the vessel, "demurrage to be in accordance with the above scale payable per colliery working day." The ship proceeded to the port named. The lay days commenced on March 16th, and expired on March 31st. On April 9th a strike commenced at the colliery. The ship remained at the port. On May 24th, the strike continuing, the colliery company gave notice that they could not load the ship, which notice was, on May 26th, communicated to the plaintiffs. They, with reasonable dispatch, obtained another charter-party, and the ship left the port on June 17th.

HELD—that "colliery working day" meant a day which was an ordinary working day at the colliery in normal circumstances, although no work might, in fact, have been done at the colliery on such day; that the exception as to time lost through strikes only applied to the lay days, and not to the time when the ship was on demurrage; that the shipowners were justified in keeping the ship at the port after the strike commenced, and were entitled to demurrage for every day, from March 31st up to June 17th, excluding Sundays and holidays.

HELD, ALSO—that in calculating the period of demurrage no account was to be taken of the conventional extension of Sundays and holidays, and that the demurrage period included the time from 5 p.m. to midnight before, and from midnight to 7 a.m. after, Sundays and holidays.

*Clink v. Hickie, Borman & Co.* (15 T. L. R. 408, 4 Com. Cas. 292—C. A., No. 173, *supra*) overruled.

Judgment of C. A. ((1899) 68 L. J. Q. B. 914; 81 L. T. 246; 15 T. L. R. 477; 4 Com. Cas. 298; 8 Asp. M. C. 574) reversed.

SAXON SHIP CO., LD. v. UNION STEAMSHIP CO., [LD., (1900) 69 L. J. Q. B. 907; 83 L. T. 107; 16 T. L. R. 527; 5 Com. Cas. 381; 9 Asp. M. C. 114—H. L. (E.).]

175. *Loading Time "on Terms of usual Colliery Guarantee"—Port of Grimsby—Demurrage—Exceptions—Strike*—A charter-party provided that a ship should proceed to Grimsby, and there load "in the usual manner according to the custom of the place" a cargo of coals, "the loading time to be thirty-six running hours on terms of usual colliery guarantee." The charter-party contained the following, amongst other exceptions:—"Commotion by keelmen, pitmen, or any hands striking work, . . . or other acts or causes beyond the freighter's control which may prevent or delay" the loading of the ship. The ship was in dock at Grimsby, and ready to load on July 19th. By reason of the Welsh coal strike there was at that date an accumulation of shipping at Grimsby, and the ship was thereby prevented from getting a berth under a coal

**Demurrage—Continued.**

tip until July 29th, after which date the loading proceeded without further delay. In an action by the shipowners claiming demurrage—

**HELD**—that the charterers were not protected from liability for demurrage by the exceptions in the charter-party, but that, by the provisions of "the usual colliery guarantee" in use at Grimsby, the time for loading did not begin to run until the ship was under the tip, and that the charterers were, therefore, not liable for demurrage.

Judgment of Bigham, J. (4 Com. Cas. 80), affirmed.

**SHARROCK STEAMSHIP CO., LD. v. STORRY & CO.** (1899) 81 L. T. 413, 16 T. L. R. 6, 5 Com. Cas. 21; 8 Asp. M. C. 590—C. A.

**(c) Commencement of Lay Days.**

**176. Charterer using with Reasonable Diligence the Usual and Available Means for Loading.—Commencement of Charterer's Obligation to Load.**—The plaintiffs, who were the chartered owners of the steamship *Heatha* claimed from the defendant, who was a shipper of stone at Newlyn, demurrage under a sub-charter. The material clauses of the charter-party were as follows:—"The cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours (Sundays and holidays excepted). The time for loading and discharging to count from the time the ship arrives at the loading and discharging ports respectively in usual working hours." The plaintiffs had brought the steamship to the port of loading with all reasonable despatch. The vessel on her arrival found the only available berth occupied by another steamer, and the only available quay space occupied by stone which was being put into the other steamer. The carts usually employed to bring stone from the quaires to the quay were for the time largely employed in the fishing trade. The defendant did all he could to get every available cart, and placed the berth at the disposal of the ship as soon as he could.

**HELD**—that the charterer had used with reasonable diligence the usual and available means for loading and thus had discharged the whole obligation upon him. That the obligation of the charterer to load did not commence until it was possible to load; and that there must be judgment for the defendant.

Decision of Bigham, J. (1902) 18 T. L. R. 185 affirmed.

**TEMPLE, THOMSON, AND CLARKE v. RUNNALLS,** [(1908) 15 T. L. R. 822—C. A.]

**177. Place of Loading—Port—Arrived Ship—Implied right to Name Berth.**—Where under a charter-party a ship has to proceed to and load or deliver at a named place, which is an area larger than a berth, in some part or in several parts of which the ship can discharge, the lay days commence as soon as the shipowner has placed the ship at the disposal of the charterer in that named place as a ship ready so far as

she is concerned to load or discharge, notwithstanding that the charterer has not named, or has been unable to name, a berth at which, in fact, the discharge can take place. The words "usual place of discharge" in a port mean the commercial ambit of the port as distinguished from the whole port in its geographical or maritime sense. Where, however, the charterer is entitled by express words in the charter-party to name a berth for the discharge the lay days do not begin to run until the ship has reached the berth named by him.

*Pyman v. Dreyfus* ((1889) 24 Q. B. D. 152; 59 L. J. Q. B. 13; 61 L. T. 724; 38 W. R. 447; 6 Asp. M. C. 444—Div. Ct.) followed.

Decision of Channell, J. ([1907] 1 K. B. 344, 76 L. J. K. B. 342, 96 L. T. 158, 23 T. L. R. 215; 12 Com. Cas. 173; 10 Asp. M. C. 398) reversed.

**LEONIS STEAMSHIP CO., LD. v. JOSEPH RANK,** [L.D., (1907) 21 T. L. R. 128—C. A.]

**178. Ship to Proceed to a Port, "to a Loading Place as Ordered"—Order to Ship to go to Particular Loading Berth at the Port.**—A charter-party made between the plaintiffs and the defendants provided that the plaintiffs' steamship was to proceed to Santander excluding San Salvador old tip "to a loading place as ordered" and there take on board a full and complete cargo. The merchants were to be allowed one working day for loading every 100 tons of cargo. The period for loading was "not to commence . . . until after a true written notice has been given . . . that the vessel is wholly unballasted . . . and in every other respect ready to load . . . and that she has been duly entered inwards at the Custom House, and is in free pratique." It was also provided that the charterers were to be advised of the steamer's departure from the last port within twenty-four hours of sailing for Santander in proceeding direct; or should the steamer take outward cargo to a port on the way the captain to telegraph from such port to the shippers at Santander the probable date the steamer would be there ready to load, and further, if she should not have arrived at Santander and be ready to load within twenty-seven days of the date of the charter-party, the charterers were to have the option of cancelling the charter-party. The ship arrived at Santander on November 18th, and notice under the charter-party or free pratique was given on November 19th, but in consequence of having by the custom of the port of Santander, to wait her turn until a berth was ready for her, the ship did not arrive at the loading berth to which she was ordered till December 7th, 1900.

**HELD**—that the lay days began to run from the time she reached the loading berth to which she was ordered and not from the time notice of free pratique was given, inasmuch as the place described in the charter-party as that at which she would be arrived for the purpose of being at the charterer's disposal was not merely the port of Santander, but the port of Santander and the loading place at that port, as ordered.

**MODESTO PINERO & CO. v. DUPRE,** (1902) 86 [L. T. 569, 18 T. L. R. 371, 7 Com. Cas. 105; 9 Asp. M. C. 297—Kennedy, J.]

**Demurrage—Continued.**

**179. Termination of Voyage—Delivery of Cargo at Named Wharf—Wharf under Control of Purchasers of Cargo—Responsibility for Delay in Delivery—Dispatch Money.]**—The plaintiffs' steamship was chartered to the defendants, who sold a cargo *ex ship*, R. Dock. The purchasers of the cargo were lessees of a wharf in the R. Dock, and had sole control over the wharf and the berthing of vessels there. The charter-party provided that the vessel should proceed to the purchasers' wharf, and there deliver her cargo. "Time for discharge to count from 6 a.m. after ship is in every respect ready in berth." The vessel arrived in the R. Dock on February 8th, and was then ready to discharge. Other vessels, which arrived at the dock after the plaintiffs' vessel, were given preference to suit the business arrangements of the purchasers, who did not give the plaintiffs' vessel a berth until February 14th.

By a contract between the charterers and the purchasers the cargo was to be discharged at the rate of 300 tons per working day, from the time when the ship was ready to discharge, otherwise the purchasers were to pay demurrage as per charter-party.

**HELD**—that the lay days did not begin to run until 6 a.m. on February 15th, and that the charterers were not responsible for the delay in getting into berth, though they did not insist on their rights under their contract with the purchasers.

Judgment of Mathew, J. ((1899) 4 Com. Cas 335) affirmed.

**WATSON v. H. BORNER & Co., LD.**, (1900) 16 [T. L. R. 524; 5 Com. Cas 377—C. A.]

**180. To Load as Customary always Afloat—At such Wharf as Charterer's Agent may Direct—Insufficient Water to Complete Loading at Wharf—Obstacles to Loading caused by Charterers, or their Engagements.]**—Where a ship-owner agrees to load at such wharf, jetty, or anchorage as the charterer's agent may direct, the effect is the same as if the jetty or anchorage had been named in the charter party.

**Tharsis Copper Co. v. Morel** [(1891) 2 Q. B. 647, 61 L. J. Q. B. 11; 40 W. R. 58; 65 L. T. 659, 7 Asp. M. C. 106—C. A.] followed.

To load as customary always afloat merely negatives the charterer's right to put cargo on board except at such times as the vessel is afloat.

**Carlton Steamship Co. v. Castle Mail Packets Co.** ((1898) A. C. 486; 67 L. J. Q. B. 795; 47 W. R. 65; 78 L. T. 661—H. L., *see* No. 54, *supra*) followed.

If a ship is prevented from reaching the named jetty in consequence of other engagements of the charterer the lay days begin to run as soon as the ship is (apart from berthing) ready to load.

A vessel was to proceed to B. and there load as customary always afloat at such wharf, jetty, or anchorage as the charterer's agent might direct. She drew too much water to load fully at the

jetty at B., but it would not have been unusual for her to partly load there and complete loading at an anchorage.

On May 27th she was lying at a buoy ready to load, and on the 28th she was ordered to the jetty; it proved, however, that all four berths were occupied, three of them by vessels belonging to and being loaded by the charterers.

**HELD**—that the lay days began to run from the 28th, as she was prevented from loading by obstacles put in her way by the charterers.

But, that some deduction must be made because the master subsequently refused to go alongside the jetty when it was available for an interval, and so prolonged the loading.

**AKTIESELSKABET INGLEWOOD AND MILLAR'S** [KARRI v. JABRAH FORESTS, LD., (1903) 88 L. T. 559; 19 T. L. R. 403; 8 Com. Cas. 196; 9 Asp. M. C. 411—Kennedy, J.]

**(d) Computation of Time.**

**181 Fraction of Day—Sundays—Taking in Ballast.]**—A ship was chartered to carry a cargo of coals from Cardiff to Algoa Bay, and by the charter-party the cargo was "to be received from alongside according to the custom and law of the port of destination, free of expense and risk to the ship, at the average rate of not less than 120 tons per weather working day, Sundays and holidays excepted, time to count twenty-four hours after arrival in Algoa Bay, and captain's notification to charterers agents that vessel is ready to deliver; demurrage (if any) to be paid at the rate of 4*d.* per net registered ton per running day." The lay days commenced on November 19th, and the time for discharging the cargo at the rate of 120 tons per weather working day was twenty-nine days, leaving 3 tons to be discharged on the thirtieth day. The thirty-five days from November 19th to December 23rd were weather working days, but five of them were Sundays. On two of the Sundays cargo was discharged, the consignees paying the extra expense. On four of the days as the cargo was discharged the ship took in ballast, which was necessary for the safety of ship and cargo, and this delayed the discharge.

**HELD**—(1) that the charterers had thirty whole lay days for unloading the cargo; (2) that the Sundays on which work was done must not be counted as lay days; and (3) that the days on which the ship was taking in ballast must be counted as lay days, the taking in ballast not being a breach of any obligation on the part of the shipowners, but merely the performance of a necessary operation.

**Yeoman v. R.** [(1904) 2 K. B. 429; 73 L. J. K. B. 905; 52 W. R. 627; 20 T. L. R. 524; 9 Com. Cas. 269—C. A., No. 183, *infra*] distinguished.

**HOULDER v. WEIR**, [1905] 2 K. B. 267; 74 [L. J. K. B. 729; 92 L. T. 861; 21 T. L. R. 503; 10 Com. Cas. 228; 10 Asp. M. C. 81—Channell, J.]

**182. London Corn Trade Association Contract—Construction.]**—A charter-party incorporated

**Demurrage—Continued.**

the London Corn Trade Association Contract, which contains the following provision as to lay days:—"One running day for every 400 tons up to 2,800 tons of grain, and for all quantities in excess 500 tons per day."

**HELD**—that, upon the true construction of this clause, whatever might be the size of the vessel, one day was to be allowed for every 400 tons up to 2,800, and one day for every 500 tons above that figure; and that, therefore, with a cargo of 3,800 tons nine (*i.e.*, 7 + 2 days) must be allowed.

Decision of Walton, J. (89 L. T. 507, 20 T. L. R. 37, 9 Com. Cas. 83) affirmed.

**TURNER, BRIGHTMAN & Co. v. BANNATYNE & Sons, Ltd.**, (1904) 20 T. L. R. 782, 9 Asp. M. C. 495, 91 L. T. 618, 9 Com. Cas. 306; 10 Asp. M. C. 1—C. A.

**183 Part of a Day.**—By a charter-party, the cargo on board a ship was to be "discharged at the average rate of not less than 210 tons per working day, weather permitting, the time to commence in accordance with the custom of the port, Sundays and all holidays, and time lost through strikes or lock-outs of workmen, accident, frosts, floods, rains, winds, rollers, or any cause whatever beyond the control of the consignee of the cargo not to count as discharging time." By the next clause, "demurrage to be paid at the rate of 4*d* per net register ton per day, and *pro rata* employed beyond the time allowed for discharging." The average rate of 210 tons per working day worked out at 11½ days. The discharge took longer, and the ship-owners claimed demurrage after the 11½ days. The charterers contended that part of a day could not be counted, and that as they had rightfully broken into the twelfth day they were entitled to the whole of that day for discharging.

**HELD**—that portions of a day must be taken into account, and that the shipowners were entitled to demurrage after the 11½ days.

**YEOMAN v. THE KING**, [1904] 2 K. B. 429; 73 [L. J. K. B. 905, 52 W. R. 627; 20 T. L. R. 524; 9 Com. Cas. 269—C. A.

**184. Time to Count from the Time "when Ship is in every respect ready in Berth, but Berth guaranteed within Twenty-four Hours or Time to count"—Bye-law of Dock.**—Where a charter-party contained a clause that the time for discharging was to count from the time "when ship is in every respect ready in berth, but berth guaranteed within twenty-four hours or time to count," and where by a byelaw of the dock no one consignee was allowed to have more than three vessels in dock at the same time.—

**HELD**—that between the owners of the vessel and the charterers the latter were not responsible for the delay occasioned by the postponement of the discharge of the owners' vessel in consequence of there being three vessels belonging to the con-

signees of the charterers already berthed in the dock.

**THE DEERHOUND**, (1901) 49 W. R. 511; 84 [L. T. 360, 17 T. L. R. 328; 6 Com. Cas. 104; 9 Asp. M. C. 189—Barnes, J.

**185. "Working Day."**—By the terms of a charter-party a vessel was to be loaded in nine "working days," and to be discharged "*per* like working day . . . to count from 6 a.m. after the ship is . . . ready. . . . To work day and night if required to do so" at port of discharge.

**HELD**—that a "working day" at the port of loading was one of twelve (and not twenty-four) hours from 6 a.m., and that, therefore, demurrage began to run at 6 p.m. on the last of the lay days

**MEIN v. OTTMAN**, (1904) 6 F. 276—Ct. of Sess

**186. "Working Day of Twenty-four Consecutive Hours."**—A "working day of twenty-four consecutive hours" means a period of twenty-four actually consecutive hours, including the hours of night.

**Forest Co. v Iberian Ore Co** ((1899) 16 T. L. R. 59—C. A., *infra*) distinguished.

**TURNBULL, SCOTT & Co v. CRUICKSHANK & Co.**, (1905) 7 F. 265—Ct of Sess.

**187. "Working Day of Twenty-four Hours."**—A charter-party provided that the charterers were "to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . same to count from 6 a.m. of the day following the day when steamer is reported at the Custom House, unless she be reported before noon, in which case time to count from notice of readiness, and in every respect ready to load or discharge respectively in free pratique. Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used."

**HELD**—that the charterers were entitled to twenty-four working hours for the loading or discharging of each 350 tons.

Judgment of C. A. ((1898) 79 L. T. 240; 14 T. L. R. 560, 3 Com. Cas. 316, 8 Asp. M. C. 438) affirmed.

**FOREST STEAMSHIP CO. v. IBERIAN IRON ORE Co.**, (1900) 81 L. T. 563; 16 T. L. R. 59; 5 Com. Cas. 83, 9 Asp. M. C. 1—H. L. (E.)

**(e) Custom of Port.**

**188 Charterer's Obligation to have Cargo ready—Ship kept waiting for a Loading Order—Liability of Charterers.**—The defendants chartered a vessel from the plaintiffs to proceed to N., and there load a cargo of coal from a specified colliery. There were a number of vessels waiting for coals from this colliery, and the chartered vessel had to wait her turn for a loading order.

Both parties knew the practice of the port, and the defendants did not act unreasonably in refusing to name another colliery.

**Demurrage—Continued.**

**HELD**—that the charterers were not liable for the delay; and that they had fulfilled their obligation to have a cargo ready for the vessel, when they got a loading order in her proper turn from the colliery, although the charter-party contained no provision as to regular turn.

*Little v. Stevenson* ([1896] A. C. 108; 65 L. J. P. C. 69; 74 L. T. 529—H. L.) followed.

*Grant v. Coverdale* ((1884) 9 App. Cas. 470; 53 L. J. Q. B. 462; 32 W. R. 831; 51 L. T. 472, 5 Asp. M. C. 353—H. L.) distinguished.

*JONES v. GREEN & Co.*, [1904] 2 K. B. 275; 73 [L. J. K. B. 601; 90 L. T. 768; 9 Com. Cas. 275; 9 Asp. M. C. 600—C. A.

**189** "*Customary Steamer Dispatch of the Port*"—*Interpretation*—*Custom to Discharge a Certain Quantity per Day*—A charter-party contained a provision that the cargo should be discharged "with the customary steamer dispatch of the port." Upon a claim for demurrage—

**HELD**—that these words meant that the cargo was to be discharged with all reasonable dispatch under the circumstances existing at the time when she came to the port, and with the use of the appliances and methods of and facilities for discharge usually employed at the port.

The same charter-party contained also a clause that "the usual custom of the wood trade of each port is to be observed in cases where not specially expressed"; and the cargo owners, who had unloaded at the rate of 97 standards per weather working day, sought to set up a "customary rate of discharge" of 90 standards.

**HELD**—that such custom, if proved, would be unreasonable and bad, as contravening the construction of the charter-party laid down above.

*SEA STEAMSHIP CO., LD. v. PRICE, WALKER & [Co., LD.]*, (1903) 19 T. L. R. 519; 8 Com. Cas. 292—Kennedy, J.

**190.** *Delay in Procuring a Discharging Berth—Harbour Regulations—Liability of Charterers for Delay—Cargo to be Delivered "as Customary, where and as Directed by Consignee."*—Under a charter-party the defendants, in fulfilment of a contract for the sale of Spanish ore, shipped a cargo of ore on board a steamship, to be delivered at Maryport, as customary, where and as directed by consignee. At Maryport, by the harbour regulations, consignees having one vessel already discharging for them cannot have another vessel berthed to discharge for them if a vessel of any other consignee is awaiting a berth. The defendants, on the arrival of the ship, had four other vessels chartered by them, with cargoes of ore for the same purchasers, who were treated by the harbour authorities as the consignees, awaiting a berth, and many vessels for other consignees were also awaiting. The ship was consequently unable to get a berth for twenty days after arrival.

**HELD**—that the delay was not the fault of the charterers, and that where, under such a

charter-party, the delay complained of is such as ought to have been in the contemplation of both parties at the time of the contract, the shipowner has no cause of action against the charterer.

*HARROWING AND OTHERS v. DUPRE*, (1902) 18 [T. L. R. 594; 7 Com. Cas. 157—Bigham, J.

**191.** "*Discharge Afloat according to the Customs at the Port of Discharge*"—*Discharge by Dock Company—Delay—Liability of Consignee.*—Where, under a charter-party a vessel is to "discharge afloat according to the customs at the port of discharge," and no time is fixed for the discharge, and the whole work of discharge is, in accordance with the practice of the port, put into the hands of a dock company, the charterers are not liable for delay caused by the negligence of the dock company.

*WEIR & Co. v. RICHARDSON*, (1898) 3 Com. [Cas 21; 14 T. L. R. 80—Bigham, J.

**192.** *Discharging Subject to Lien—Time when such Discharge can take place—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 493, 494.*—A charter-party provided for the discharge of a vessel to be "in the manner and at the rate customary at each port during the customary working hours, and if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day."

The consignees had not secured a berth; and on the ship's arrival all usual berths were occupied. After eight days she began discharging at an unusual place.

**HELD**—that the consignees were liable for the delay, but only in nominal damages, since in fact it was proved that they could not have secured a berth had they tried.

After the discharge had commenced, the ship-owners refused to continue it unless the freight was paid, as under the circumstances it appeared to be uncertain who was to pay it; after a further delay they landed the cargo, subject to a lien under the provisions of sect 493, 494, of the Merchant Shipping Act, 1894.

**HELD**—that they had acted reasonably in not at once landing the cargo, subject to a lien, and were entitled to demurrage.

Channell, J., had ruled that until it was clear that the ship could not be discharged in the customary manner within the time allowed, the shipowner could not insist on landing the cargo, under the Merchant Shipping Act, 1894, sects. 493, 494, subject to a lien.

On this point the C. A. expressed no opinion.

Decision of Channell, J. (54 W. R. 471; 91 L. T. 492; 11 Com. Cas 74; 10 Asp. M. C. 225) varied.

*SMILES & SON v. HANS DESSEN & Co.*, (1907) [95 L. T. 809; 12 Com. Cas. 117; 10 Asp. M. C. 319—C. A.

**193.** *Rate of Discharge of Grain Cargoes—Bristol.*—There is no binding custom at the port of Bristol by which a shipowner is precluded

**Demurrage—Continued.**

from requiring a merchant to take delivery of grain cargoes at a greater rate than 500 tons per day.

A custom to discharge at a certain rate will become unreasonable if circumstances alter greatly, and if it still purports to apply to those altered circumstances.

No number of agreements to discharge at a certain rate can create a custom binding on an owner whose steamer is able to discharge at a substantially greater rate than those previously using the port.

A practice of contracting out of a custom may become so general as to destroy it altogether.

*Sea Steamship Co v. Price, Walker & Co.* (1903) 8 Com. Cas. 297—Kennedy, J., No. 189, *supra* followed.

*ROPNER & Co v. STOATE, HOSGOOD & Co.*, [1905] 92 L. T. 328; 21 T. L. R. 245; 10 Com. Cas. 73; 10 Asp. M. C. 32—Channell, J.

**194** "*With all Dispatch as Customary*"—*Insufficient Supply of Railway Trucks—Liability of Charterers Damage for Detention at Discharging Port during Exercise of Lien*—A charter-party provided that the ship should be discharged "with all dispatch as customary." By the custom of the port of discharge cargoes were discharged into railway waggons. Any waggons could be employed, but it was customary to contract with some one railway company for their supply. The defendants, the indorsees of the bill of lading, which incorporated the charter-party, in order to take delivery of the cargo, entered into an arrangement with a railway company for the carriage of the cargo in the company's waggons from the ship's side to a depot. Owing to a press of work the railway company did not supply sufficient waggons, and the discharge of the ship was thereby delayed.

**HELD**—that the defendants having followed the customary method of taking delivery were not liable to pay damages for the detention of the ship.

The charter-party provided that the cargo should be loaded in a fixed number of lay-days, with demurrage at a certain rate over and above such lay-days; and that the ship should have a lien on the cargo for demurrage. In the course of the loading demurrage was incurred. Whilst the discharge was proceeding the plaintiffs, the shipowners, exercised their lien for this demurrage during four days, upon which no cargo was discharged.

**HELD**—that the plaintiffs were justified in exercising the lien; that by stopping the discharge they exercised it in a reasonable manner; and that they were entitled to recover damages from the defendants for detention of the ship during the four days.

Judgment of Bigham, J. (1900) 69 L. J. Q. B. 93; 81 L. T. 642; 16 T. L. R. 66; 5 Com. Cas. 87; 9 Asp. M. C. 23 affirmed.

*LYLE SHIPPING CO., LD. v. CARDIFF CORPORATION*, [1900] 2 Q. B. 638; 69 L. J. Q. B. 889; 49 W. R. 85; 83 L. T. 329; 16 T. L. R. 536; 5 Com. Cas. 397; 9 Asp. M. C. 128—C. A.

**195** "*With Customary Steamship Dispatch, as fast as the Steamer can Deliver . . . according to the Custom of the Port*"—*Part of London—Delay caused by crowded state of Dock and want of Lighters.*—It is well established that to make a charterer unconditionally liable for demurrage it is not enough to stipulate that the cargo is to be discharged "with all dispatch," or "as fast as steamer can deliver," or to use some other general expression of the kind.

A charter-party provided that a steamship should load a timber cargo and proceed therewith to London and there deliver it, the cargo to be discharged "with customary steamship dispatch, as fast as the steamer can deliver during the ordinary working hours of the respective ports, but according to the custom of the port." The ship arrived at Gravesend, and was ordered by the defendants, the indorsees of the bill of lading which incorporated the charter-party, to discharge in the Surrey Commercial Dock. Owing to the crowded state of the dock some time elapsed before the ship could enter the dock, and, after entering, before she could obtain a berth alongside the quay. It was impossible at the time to obtain lighters, and the ship could not have been discharged any sooner if she had been sent to discharge at any other place within the port. The customary method of discharge in the port of London with regard to timber cargoes is to discharge them into lighters or on to the quay.

It was found as a fact the defendants used all reasonable means to procure the discharge of the vessel as quickly as possible.

**HELD**—that the defendants were not liable for demurrage, upon the terms of the charter-party they had not undertaken unconditionally to unload within a fixed limit of time.

Decision of C. A. ([1902] 2 K. B. 199; 71 L. J. K. B. 624; 50 W. R. 538; 86 L. T. 397; 18 T. L. R. 429; 7 Com. Cas. 139), affirming Phillimore, J. ((1901) 17 T. L. R. 283; 6 Com. Cas. 65) affirmed.

*HULTHEN v. STEWART & Co.*, [1903] A. C. 389; [72 L. J. K. B. 917; 88 L. T. 702; 19 T. L. R. 513; 8 Com. Cas. 297—H. L. (E.)

**196** "*With all Dispatch as fast as Steamer can Deliver, as Customary*"—*Alternative Methods of Discharge—Duty of Charterers—Damages for Detention*—A charter-party provided that a cargo of Danzig oak logs should be discharged at Millwall Dock "with all dispatch as fast as steamer can deliver, as customary." The more usual way at that dock is to discharge such a cargo into trucks known as bolster trucks, but it was practicable to discharge into lighters. No trucks were obtainable, but lighters could have been got.

**HELD**—that under the charter-party the defendants, indorsees of a bill of lading, which incorporated the charter-party, were bound to use reasonable care to provide for the discharge, and as they did not exhaust all available means to effect the discharge they were liable to demurrage.

*RODENACKER v. MAY & HASSELL, LD.*, (1901) [6 Com. Cas. 37—Mathew, J.



**Demurrage—Continued.**

197. "*With Customary Steamship Dispatch, as fast as the Steamer can Receive, but according to the Custom of the Port*"—*Alleged Custom excluded by Charter-party.*—The defendants were the charterers of the steamship *Mercia* from Onega, in the White Sea, to Lynn. By the charter-party, which was in the Chamber of Shipping White Sea Wood Charter to the United Kingdom, 1899 form, it was provided as follows:—"Clause 3.—The cargo is to be loaded . . . with customary steamship despatch, as fast as the steamer can receive . . . during the ordinary working hours . . . but according to the custom of the port." By a marginal memorandum it was provided—"Owners may arrange for a fixed number of standards per day for loading <sup>and</sup> <sub>or</sub> discharging." The plaintiffs claimed to recover freight and demurrage at the port of loading.

HELD—that a custom had not been proved that 50 standards were to be treated as an average amount, satisfying under the charter-party both the ship and the shippers; that, if such a custom had been proved, it was excluded by the charter-party, being contrary to the words "as fast as the steamer can receive . . . but according to the custom of the port"; that by the undisputed usage in this particular place, the shipper undertook to supply men to load the timber: that the shipper could have supplied two gangs of men and had only supplied one, and for this failure he was responsible; that the shipper was liable for not working two batches, and that there must be judgment for the plaintiffs.

METCALFE, SIMPSON & Co. v. THOMPSON, PAT-  
[TRICK & WOODWARK, (1902) 18 T. L. R. 706  
—Kennedy, J.]

**(f) Excepted Days.**

198. *Sundays and Holidays Excepted—Loading on Sunday and Holiday—Shifting from Port to Port—Charterer to Pay "Port Charges"—Pilotage Dues.*—By a clause in a charter-party the charterers had the option of using additional neighbouring loading ports, paying all "port charges."

HELD—that pilotage dues did not come within the words "port charges," and, therefore, were not payable by the charterers.

By the charter-party the charterers were allowed thirteen running days, Sundays and holidays excepted, for loading cargo.

HELD—that from the fact that loading was proceeded with on a Sunday and also on a holiday, the inference was that the parties agreed to treat both the Sunday and the holiday as lay days.

The charterers had also the option of shifting from one port to another, the time so spent to be included in the lay days.

HELD—that a Sunday or holiday so spent was to be counted.

WHITTALL & Co. v. RAHTKEN'S SHIPPING CO.,  
[LD., [1907] 1 K. B. 783; 76 L. J. K. B. 538;  
96 L. T. 885; 23 T. L. R. 346; 12 Com. Cas.  
226—Bray, J.]

199. *"Sundays and Holidays Excepted"—Loading on Excepted Days—Excepted Days Counting as Working Days—Dispatch Money—"Days Saved in Loading"—Two-weekly Service—Failure to Maintain.*—A charter-party contained the following provisions: "The service . . . is, subject as hereinafter provided, to be a two-weekly one . . . having the sailings at intervals of fourteen days . . . and to last for one year" "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading," and for any time beyond that period the charterers to pay demurrage at the rate of £40 per day, and "for each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of £20." The charterers loaded on two days which were holidays. There was no express agreement between the shipowners and the charterers as to whether those days were to be treated as working days, and there was no evidence on whose suggestion or on what terms the work was done.

HELD, by Channell, J.—that the service was to be approximately a two-weekly one, and that a slight delay would only be a ground for damages.

HELD, by Vaughan Williams and Buckley, L.J.J. (Fletcher Moulton, L.J., dissenting)—that the proper inference was that the parties agreed to treat the holidays upon which loading was done as working days.

By loading within the lay days the charterers enabled the ship to sail two days earlier than the date to which she might have been kept without paying demurrage, but one of those days was a Sunday or a holiday.

HELD, by Vaughan Williams and Buckley, L.J.J. (Fletcher Moulton, L.J., dissenting)—that the Sunday or holiday was not a day "saved in, loading" within the meaning of the charter-party.

*Whittall & Co. v. Rahtken's Shipping Co., supra*, and the *Glendon* ([1893] P. 269; 62 L. J. P. 123—Div. Ct.) followed.

Decision of Channell, J. (76 L. J. K. B. 531; 12 Com. Cas. 185) affirmed.

JAMES NELSON & SONS, LD. v. NELSON LINE  
[(LIVERPOOL), LD. (No. 3), [1907] 2 K. B.  
705; 23 T. L. R. 656—C. A.]

**(g) Exception of Strikes, &c.**

200. *"As fast as the Steamer can"—Landing Goods on Quay—Overside Discharge—Position of Vessel—Scarcity of Lighters.*—Action for twenty-three days demurrage for the detention of a steamship at her port of discharge, the Surrey Commercial Docks.

A clause of the charter-party provided:—"The cargo to be . . . discharged with the customary steamship despatch as fast as the steamer can . . . deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." Another clause provided:—"If the cargo cannot be . . . discharged by reason of a strike or lock-out of any class of workmen essential to the . . . discharge of the cargo . . . the time

**Demurrage—Continued.**

for . . . discharging shall not count during the continuance of such strike or lock-out." The vessel came into port when great pressure existed in regard to the discharge of timber cargoes on account of the glut in the timber trade, the result of which was to make the obtaining of lighters a matter of extreme difficulty. There also existed a strike which, if not universal, was of a general character, and had the effect of seriously dislocating trade arrangements. The difficulty of obtaining lighters was further increased owing to the action of the dock company in laying their hands on all barges they could find, so that 500 lighters were withdrawn from general use. The cargo was landed on the quay. Two methods of discharging cargo were customary at the dock—(1) landing goods on the quay by the consignee, (2) discharging into lighters supplied by the merchants, known as overside discharge.

**HELD**—that the position which the vessel occupied alongside the quay was not such as to enable her to discharge her cargo, that there was no custom to supply lighters on the part of the dock company, and that no dereliction of a reasonable duty had been established; that it was not practicable for the merchants to obtain lighters, and it would have been useless for them to attempt to discharge the vessel by those means, and consequently there had been no breach of duty on the part of the defendants or to the user of the alternative method.

REID v. LEE & SONS AND OTHERS, (1901) 17 T. L. R. 771—Kennedy, J.

**201. Delay in Discharge up to Time of Strike—Strike Preventing or Delaying the Discharge—Strike Intervening before Time of Discharging Expired—Bill of Lading Incorporating Charter-party.**—By a charter-party cargo was to be discharged at the average rate of 500 tons per day, but, "in any case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage." Before the lay days had expired a strike occurred which delayed the discharge. Owing to the default of the charterer, who was also the consignee, the cargo had not been discharged at the stipulated rate up to the time of the strike, with the result that the discharge could not have been completed within the time allowed, even if there had been no strike. In an action to recover demurrage.—

**HELD**—that, as the charterer by his conduct had made it impossible to discharge within the time allowed, he was not entitled to rely upon the strike as an answer to the claim, and that the charterer was liable to pay demurrage in respect of the time actually occupied in the discharge beyond the time which would have been occupied if he had not made default in discharging before the strike took place.

BLISWICK STEAMSHIP CO. v. MONTALDI, [1907] 1 K. B. 626; 76 L. J. K. B. 672, 96 L. T. 245; 23 T. L. R. 322; 12 Com. Cas. 240—Bigham, J.

**202. "General Strikes of Lightermen"—"Preventing" the Discharge—Class of Lightermen.**—An exception in a charter-party of "general strikes of lightermen" preventing the discharge of the cargo means a general strike among the lightermen engaged in a particular class of lightering, e.g., timber lightering, although there may not be a strike of all the lightermen, e.g., coal lightermen. Such a strike may in fact "prevent" the discharge of the cargo of timber.

Decision of Bigham, J. ((1901) 17 T. L. R. 330) affirmed.

AKTIESELSKABET SHAKESPEARE v. EKMÁN & [Co., (1902) 18 T. L. R. 605—C. A.

**203 "Time lost through Riots, Strikes, . . . or any cause beyond the control of the Charterers"—Construction—Exception of specified Holidays—Unauthorized Holiday taken by Men.**—A charter-party excluded from the loading days Easter Monday and Tuesday, and also "any time lost through riots, strikes, lock-outs, . . . or by reason of accidents, . . . storms, or any cause beyond the control of the charterers."

The men insisted upon taking a holiday on Easter Wednesday, as well as on the two preceding days.

**HELD**—that a holiday taken without the concurrence of the masters was sufficiently *ejusdem generis* with a stoppage of work owing to disputes to bring it within the exception of causes "beyond the control of the charterers"; and that, therefore, the day should be excluded.

Decision of Wright, J. ((1904) 20 T. L. R. 29) affirmed.

IN RE ALLISON & CO. AND RICHARDS, (1905) [20 T. L. R. 584—C. A.

**(h) Miscellaneous.**

**204 Additional Delay at Loading Port caused by Accident to Ship—No Default on part of the Master—Continuity of Demurrage Obligation.**—A ship was chartered to proceed to Poti to load a cargo of ore. On the arrival of the ship at Poti, she was unable, owing to the number of vessels waiting to be loaded, to obtain a quay berth before the expiration of the lay-days, and on February 24th, under the terms of the charter-party, she came on demurrage. On March 4th, while lying in Poti roads awaiting her turn for a berth, the ship was, without default on the part of the master, run into by another vessel, and sustained damage, to repair which she had to go to Constantinople. While there she lost her turn for loading at Poti. The repairs having been executed, she arrived back at Poti on April 19th, and again, owing to the presence of other vessels, had to wait for a berth until June 2nd. On June 10th the ship finished her loading.

**HELD**—that the ship was on demurrage from February 24th to March 4th, and from April 19th to June 10th.

TYNE AND BLYTH SHIPPING CO. v. LEECH, [HARRISON AND FORWOOD, [1900] 2 Q. B. 12, 69 L. J. Q. B. 353; 48 W. R. 590; 16 T. L. R. 197; 5 Com. Cas. 155—Kennedy, J.

**Demurrage—Continued.**

**205 Cargo to be Discharged "within 35 Weather Working Days"—Demurrage "except in Cases of Unavoidable Accidents, or Hindrances beyond the Consignee's Control."**—By a charter-party the cargo was to be received by the consignees "from alongside free of expense and risk to the ship according to the customs and laws at the port of destination, with customary dispatch, and within 35 weather working days after receipt by consignees of captain's written notice that he is ready to discharge. . . . Demurrage in unloading, if any, to be paid by consignees at the rate of 3d. per net registered ton per running day, except in cases of unavoidable accidents or hindrances beyond the consignees' control." The words "within 35 weather working days" were written in ink, the rest of the clause being in print. At the port of discharge the ship was prevented from unloading within 35 days by hindrances beyond the consignees' control, and was detained 52 days beyond. Upon a claim for 52 days' demurrage:—

**HELD**—that the consignees were not liable for demurrage, there being no evidence to justify the Court in deleting the words as to unavoidable accidents, for such a provision did not absolutely neutralise the contract to unload in 35 days.

Decision of Kennedy, J. ((1903) 19 T. L. R. 151) affirmed.

**AKTIESELSKABET ARGENTINA v. VON LAER,** [(1904) 20 T. L. R. 9—C. A.]

**206. Detention of Ship through Failure to supply Cargo—Obligation of Charterer to supply Cargo.**—By a charter-party a ship was to proceed to a loading berth at Newcastle, New South Wales, as ordered, and there load in the usual and customary manner a full and complete cargo of coals as ordered by the charterers, which they bound themselves to ship, subject to certain exceptions which did not apply. The ship arrived at Newcastle, and was ready to load, but owing to the charterer not having a cargo, or not having sufficient cargo ready, she was detained there for several days beyond her proper time for loading.

**HELD**—that the charterer was under an absolute obligation to provide the stipulated cargo, and was liable for the detention.

Decision of the Ct. of Sess (6 F. 294; 41 Sc. L. R. 230) reversed.

**ARDAN STEAMSHIP CO., LD. v. ANDREW WEIR & CO.,** [1905] A. C. 501; 74 L. J. P. C. 143; 93 L. T. 559; 21 T. L. R. 723; 11 Com. Cas. 26; 10 Asp. M. C. 135—H. L.

**207. Exceptions—"Stoppage of Trains or any Cause beyond the Personal control" of Charterers—Shortage of Trucks**—Charterers being bound to discharge into trucks by day and night (if necessary) were delayed by the short supply of trucks.

**HELD**—that this was a cause beyond their control, *ejusdem generis* with "stoppage of trains"; and that, therefore, they were protected by the express exception in their charter-

party so far as day hours were concerned; but that as they had not asked for trucks for night work, they were liable for demurrage during the night hours.

**TURNBULL, SCOTT & CO. v. CRUICKSHANK & CO.,** (1905) 7 F. 265—Ct. of Sess.

**208 Failure to provide Ship—Goods to be Shipped during a Particular Month—Resale of Goods to Third Person—Failure of Shipowner to provide Ship—Measure of Damages.**—By a charter-party the defendants agreed to send a ship to a port in Sweden in September, and there load from the plaintiffs a certain quantity of wood pulp to be carried to Cardiff; the ship to be at liberty to call at any port or ports in any order, penalty for non-performance of the agreement to be the estimated amount of freight on quantity not shipped in accordance therewith. The plaintiffs sold the wood pulp to merchants at Cardiff. The defendants did not send a ship to the port of loading in September, and in consequence the plaintiffs were unable to deliver the wood pulp to their purchasers, who bought in the market against them. The plaintiffs sued the defendants to recover as damages the difference in price which they had to pay to their purchasers.

**HELD**—that this was the proper measure of damages, the price at each place being the value of the goods there; and, further, that the damages were not limited to the estimated amount of freight.

Decision of Ct. of Sess. (6 F. 486; 41 Sc. L. R. 274) reversed.

**STRÖMS, BRUKS, AKTIE, BOLAG AND OTHERS** [v. J. & P. HUTCHISON, [1905] A. C. 515; 74 L. J. P. C. 130; 93 L. T. 562; 21 T. L. R. 718; 11 Com. Cas. 13; 10 Asp. M. C. 138—H. L. (E.)]

**209. Implied Obligation of Consignees to Unload Ship.**—The implied obligation of consignees under a bill of lading is to discharge the cargo with reasonable speed, although the bill of lading may be silent on the point. If they neglect to do so, they will be liable to damages in action for breach of contract.

**ZILLAH SHIPPING CO. v. MIDLAND RY. CO.,** (1903) 19 T. L. R. 63—C. A.

**210. Interpretation of Charter-party—Partly in Print and Partly in Writing.**—The *Anna* was chartered to carry a cargo for the defendants. By the charter-party it was agreed (*inter alia*) that the cargo was to be delivered to and taken from the vessel, *after being discharged on the quay at ship's expense* with customary dispatch for similar cargoes at the respective ports. *Ten* running days (Sundays and holidays excepted) to be allowed the merchants for loading, and *ten* like days for unloading, and *ten* days on demurrage over and above the said lying days at *five* pounds per day. The words in italics were all written in the charter-party, which was otherwise, so far as this point is concerned, in print.

**Demurrage—Continued.**

**HELD**—that the words interpolated in writing could not amount to more than this, that the merchant was not bound to take delivery except as and when the cargo was placed on the quay; and that the placing on the quay was to be done at ship's expense; that reasonable effect must, if possible, be given to all parts of the contract, and the words as to lay days and demurrage, which occurred after the interpolated words, were not necessarily in conflict with the intentions of the parties, but were quite inconsistent with the contention that the merchant was absolutely and in any case discharged from all claims for demurrage; and that if the lay days were exceeded there was a *prima facie* obligation on the part of the charterers to pay demurrage.

**THE ANNA**, (1902) 18 T. L. R. 25—Adm. Div.

**211. Loading "in Regular Turn"—Delay due to Crowded state of Port—Liability of Charterers.**—The defendants chartered from the plaintiffs a vessel to proceed to N., and there "in the usual and customary manner load in regular turn" a cargo of coals from a named colliery of their own, or any other colliery specified by them. By the custom of the port vessels could only load on getting an order from the colliery; and, owing to the number of ships waiting to load from this particular colliery, the vessel was detained for a long time before she could get a loading order in her proper turn at such colliery. She was thus delayed longer than ships arriving after her, but loading from less busy collieries.

**HELD**—that in "regular turn" meant in regular "colliery" (and not "port") turn; and that as the plaintiffs knew the circumstances of the port and the risk of delay, and as the defendants had not acted unreasonably in not substituting a less busy colliery, the defendants were not liable for the delay.

**BARQUE QUILPUE v. BROWN**, [1901] 2 K. B. [264, 73 L. J. K. B. 596; 90 L. T. 765; 9 Com. Cas. 264, 9 Asp. M. C. 596—C. A.

**VII. MARITIME LIENS****(a) Generally.**

**212 Company—Winding-up—Proceedings in Foreign Court—Judgment in rem—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 163.**—A ship, owned by an English joint-stock company, was arrested on her arrival at a German port by a court of competent jurisdiction in an action commenced by the holder of a bill of lading for non-delivery of goods at that port. By German law non-delivery of goods specified in a bill of lading entitles the holder of the bill to a lien on the ship. In these proceedings the German court declared the holder of the bill of lading in question to be entitled to a lien on the ship, directed the ship to be sold, and ordered the lien to be satisfied out of the proceeds of the sale. In the meantime a winding-up order had been made against the company owning the ship,

founded upon a petition which had been presented some time before the ship's arrest in the German port.

In an action by the liquidator of the company to recover from the holder of the bill of lading the money he had received by order of the German Court in satisfaction of his lien, Collins, J. gave judgment for the defendant. On appeal:—

**HELD**—that the judgment of the German Court was a judgment *in rem*, and that, therefore, the holder of the bill of lading was entitled to the money received by him under it, free from any claim by the liquidator.

Judgment of Collins, J. ([1897] 1 Q. B. 55; 75 L. T. 354; 66 L. J. Q. B. 162; 8 Asp. M. C. 184; 2 Com. Cas. 1) affirmed.

**MINNA CRAIG STEAMSHIP CO. v. CHARTERED [MERCANTILE BANK OF INDIA]**, [1897] 1 Q. B. 460; 66 L. J. Q. B. 339 76 L. T. 310; 13 T. L. R. 241; 46 W. R. 388; 8 Asp. M. C. 241; 2 Com. Cas. 110—C. A.

**213. Conflicting claims—Mortgagee—Master and Supercargo—Wages, &c. for more than one Voyage—Lex loci—Lex fori—Argentine Commercial Code—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167.**—The mortgagees of an Argentine ship commenced foreclosure proceedings in England, and disputed the claim of the master except in respect of his wages and disbursements for the last voyage only. Their contention was correct by the Argentine law.

**HELD**—that the *lex fori*, and not the *lex loci*, applied: that the master was entitled to priority under sect. 167 of the Merchant Shipping Act, 1894, in respect of all his unpaid wages and disbursements as master, and also in respect of still earlier wages and disbursements as supercargo, so far as these last were payments to sailors, who might in default of payment have seized the ship.

*The Milford* ((1858) Sw. 362) discussed in the light of the Act of 1894.

*The Albion* ((1872) 1 Asp. M. C. 481) followed.

**THE TAGUS**, [1903] P. 44; 72 L. J. P. 1, [87 L. T. 598; 19 T. L. R. 82; 9 Asp. M. C. 371—Phillimore, J.

**214 Priority of Liens—Maritime Lien for Wages and "Victualling Allowance"—Common Law Possessory Lien for Repairs: Cost of Maintaining and Repatriating Foreign Sailors.**—A foreign ship, on which the men were paid 40 lire per month, and an additional 40 lire if the men provided their own victuals, reached London on March 9th; on April 8th she was taken into a repairer's dry dock; on September 24th she was ordered by the Court to be sold in a suit for wages by the master and men; the repairs were not then completed.

**HELD**—that the "victualling allowance" was equivalent to wages for the purposes of maritime lien; also that the repairs were necessary, and that the repairer had a lien for the cost of the

**Maritime Liens—Continued.**

work already done, but not completed, although the crew were on board; and that the liens had priority as follows.—(1) master and men for wages, disbursements, and victualling allowance down to April 8th, and their "viaticum", (2) the repairer's lien for work and materials; (3) master and men for wages, &c., after April 8th.

*The Gustaf* (1862) Lush. 506; *The Immacolata Concezione* (1883) 9 P. D. 37; 53 L. J. P. 19, and *Roberts v. Harelock* (1832) 3 B. & Ad. 404, 37 R. R. 452 followed.

THE TERGESTE, [1903] P. 26; 72 L. J. P. 18; [87 L. T. 567; 19 T. L. R. 62, 91; 9 Asp. M. C. 356—Phillimore, J.

**215. Salvage Services—Claim for Damages by Collision—Competing Rights—Priorities—Insufficient Proceeds.**—Reward to salvors for services rendered ought not to be recovered against the *res* to the detriment of a claimant in respect of subsequent damage.

*The Veritas*, laden with a cargo of ice for Liverpool, was in distress outside the Mersey, and salvage services were rendered to her by the ss. *C.*, by which she was brought into and anchored in the Mersey. The services of the tug *P. C.* were then engaged, and while the tug was fast to *The Veritas* a collision occurred between *The Veritas* and ss. *Devonian*, in consequence of which *The Veritas* began to fill, and salvage services were rendered to her by the tugs *P. C.* and *S. C.*, with the result that she was brought to a place alongside the dock wall to the south of the Liverpool landing stage. From this place she drifted against the stage, doing damage to the boom and other connections of the stage, and sank, and her cargo of ice perished. The tugs recovered judgment for their services, the question of priorities only being reserved, without any objection by the ss. *C.* *The Veritas* was removed by the Mersey Docks and Harbour Board under their statutory powers and sold by the Board, and after deducting the expenses of the Board the net proceeds were brought into Court to the credit of the salvage action. The proceeds were insufficient to meet all the claims.

HELD—that the claim of the Board for damages being *ex delicto* came first, then the claim of the tugs for salvage services; and lastly that of the ss. *C.* for salvage services, and that payment out must be made accordingly, with costs in each case, claims for salvage in general ranking against the fund in the inverse order of their attachment on the *res*.

THE VERITAS, [1901] P. 304; 70 L. J. P. 75; [50 W. R. 30, 85 L. T. 136; 17 T. L. R. 721; 9 Asp. M. C. 237—Barnes, J.

**(b) Owner's Lien**

**216. Assignees of Charterer—Freight Received in Lump Sum before Whole Due—Damages for Breach of Charter-party—Set-off and Counter-claim.**—The defendants were owners of a ship chartered to one P., and they had a lien upon cargoes and sub-freights for amounts due under

the charter-party. On the arrival of the ship at a port, the master by the defendant's instructions collected the bill of lading freight, which was paid to him in a lump before all the cargo was discharged, and therefore before it was all due.

The plaintiffs were equitable assignees of the freight, but had given no notice to the defendants or to the consignees.

HELD—that though the plaintiffs could require the defendants to account for the money received by the master, yet the defendants could bring into the account by way of set-off or counter-claim a month's hire of the ship not accrued due when the master received the money and also their damages recoverable from the charterer for a breach of the charter-party.

SAMUEL, SAMUEL & CO v WEST HARTLEPOOL [STEAM NAVIGATION CO., (1907) 12 Com. Cas. 203—Walton, J.

**217. "Captain to Sign Bills of Lading at any Rate of Freight without prejudice to the Charter"—Freight Paid in Advance—Hire Unpaid—Liability of Captain for Signing Bills of Lading as Presented.**—A time charter-party of a steamer at a monthly hire provided that the captain should sign bills of lading at any rate of freight, without prejudice to the charter-party. There was power to sub-let, and a lien was given upon all cargoes and sub-freights for the charter hire. The vessel was sub-let. The captain signed bills of lading as presented, showing freight paid in advance and containing no reference to the charter-party. The time charterer made default in payment of the hire.

HELD—that the captain was not negligent in signing bills of lading in such form.

*Semble*, that he was bound to do so.

THE SHILLITO, (1898) 3 Com. Cas. 44—[Barnes, J.

**218 Charterers Shipping their own Goods—Notice in Charter-party of Lien for Freight—Bill of Lading Stating that Freight Paid—Right of Consignees held to be Subject to the Lien.**—B. & Co., who had chartered a vessel from the plaintiffs under a time charter-party, giving the owners a lien on cargo and sub-freight, loaded some timber of their own, and indorsed the bill of lading to the defendants, who were for some purposes their agents. The latter advanced money on the bill of lading although they knew of the lien given by the charter-party, and were aware that money was probably due from the charterers to the plaintiffs.

HELD—that, although the bill of lading stated that the freight for the timber had been paid in advance, the plaintiffs' lien prevailed over the defendants' rights as consignees. Whatever might be the rights of third parties, holders for value without notice, in a similar case, the defendants were in a different position, and could not get rid of the owners' lien; they were merely pledgees of the charterers' own goods, to which the lien attached as soon as they were shipped.

Decision of Walton, J. (18 T. L. R. 358) reversed.

**Maritime Liens—Continued**

*Kern v. Deslandes* (1860) 10 C. B. (N.S.) 205 followed.

WEST HARTLEPOOL STEAM NAVIGATION CO.,  
[*Ld. v. TAGART, BEATON & Co.*, (1903) 19  
T. L. R. 251—C. A.

**219. Right of Owner or Charterer to Collect Freight—Lien on Bill of Lading Freight—Sums due under Charter-party—Necessary Disbursements—Damages for Breach of Charter-party**—The defendants chartered their steamship for a term of twenty-four calendar months at the rate of £1,550 (less 2½ per cent. commission) a month, payable in advance. The vessel came on hire on March 18th, 1901, and was employed by the charterer to carry a cargo from the United States to Japan. The charter-party provided that the owners should have a lien upon all cargoes and all sub-freights for any amounts due under the charter-party. The cargo was carried under a contract made between the shippers and the charterer. Under the bill of lading there was a lien as against the shippers for the bill of lading freight payable at Nagasaki, in Japan, and by the charter-party the owners had a lien upon cargoes and sub-freights for amounts due under the charter-party. On arrival of the vessel at Colombo, in the course of the voyage the master was obliged to pay for bunker coal to enable her to proceed to Japan, by drawing upon the owners a bill for £134 17s. 2d., which was duly honoured. By Clause 2 of the charter-party all coals were to be supplied by the charterer. During the discharge the owners paid disbursements amounting to £250 which, under Clause 2 of the charter-party, should have been paid by the charterer. The vessel arrived at Nagasaki on June 9th, 1901, and completed her discharge there on June 26th. On her arrival at Nagasaki there was due in respect of bill of lading freight £5,258 7s. 11d., which the master, acting upon the owners' instructions, collected, and which was held by them. Of that amount it was admitted they were entitled to retain £3,523, made up of £3,100 for chartered freight due and unpaid upon the vessel's arrival, £390 for chartered hire due for the eight days, June 18th to 26th, and £33 for bunker coals taken over by the charterer at the beginning of the voyage. On June 18th, 1901, a further month's hire, amounting to £1,511 5s., became due. On June 26th the owners withdrew the vessel from the chartered service of the charterer, without prejudice to their claim against him for breach of the charter-party. It was agreed, for the purposes of an arbitration in respect of disputes as to freights arising out of the charter-party, that the owners were entitled to £3,000 damages in respect of such breach. Upon a special case stated by the arbitrator—

**HELD** (1)—that the two sums of £134 17s. 2d. and £250 were amounts due under the charter-party, and that the owners had a lien upon the £5,258 7s. 11d. for these two sums, making up £384 17s. 2d. (2) that if the bill of lading freight was actually received before June 18th, there was no lien for that amount at the time the lien was exercised, and therefore no lien for

the £1,511 5s., but that if the bill of lading freight was received after June 18th and before June 26th, when the vessel was withdrawn by the shipowners, at the date it was received the lien existed; (3) that there was no lien for the £3,000 damages; (4) that if the shipowners were entitled under the charter-party to collect and receive the £5,258 7s. 11d., then, under the charter-party, they had to account for it with the charterer, or the claimants as representing him, but as against the claimants the shipowners would be entitled to set up any cross-claims they might have under the charter-party against the charterer.

SAMUEL, SAMUEL & CO. v. WEST HARTLEPOOL STEAM NAVIGATION CO., (1906) 11 Com. Cas. 115—Kennedy, J.

**220 Sub-charter-party—Bill of Lading Freight—Lien for Hire—Hire accruing Due—Withdrawal of Ship—Payment of Hire**—A charter-party gave the charterers liberty to sublet the steamers for all or any part of the time covered by the charter, the hire being payable half-monthly in advance. By the charter-party the captain, though appointed by the owners, was to be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers agreed to indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading. The owners were to have a lien upon all cargoes and all sub-freights for any amounts due under the charters.

The steamer was sub-chartered to the plaintiffs, and under the sub-charter she loaded a cargo for Hamburg, the master signing a bill of lading. On arrival of the steamer at Hamburg the cargo was delivered to the consignee and the agent, who was acting for all parties, received payment of the bill of lading freight. The shipowners claimed a lien upon the freight for the amount due to them under the charter-party. The plaintiffs claimed the amount as freight due to them under the bill of lading.

**HELD**—that the charter was not a demise of the steamer, the owners, through the captain, remaining in possession of her, and that the contract under the bill of lading was made with the owners, that, therefore, they had a right to demand the bill of lading freight, and to exercise their lien for any sum accrued due under the charter-party, accounting to the sub-charterers for any balance over and above that sum.

In such a case the ship's agent, in collecting the freight, acts as agent either for the owner or for all parties, and the freight in his hands is subject to the owner's lien.

The lien does not, however, extend to hire not yet due, but only accruing due, at the time when the lien is exercised.

The charter-party provided for payment of hire half-monthly in advance; any default to entitle the owner to withdraw the ship without prejudice to any claim which he might otherwise have against the charterers.

**HELD**—that if the owner withdraws the ship in the middle of a half-month, he is entitled to

**Maritime Liens—Continued.**

hire only in respect of so much of the half-month as the ship was in the charterer's service

WEHNER AND OTHERS *v* DENE STEAM SHIP-  
[PING CO. AND OTHERS, [1905] 2 K. B. 92;  
74 L. J. K. B. 550; 21 T. L. R. 339, 10 Com.  
Cas. 139—Channell, J

**221. Sub-Freight Paid by Consignees to Charterer's Agent.**—The consignees of a cargo had already paid the sub-freight due thereon to agents of the charterers; but, before the agents could pay it over to their principals, the ship-owners intervened, and gave them notice of their lien on sub-freights, and asked them not to part with the money.

HELD—that the lien of the owners was lost as soon as the consignees paid the freight to the person entitled thereto, or his agent, for after such payment the money could no longer be regarded as freight

Decision of Bigham, J. affirmed.

TAGART, BEATON & CO. *v*. JAMES FISHER &  
[SONS, WEST HARTLEPOOL STEAM NAVI-  
GATION CO., LD, THIRD PARTIES, [1903] 1  
K. B. 391, 72 L. J. K. B. 202; 51 W. R. 599;  
88 L. T. 451; 8 Com. Cas. 133, 9 Asp. M. C.  
381—C. A.

**VIII. BOTTOMRY.**

**222. Necessaries—Ship and Freight—Cargo—Marshalling of Assets.**—Where there are two funds belonging to different persons, namely, the proceeds of ship and freight belonging to the ship owners, and the proceeds of cargo belonging to the cargo owners, against both of which funds the holder of a bottomry bond, on ship, freight, and cargo has obtained a judgment, the Court will not marshal the proceeds of ship, freight, and cargo in favour of necessaries men who have obtained a judgment against ship and freight, notwithstanding that the bottomry bondholders would not be prejudiced thereby.

THE CHIOGGIA, [1898] P. 1; 8 Asp. M. C.  
[352; 16 L. J. P. 174; 77 L. T. 472; 14 T. L. R.  
27; 46 W. R. 253—Barnes, J.

**223. Document in Substance a Bottomry Bond—Interpretation—Maritime Risk—Maritime Interest—Bull Transaction—Validity**—A document signed by the master of a ship, if in substance and effect a bottomry bond, is not invalid because it is called something else. It is the practice of the Court to construe literally such a document. A document signed by the master of a ship purported to be in the nature of a bill transaction, as well as a pledge of the ship and freight. It did not stipulate for maritime interest; but the lender ran the risk of the vessel not reaching her port of discharge in Europe, unless whilst on her voyage she should put into a port of refuge, in which case the loan was to become at once due and payable, and for the recovery of which the lender was to have power at once to proceed against the ship.

HELD—that the document was a valid bottomry bond.

THE HAABET, [1899] P. 295; 68 L. J. P. 121;  
[48 W. R. 223; 81 L. T. 463; 16 T. L. R.  
548, 8 Asp. M. C. 605—Bucknill, J.

**IX. GENERAL AVERAGE.**

**224. Average Statement—Where to be made up**—There is no obligation on a shipowner to have a general average statement made up at the ship's port of destination, or at any particular place, so long as it is made up in a reasonable time.

Judgment of the Court below reversed.

WAVERTREE SAILING SHIP CO, LD *r* LOVE,  
[1897] A. C. 373; 8 Asp. M. C. 276, 66  
L. J. P. C. 77; 76 L. T. 576; 13 T. L. R. 419  
—P. C.

**225. Chartered Freight Outward and Home-ward—Sacrifice on Outward Voyage—Liability of Chartered Freight to Contribute**—A ship was chartered to proceed from England to Savannah, there to load a cargo of cotton, freight being payable on delivery of the cargo at a port in the United Kingdom or on the Continent. Under the charter-party the charterer had the option of taking a cargo of coal on the outward voyage, but the vessel in fact sailed in ballast. On the outward voyage a general average sacrifice of ship's materials was made.

HELD—that the homeward freight under the charter-party must contribute to the general average sacrifice made on the outward voyage.

Williams *v* London Assurance Co. ([1813]  
1 M. & S. 318; 14 R. R. 411) followed.

Judgment of Mathew, J. ([1901] 2 K. B. 861;  
70 L. J. K. B. 930; 50 W. R. 42, 17 T. L. R.  
764; 6 Com. Cas. 291) affirmed.

STEAMSHIP CARISBROOK CO. *v*. LONDON AND  
[PROVINCIAL MARINE AND GENERAL INSUR-  
ANCE CO., [1902] 2 K. B. 681; 71 L. J. K. B.  
978; 50 W. R. 691; 87 L. T. 418; 18 T. L. R.  
783; 7 Com. Cas. 235, 9 Asp. M. C. 332—O. A.

**226. "Corresponding Expenses of Leaving"—Cost of Cutting a Passage through Ice in River—York-Antwerp Rules, 1890, r. 10 (a).**—A ship returned to her place of loading for the purpose of effecting repairs. While the repairs were being effected, ice formed in the river through which she had to proceed to sea. The ship-owners incurred expense in having a passage cut through the ice.

HELD—that the expense was not part of "the corresponding expenses of leaving" her place of loading within the meaning of rule 10 (a) of the York-Antwerp Rules, 1890.

WESTOLL *v*. CARTER, (1898) 3 Com. Cas. 112;  
[14 T. L. R. 281—Bigham, J.

**227. Necessary Repairs to Ship—Depreciation of Cargo—Maintenance of Cattlemen—Fodder and Water for Cattle—York-Antwerp Rules, 1890, rr. 10 (c), 11.**—The plaintiffs shipped in

**General Average—Continued.**

the defendants' steamship a cargo of live cattle for carriage from Buenos Ayres to the United Kingdom, under a charter-party, which provided that average (if any) should be adjusted according to the York-Antwerp Rules; and that the vessel should on no account call at Brazilian or Continental ports before landing her live stock. The reason of this proviso was that by the law of the United Kingdom live cattle could not be landed in the United Kingdom if the ship carrying them had touched at the ports specified. In the course of the voyage the vessel sprang a leak, and it became necessary for the safety of all concerned to put into Bahia, a Brazilian port, for repairs. Consequently the cattle could not be landed in the United Kingdom, and were sold in Antwerp, realising less than they would have done if they had been sold in the United Kingdom.

**HELD**—that the loss sustained by the owners of the cattle was the subject of general average contribution.

During the execution of repairs to the vessel at Bahia, the owners of the cattle incurred expense in the maintenance of the cattlemen in charge of the cattle on the ship, and in the supply of fodder and water to the cattle.

**HELD**—that these expenses were not recoverable in general average either under the York-Antwerp Rules, 1890, or at common law.

**ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY SHIPPING CO.** [1899] 2 Q. B. 403; 68 L. J. Q. B. 900; 48 W. R. 64. 81 L. T. 296; 15 T. L. R. 472, 4 Com. Cas. 284; 8 Asp. M. C. 595—Bigham, J.

**228 Negligence Clause—Bill of Lading without Prejudice to Charter-party—Indemnity.**—By a charter-party, which contained a negligence clause, it was provided that the captain should sign bills of lading at any rate of freight the charterers or their agents might choose without prejudice to the stipulations of the charter-party, and that the charterers should indemnify the owners from any consequences that might arise from the captain following the charterers' instructions and signing bills of lading. The captain, by the charterers' instructions, signed bills of lading containing no negligence clause. The vessel, owing to the negligence of the captain and crew, came into collision and certain general average sacrifices and expenses were rendered necessary. The owners were unable, owing to the absence of a negligence clause, to recover contribution from the owners of the cargo in question. In an action by the owners against the charterers—

**HELD**, by A. L. Smith and Romer, L.JJ. (Vaughan Williams, L.J. dissenting)—that under the provisions in the charter-party the charterers were liable to make good to the owners the amount of general average contribution not recovered from the owners of the goods.

*The Curron Park* ((1890) 15 P. D. 203, 59 L. J. P. 74; 63 L. T. 356—Hannen, P.) approved.

Decision of Mathew, J. ((1899) 15 T. L. R. 512; 4 Com. Cas. 331) affirmed.

**MILBURN & CO. v. JAMAICA FRUIT IMPORTING [AND TRADING CO. OF LONDON]**, [1900] 2 Q. B. 540; 69 L. J. Q. B. 860; 83 L. T. 321; 16 T. L. R. 515; 5 Com. Cas. 346; 9 Asp. M. C. 122—C. A.

**229. Sacrifice of Freight—Fire—Discharge and Sale of Cargo—Cargo unfit to be carried to Destination—Loss of Freight.**—A cargo of coals, laden on board the plaintiffs' ship under a charter-party, became heated to such an extent during the voyage that, if the voyage had been proceeded with, the ship and cargo would have been totally lost through fire. The master, in the interests of ship, freight and cargo, put into a port of refuge, where a portion of the coals was discharged, and the ship and cargo were then in safety, but the condition of the coal was such that no portion of it could be reloaded and carried to its destination; the cargo was sold, and the voyage was abandoned. In an action by the plaintiffs on a policy on the freight the defendants claimed to have the loss of freight made good in general average, and to deduct the contribution falling on the plaintiffs as ship-owners from the amount due on the policy.

**HELD**—that as, owing to the condition of the cargo, the freight had been entirely lost before the master determined to put into the port of refuge, there had been no general average sacrifice of freight, and that the right to a general average contribution never arose.

Judgment of Bigham, J. ([1899] 2 Q. B. 356; 68 L. J. Q. B. 1021, 48 W. R. 48; 81 L. T. 231, 15 T. L. R. 460, 4 Com. Cas. 256) affirmed.

**IREDALE v. CHINA TRADERS INSURANCE CO.**, [1900] 2 Q. B. 515; 69 L. J. Q. B. 783, 49 W. R. 107, 83 L. T. 299; 16 T. L. R. 484; 9 Asp. M. C. 119—C. A.

**230 Ship and Cargo belonging to the same Owner—Sacrifice of Mast—Liability of Underwriters on Cargo.**—The object of the maritime law of general average is to give the master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed, and such a sacrifice is a general average act quite independently of unity or diversity of ownership. The mainmast of a ship, which was an iron mast and hollow, owing to very bad weather had settled down. The master exercised his judgment reasonably, brought the ship into position, had the rigging cut, and the mast fell over the side. The ship was brought home under jury rig in safety. It was found, when the cargo was discharged, that the mast had been in no greater peril than the rest of the adventure. The ship and the cargo belonged to the plaintiffs, and there could be no contribution in fact.

**HELD**—that there was a general average sacrifice and a general average loss; and that the liability of the underwriters on cargo was not affected by the joint interests.



**General Average—Continued.**

*The Brigella* ([1893] P. 189, 62 L. J. P. 81, 69 L. T. 834, 7 Asp. M. C. 403—Barnes, J.) disapproved.

Judgment of Mathew, J. ([1901] 1 Q. B. 147; 70 L. J. Q. B. 45; 49 W. R. 221; 84 L. T. 57; 17 T. L. R. 59; 6 Com. Cas. 19; 9 Asp. M. C. 141) affirmed.

MONTGOMERY & Co. v. INDEMNITY MUTUAL [MARINE INSURANCE Co., [1902] 1 K. B. 734; 71 L. J. P. 457, 50 W. R. 440; 86 L. T. 462; 18 T. L. R. 479; 7 Com. Cas. 120; 9 Asp. M. C. 289—C. A.

**231. Time Charter—Voyage Charter—Damage by Water in Extinguishing Fire—Delay caused by Vessel Undergoing Repairs—Time Freight—Practice of Average Adjusters.**—According to the practice of average adjusters, a loss of time charter freight due to the detention of the vessel whilst under repair of damage resulting from a general average sacrifice is never included in general average.

**HELD**—that this practice is in accordance with legal principles and is right; that the cargo owners have no concern with the contract between the ship owner and the time charterers; that the loss of freight under it caused by the delay is the result of an accidental circumstance peculiar to the ship owner and time charterers, and that the question is whether the ship owner is entitled to be compensated in general average on the basis of the ordinary consequences of the delay as if the ship were carrying the goods simply under the contract under which they were shipped.

In the statement of the principle of general average in the case of *Birkley v. Palgrave* ((1801) East, 220, at p. 228; 6 R. R. at p. 263), that "all loss which arises in consequence of extraordinary sacrifices made or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested," the words "all loss" ought not to be extended to include losses which are the result of "accidental circumstances" affecting the loser, and are not losses which the other persons interested ought in ordinary course to be treated as concerned with.

THE LEITRIM, [1902] P. 256; 71 L. J. P. 108; [87 L. T. 240; 18 T. L. R. 819; 51 W. R. 158; 8 Com. Cas. 6, 9 Asp. M. C. 317—Barnes, J.

**232. Wages and Provisions in Port of Refuge—York-Antwerp Rules, 1890—Contribution by Cargo—Time Charter-party—Hire continuing to Run—Charterers' Right to Recover from Ship-owners.**—A time charter-party provided that general average should be according to York-Antwerp Rules, 1890. Bills of lading containing the like provision were signed by the master. The vessel put into ports of refuge in such circumstances that, under the terms of the charter-party, hire continued to run, and the owners pay for wages and provisions during the

period of detention. The owners recovered contribution from cargo in respect of wages and provisions.

**HELD**—that, there being no clause in the charter-party giving the charterers the right to such contribution, they were not entitled to recover it from the shipowners.

HOWDEN & Co. v. SS. NUTFIELD Co., LD., [(1898) 3 Com. Cas. 56; 14 T. L. R. 172—Kennedy, J.

**X RULES FOR PREVENTING COLLISIONS.****(a) Fog.**

**233 Fog Signal—Regulations for Preventing Collisions at Sea—Foreign Vessel upon "High Seas"—Statutory presumption of Fault—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 419 (4), 424.**—An English and a Dutch vessel came into collision outside territorial waters in a fog, and it was admitted that both had committed breaches of the regulations.

It was, however, contended on behalf of the foreign vessel that the statutory presumption of fault created by sect. 419 (4) of the Merchant Shipping Act did not arise in her case in the absence of an Order in Council as provided for by sect. 424.

**HELD**—that it was not necessary to decide the point, as, on the facts, the Court was satisfied that her mistake in navigation had contributed to the collision.

The necessity for exact compliance with the rules discussed, danger of not stopping engines, when a fog signal is heard forward of the beam.

THE KONING WILLEM I., [1903] P. 114; 72 [L. J. P. 28; 88 L. T. 807; 9 Asp. M. C. 425—Bucknill, J.

**234 Fog Signals—Duty of Vessel to Stop—Regulations for Preventing Collisions at Sea, art 16**—*Semle*, if a steamship in a fog does not stop on hearing a whistle forward of the beam, she may in the event of a collision be held to be in fault, though the whistle did not proceed from the vessel with which she collided.

THE LONDON, (1904) 73 L. J. P. 125; 91 L. T. [327—Jeune, P.

**235. Fog Signal forward of Beam—Duty to Stop—Excuse—Regulations for Preventing Collisions at Sea, 1897, art. 16.**—By art. 16, "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Each of two colliding vessels sought to justify her non-compliance with this rule—

A. alleged that the whistle of an apparently overtaking vessel was being sounded on her port quarter.

**HELD**—no excuse, for on A. stopping and making the appropriate signal, such vessel

**Rules for Preventing Collisions—Continued.**

would have been warned and could herself have stopped.

*B.* alleged that *A.*'s whistle sounded a long way off, that two other whistles helped to determine her position; and further that *B.*, though she did not stop at once, did so subsequently and had re-started before the collision occurred.

**HELD**—no excuse.

The fact that a whistle is "apparently" distant is no justification for non-compliance with the positive rule.

**THE BRITANNIA**, [1905] P. 98; 74 L. J. P. 46; 92 L. T. 634; 21 T. L. R. 110; 10 Asp. M. C. 65—Barnes, J.

**236. Fog Signals heard Forward of Beam—Navigating with Caution till Danger is Passed—Difficulty of locating Signal in Fog—Continuing Course without Stopping from Time to Time—Regulations for Preventing Collisions at Sea, 1897, art. 16.**—The *O.* was proceeding slowly at night on account of fog. On hearing a whistle apparently at some distance on the port bow she stopped. The sound of the whistle then apparently broadened a little, and the *O.* then went dead slow ahead in order to get steering way and keep her course. She continued so for twenty minutes, the sound of the whistle still apparently broadening a little but getting closer. A collision then occurred.

**HELD**—that, having regard to the difficulty of accurately locating a signal in fog the *O.* was not justified in continuing for twenty minutes without stopping from time to time, and that she had broken art. 16 (2), which required her to "stop her engines and then navigate with caution until danger of collision is over."

**THE ARAS**, [1907] P. 28; 76 L. J. P. 37; 96 [L. T. 95; 10 Asp. M. C. 358—Barnes, J.]

**237. Moderate Speed in Fog—Power to Stop within Short Space.**—In deciding whether or not a vessel in a fog was steaming at a "moderate" speed, her power of stopping within a short distance is a material circumstance to be considered, but it cannot justify a speed rendering it impossible for her to stop within the limit of observation.

Decision of *L. A.* (18 T. L. R. 672) affirmed.

**OCEANIC STEAM NAVIGATION CO. v. WATFORD STEAMSHIP CO. THE OCEANIC** [1903] 88 L. T. 303; 19 T. L. R. 361; 9 Asp. M. C. 378—H. L. (E.)

**238. Regulations for Preventing Collisions at Sea, 1897, arts. 16, 19, 21, 22, 23.**—In a dense fog preventing either vessel from seeing the other, the steamship *L.* heard on her starboard bow the whistle of the *H.*, and thereupon stopped her engines. A collision ensued.

**HELD**—that the *L.* had conformed to art. 16 by stopping and navigating with caution, that art. 16 was the only one applicable in a fog so long as the other vessel's position and course was not accurately ascertained and that the *L.*

was not in default for not reversing upon the assumption that the *H.* was a crossing ship which it was her duty to keep clear of under arts. 19, 23.

**CRAWFORD AND ANOTHER v. GRANITE CITY** [STEAMSHIP CO., LD, (1906) 8 F. 1013—Ct. of Sess.]

**239. River Thames—Fog and Steam Whistle Signals—Vessels in Fairway and not under way—Ringing Bell—Thames Bye-laws, 1898, r. 38.**—Rule 38 of the Thames Bye-laws, 1898—under the heading of "Fog and Steam Whistle Signals"—which directs that "all steam and sailing vessels when in the fairway of the river and not under way shall at intervals of about one minute ring the bell rapidly for about five seconds," only applies in cases of fog, mist, and the like. To hold otherwise would be to render it necessary for all vessels at anchor in the Thames to be constantly ringing their bells throughout the day and night in matter what the weather might be, and this would be an unreasonable conclusion to come to.

**THE RULIN** (1902) 86 L. T. 265; 18 T. L. R. 343; 9 Asp. M. C. 278—Barnes, J.

**240. Speed—Regulation for Preventing Collisions at Sea, 1897, art. 16.**—If a steamer in a fog cannot reduce her speed sufficiently with her engines continually working so as to go at a moderate speed, within the meaning of art. 16 of the Regulations for Preventing Collisions at Sea, it is her duty occasionally to stop her engines and thereby to reduce her speed.

Decision of Barnes, J. ((1901) 17 T. L. R. 65; 9 Asp. M. C. 151) affirmed.

**THE CAMPANIA** [1901] P. 289; 70 L. J. P. 101; 84 L. T. 673; 17 T. L. R. 509; 9 Asp. M. C. 177—C. A.

**241. Speed—Obligation of Vessel in vicinity of Fog and hearing Fog Signal—Regulations for Preventing Collisions at Sea, 1897, art. 16.**—By art. 16 of the Regulations for Preventing Collisions at Sea: "Every vessel shall in a fog go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing apparently forward of her beam the fog signal of a vessel, the position of which is not ascertained, shall so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

A vessel *The Holmwood*, was making about five knots an hour, having on her port bow, at some distance, a fog out of which a whistle came; on the other hand, straight ahead and on her starboard hand, the weather was tolerably clear.

**HELD**—that, under these circumstances *The Holmwood* had imposed upon her the obligation to stop her engines, under art. 16, when she first heard the whistle, because the position of the vessel signaling was not ascertained.

**THE BERYARD HALL**, (1902) 71 L. J. P. 72; 86 L. T. 658; 9 Asp. 300—Jenne, P.

**242. Speed—Sounding Whistle—Approach in Fog—Position of other Ship Ascertained—Regu-**

**Rules for Preventing Collisions—Continued.**

*lations for Preventing Collisions at Sea, art. 16.]*—The plaintiffs' steamship when making about eight knots saw the defendants' steamship three miles off about a point on the port bow. The defendants' vessel was making about ten knots, and the vessels were on opposite courses. The plaintiffs' vessel was kept on her course, and the defendants' vessel broadened to about two points on her port bow, the vessels thus approaching so as to pass clear port to port. A fog bank then hid the defendants' vessel from sight, and the plaintiffs' vessel continued on her course and speed until she reached the fog bank, when she heard the whistle of the defendants' vessel. She then sounded her whistle, and her engines were put to slow, when another whistle was heard and her engines were put full speed astern and her whistle sounded. The defendants' vessel then came in sight 300 or 400 yards off under a starboard helm, and at high speed, and struck and sank the plaintiffs' vessel. The defendants' vessel was found to blame for going at an excessive speed in a fog and in starboarding her helm, and there was no appeal as to this. The plaintiffs' vessel was found not to blame. Upon appeal—

HELD—that on the special facts of the case inasmuch as the position and course of the defendants' vessel were ascertained before she was hidden by the fog so that the vessels would pass clear port to port, the plaintiffs' vessel did not act wrongly in continuing her speed and in not sounding her whistle sooner.

Decision of Barnes, P. (92 L. T. 278; 10 Asp. M. C. 100) affirmed.

Decision of C. A. ((1907) 96 L. T. 869; 23 T. L. R. 358) affirmed.

THE ORAVIA, (1907) 97 L. T. 523; 23 T. L. R. 663—H. L. (E.)

**243. Steamship and Sailing Ship in a Fog—Stopping and reversing Engines—Regulations for Preventing Collisions at Sea, 1897, arts 22, 23.]**—A fog-horn which sounded one short blast indicated to a steamer that a sailing vessel was on the starboard tack and not far off. Those in charge of the steamer, which was going dead slow, ought to have heard the fog-horn sooner than they did, but they were not paying proper attention. The master of the steamer stopped his engines when he heard the blast. Later on he heard it more ahead and nearer, and then he reversed his engines and hard-a-ported his helm to counteract the action of his reversed engines. A collision, however, occurred.

HELD—that the steamer committed a fault in not at once stopping and reversing her engines when the other vessel was first heard, by arts. 22 and 23 of the Regulations for Preventing Collisions at Sea, 1897; and that the steamer was alone to blame for the collision.

THE MERTHYR, (1899) 79 L. T. 676; 8 Asp. [M. C. 475—Barnes, J.]

**244. Vessel hearing Whistle to stop Engines—Ascertaining Position of other Vessel—Regula-**

*tions for Preventing Collisions at Sea, art. 16.]*—The duty of a vessel in a fog is to stop her engines when the first whistle is heard, and then navigate with caution, and she is to do that because she hears forward of her beam a fog signal of another vessel, the position of which is not ascertained. She is to keep them stopped until she can, by hearing further signals from the other vessel, ascertain the position of that other vessel.

THE RONDANE, (1900) 69 L. J. P. 114; 82 [L. T. 128, 9 Asp. M. C. 106—Jeune, P.]

**245. Vessel moored to Pontoon—Run into by Second Vessel—Liability for Injury to Pontoon—“At Anchor”—Duty to ring Bell—Tyne By-laws, 1884, r. 18 (c).]**—The *T.*, a steam tug, was lying moored to a pontoon in the Tyne, when she was run into in a fog by the steam-trawler *R.* The pontoon and bridge connecting it to the bank belonged to the Tyne Ferry Company.

The company sued the owners of the *T.* for the damage done to the pontoon and bridge, and the owners of the *T.* sued the owners of the *R.* for the damage sustained by the *T.* The latter agreed to indemnify the company in respect of the costs of their action. The two actions were heard together.

HELD—(1) that the *T.* was not “at anchor,” and was not therefore in fault for not ringing her bell in the fog.

(2) That the damage done to the pontoon and bridge was not attributable to the presence of the *T.*; and

(3) That the *R.* was being negligently navigated.

THE TITAN · THE RAMBLER, (1907) 96 L. T. [93; 10 Asp. M. C. 350—Barnes, P.]

**246. Whistle—Speed—Regulations for Preventing Collisions at Sea, arts. 16 and 21.]**—The captain of the *C.*, while steaming at about three knots an hour in a thick fog, heard the *M.*'s whistle faintly, and sounded his in reply, and continued to whistle after that time, and he heard the *M.*'s whistle blown until the collision. The captain of the *C.* misjudged the sound of the *M.*'s whistle. The whistle remained on the same bearing all the way through. The speed of the *C.* was kept up until the last moment, and then she crashed into the *M.* and sank her.

HELD—That the *C.* ought to have stopped her engines and taken off her speed in order to comply with art. 16, for, although art. 21 is a general rule, it is qualified by art. 16 in cases where the latter article applies.

THE CAHAY, (1899) 81 L. T. 391; 8 Asp. [M. C. 35—Barnes, J.]

**(b) Generally.**

**247. Inland Tidal Water—Application of Regulations—All Waters connected with the High Seas navigable by Sea-going Vessels—Ultra vires—“Course authorised or required by these Rules”—Course dictated by Good Seamanship—Necessity to Signal—Regulations for Preventing Collisions at Sea, arts. 27, 28, 29.]**—The Regulations

**Rules for Preventing Collisions—Continued.**

for Preventing Collisions at Sea apply, unless excluded by local rules, to inland navigation in waters connected with the high seas and navigable by sea-going vessels, and in that application they are not *ultra vires*. It is now too late to argue to the contrary in the C. A. The observations to that effect by Gorell Barnes, J., in *The Carlotta* ([1899] P. 223; 15 T. L. R. 362) approved.

In art. 28 of the Regulations, which provides that when vessels are in sight of one another a steam vessel under way, "in taking any course authorised or required by these rules shall indicate that course by" certain signals on her whistle or siren, the word "authorised" includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel. The rule therefore applies when one of two approaching vessels thinks it necessary in order to avoid danger of collision, to go astern though not absolutely required by rule to do so.

*The Esknaar* ([1902] P. 250, 18 T. L. R. 727, No 282, *infra*) approved.

Decision of Deane J. (10 Asp. M. C. 257, 91 L. T. 853) reversed.

THE ANSELM, [1907] P. 151, 76 L. J. P. 51, [97 L. T. 16; 10 Asp. M. C. 438; 23 T. L. R. 378—C. A.

**248. Manchester Ship Canal—Whether Collision Rules apply—Eng—Duty of Vessels in Canal on hearing Whistle—Regulations for Preventing Collisions at Sea, arts. 16–39—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 415 (1).—***Scmble*, the Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal.

Even if they do a vessel in a fog hearing a whistle forward of the beam need not necessarily stop, for approaching vessels in a canal must be on and may be assumed to be on their right side and therefore their position is sufficiently "ascertained."

THE HART, [1904] P. 331, 73 L. J. P. 47, 96 [L. T. 323, 20 T. L. R. 291, 9 Asp. M. C. 547—Barnes, J.

**249. Non-compliance with Regulations—Onus of justifying Conduct—Regulations for Preventing Collisions at Sea, arts. 20, 21, 22, 23.—**The Collision Regulations are absolute rules to be disregarded only at the peril of those who break them and in cases of absolute necessity.

The *K.* a steamship, found herself dangerously close to the *B.* a sailing vessel; owing to the insufficiency of the *B.*'s lights, the *K.* could not tell what her course was; she, therefore, starboarded in order to turn away from her and continued at full speed. This brought her across the bows of the *B.* which ran into her amidships three minutes after she was first sighted.

Held—(1) that the *K.* was not to blame merely for crossing the bows of the *B.*, since she could not tell what the latter's course was; but

(2) that she was in fault for infringing art.

23 by not stopping and reversing as soon as she saw the *B.*, and had not proved that her breach of the regulations was justified as being the only chance, or the best chance, of escaping a collision.

*The Khedive* ((1880) 5 App. Cas. 876; 52 L. J. Adm. 1; 29 W. L. 173, 43 L. T. 610—H. L.) applied.

WINDRAM v. ROBERTSON, (1905) 7 F. 665— [Ot. of Sess.

**250. No Proof that Collision not due to Breach of Regulations—Regulations for Preventing Collisions at Sea, 1897, art. 28.]—**In a collision between two vessels, one of the vessels held to blame for not indicating to the other vessel, by blowing two short blasts on her whistle, that she was directing her course to port, as required by art. 28 of the Regulations for preventing collisions at Sea, 1897, it not being proved that the breach of the regulations could not possibly have contributed to the collision.

THE ARISTOCRAT, [1908] P. 9, 97 L. T. 838, 77 [L. J. P. 57, 24 T. L. R. 21—C. A.

**251. Regulations of 1897 for Preventing Collisions at Sea, art. 21—Construction.]—**By art. 21 of the Regulations of 1897 for Preventing Collisions at Sea—"Where by any of these rules one of the two vessels is to keep out of the way, the other shall keep her course and speed." *Note*—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone she also shall take such action as will best aid to avert collision."

Held—that the construction to be put upon the rule is that the vessel which has to keep her course and speed is to do so until the other vessel could not avoid a collision without the assistance of the vessel which has to keep her course and speed.

THE ORXEN, (1900) 16 L. T. R. 149—C. A.

**252. Squadron of Warships—Sailing Vessel passing through Fleet—King's Regulations and Admiralty Instructions, art. 597 (2) (6) (12).—Regulations for Preventing Collisions at Sea, 1897, arts. 20, 21, 22, 27.]—**A squadron of warships were steaming N N W in two columns, each column consisting of four ships. Each ship was two cables distant from the ship next ahead of her, measured from foremast to foremast. The wind was southerly. A sailing vessel was seen on the port bow approaching the port column of the squadron, and showing her green light. The second and third ships in the port column ported in order to pass clear ahead of the sailing vessel, and as the third ship ported the fourth ship in the column (*The Sully*) starboarded, in order to pass under the stern of the sailing vessel, which she would have done if the sailing vessel had kept her course. Just as *The Sully* began to answer her starboard helm, the sailing vessel suddenly came up into the wind and altered her course eight points, exposing her red light to *The Sully*. The latter thereupon put helm hard

**Rules for Preventing Collisions—Continued.**

a-port and reversed her starboard engine, but immediately afterwards she came into collision with the sailing vessel.

**HELD**—That *The Sutlej* acted rightly in star-boarding her helm, as she would thereby have passed clear of the sailing vessel if the latter had kept her course; that, having regard to the obligations under art. 597 of the King's Regulations as to ships in a squadron keeping station as much as possible, she did not act wrongly in not starboarding sooner; and that therefore *The Sutlej* was not to blame for the collision.

Decision of Jeune, P. (20 T. L. R. 509) reversed.

H.M.S. SUTLEJ, (1905) 21 T. L. R. 325—C. A.

**253. Steamship and Sailing Ship—Stopping and Reversing—Rule discussed.**—The obligation to stop and reverse is now somewhat less stringent than it was, and, in case of necessity, such action as would best aid to avert a collision may be taken.

THE BOYNTON, (1898) 14 T. L. R. 173—[Jeune, P.]

**254. Wrong Manœuvre by One Vessel—Momentary Delay by Other.**—A captain placed suddenly in a difficulty by the fault of another vessel is entitled to time—possibly a very short time—for thought. In any particular case it is a question of fact whether he did, or did not, act with reasonable promptitude.

HOEK VAN HOLLAND MAATSCHAPPIJ v. CLYDE [SHIPPING CO., LD, (1903) 5 F. 227—Ct. of Sess.]

**(c) Lights.**

**255. Absence of Lights not causing Collision—Onus on Plaintiff—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), s. 419, sub-s. (4).—An action was brought by a ketch called *The Bataria* against the steamship *Argo* for having run into her. *The Argo* was coming up hugging the north shore of the Humber. The ketch had been in the Victoria Dock, and was coming out of the dock into the Humber, and just as *The Argo* was approaching the dock entrance the ketch was being warped out without lights after sunset in breach of art. 5 of the Regulations for Prevention of Collisions at Sea, 1897, and was therefore in fault within sect 419, sub-sect. 4 of the Merchant Shipping Act, 1894. Considering the propinquity in which the steamer was to the ketch when the latter was coming out of the dock gates, the accident was nearly inevitable. The plaintiffs showed that the non-exhibition of the red light could by no possibility have contributed to the accident.

**HELD**—that the ketch had succeeded in meeting the onus which was upon her of showing that, red light or no red light, owing to the action of the steamer the collision was inevitable, and therefore *The Argo* must be held alone to blame.

THE ARGO, (1900) 82 L. T. 602, 9 Asp. M. C. [74—C. A.]

**256. Anchor Light—"In the Forward Part of the Vessel"**—Regulations for Preventing Collisions at Sea, 1897, art. 11.—By art. 11 of the Regulations for Preventing Collisions at Sea, 1897, a vessel 150 feet or upwards, when at anchor, shall carry "in the forward part of the vessel" a white light, and another at or near the stern.

A vessel 313 feet in length, at anchor, carried her forward light in the fore rigging abreast of the foremost, 72 feet from the stern.

**HELD**—that the light was carried "in the forward part of the vessel" within the meaning of art. 11.

Decision of Bucknill, J. ([1900] P. 43; 69 L. J. P. 31; 48 W. R. 431; 81 L. T. 728) on this point reversed.

THE PHILADELPHIAN, [1900] P. 262; 69 L. J. [P. 101; 48 W. R. 514; 82 L. T. 601; 16 T. L. R. 383; 9 Asp. M. C. 72—C. A.]

**257. Anchor Light "at or near the Stern"**—Regulations for Preventing Collisions at Sea, 1897, art. 11.—Art 11 of the Regulations for Preventing Collisions at Sea, 1897, requires the aft anchor light to be "at or near the stern."

*The Algoa* was at anchor at night in the Elbe; she had an anchor light forward, and a second one aft at 100 or 120 feet from the stern. She was 455 feet long. *The Gannet* coming down the Elbe ran into *The Algoa*. Those in charge of *The Gannet* said they saw the forward anchor light of *The Algoa* about a mile off, but did not see the aft anchor light till just before the collision. It was admitted that *The Algoa* had committed a breach of the regulations by reason of the aft anchor light not being "at or near the stern." The question was whether or not the light which by the regulations ought to have been exhibited by *The Algoa* at or near the stern was in such a position that it could be seen by vessels approaching from above. The nautical assessors thought the light ought to have been seen.

**HELD**—that the balance of testimony was greatly in favour of *The Gannet* and that *The Algoa*, which was athwart the stream, having her lights in an unusual position, in an admittedly improper position, was the vessel that was to blame.

The decision of C. A. ([1899] P. 230, 68 L. J. P. 99) reversed.

THE GANNET (OWNERS OF STEAMSHIP) v. [OWNERS OF STEAMSHIP ALGOA, THE GANNET,] [1900] A. C. 234; 69 L. J. P. 49; 82 L. T. 329; 9 Asp. M. C. 43—H. L. (E.).

**258. Barge swinging at Tier—Turn of Tide—Duty to have Man on Board—Duty to show Light—Preliminary Article—Thames Bye-laws, 1898**—The barge *G*, laden with a cargo, was fastened by means of her headfast to the port bow of the barge *J*, which was moored head and stern to the steamship *V*, lying at the tiers at Greenwich. The tide at the time was high water slack, and when the man in charge of the *G* had made her headfast secure, he went on board the *V*, leaving the

**Rules for Preventing Collisions—Continued.**

*G.* unattended. When the tide ebbed, the barge, which was 80 feet long, and had a freeboard of 15 inches, swung out athwart the stream, and the steamship *St. A.*, proceeding down the river during the night, collided with and sank the *G.* Shortly before the collision, the *St. A.* had slowed and stopped her engines and ported to allow some sailing barges to pass ahead, and when the *G.* was seen close to and ahead the *St. A.* was making about two knots; the engines of the *St. A.* were then reversed. The owners of the *G.* sued the owners of the *St. A.* for damage sustained by the alleged negligent navigation of the *St. A.*

**HELD**—that the action should be dismissed, as the look-out on the *St. A.* was not defective and her speed was not excessive; the *G.* should have had someone on board her at the turn of the tide to give notice of the position of the *G.*, and to show a light to vessels as they approached, and the absence of any signal was a breach of the preliminary article of the Thames Bye-laws, 1898

THE *ST. AUBIN*, [1907] P 60; 76 L. J. P 25; [95 L. T. 587, 10 Asp. M. C. 298—Deane, J.]

**259.** *“Not under Command”*—*Regulations for Preventing Collisions at Sea*, 1897, art. 4 (a) (c)]—Whether a vessel is, or is not, under command within the meaning of art. 4 (a) is a nautical question for the assessors.

Vessel *A.*, sailing close-hauled on the starboard tack, saw the red light of vessel *B.*, running free, somewhat fine on her starboard bow; she also saw two red lights showing that *B.* was (from the effect of a collision) not under command.

*A.* could not luff, because broader on her starboard bow were the masthead and green lights of a steamer—in fact, a tug trying to help *B.* *A.*, therefore, put her helm up, and would have passed safely across the bows of *B.* had not the latter suddenly ported.

**HELD**—that *A.* was right, under the circumstances, in starboarding, and that *B.* was to blame because, having led *A.* to believe that she was not under command, she wrongly changed her course, and so impeded *A.* in her efforts to avoid her.

THE *HAWTHORNBANK*, [1904] P 120; 73 [L. J. P 18; 90 L. T. 293, 9 Asp. M. C. 535—Barnes, J.]

**260.** *Side Lights—Dumb Barge made fast to Side of Tug—Duty to comply with Regulations for Preventing Collisions at Sea—“Ship”*—*“Vessel used in Navigation”*—*Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), ss 418, 742—*Regulations for Preventing Collisions at Sea*, art 5 ]—A lighter, an iron dumb barge of 120 feet in length, with a crew of two hands, with a cargo of stone, lashed alongside the side of a tug while the two vessels are proceeding straight down the river Ribble, and are making about two knots over the ground, is a “vessel used in navigation” within the meaning of the definition of a “ship” in sect 742 of the Merchant Shipping Act, 1894, and consequently obliged to

comply with the Regulations for Preventing Collisions at Sea where the same are applicable, and must therefore exhibit the usual coloured side lights.

THE *LIGHTER* No. 3, (1902) 18 T. L. R. 322—Barnes, J.

**261.** *Steam Trawler—Trawl not down—Lights—Regulations for Preventing Collisions at Sea*, 1897, arts 2, 9, 20.]—A British steam trawler of over twenty tons gross register was fishing off the coast of Europe, north of Cape Finisterre, and carrying the alternative lights prescribed by art. 9. She had just got in her trawl and was going ahead.

**HELD**—that she must from that moment be treated as a steamer under command, carry the lights required by art. 2, and keep out of the way of a sailing vessel in accordance with art. 20.

**HELD**, also, on the facts, that she was not keeping a good look-out.

THE *Tweedswale* (1889) 14 P. D. 161; 58 L. J. P 41; 37 W. R. 783, 61 L. T. 371—Butt, J.] followed

THE *UPTON CASTLE*, [1906] P. 117; 75 L. J. P. [77; 93 L. T. 814, 10 Asp. M. C. 153—Deane, J.]

**262.** *Steam Trawler with Trawl down—Sailing Vessel—“Special Circumstances”*—*Regulations for Preventing Collisions at Sea*, art. 27.]—A collision occurred on a clear night between a sailing vessel which was sailing close-hauled and a steam trawler which was making about 1½ knots per hour, and had her trawl down, as indicated by the appropriate lights.

**HELD**—that there were “special circumstances” within the meaning of art 27 of the Regulations, and that the sailing vessel ought to have kept out of the way.

**HELD**, also, that the trawler ought at the same time to have acted in accordance with good seamanship, and that, under the circumstances, she had not done so; and that, therefore, both vessels were in fault.

THE *KING’S COUNTY*, (1901) 20 T. L. R. 202—[Barnes, J.]

**263.** *Steam Tugs—“Under Way”*—*Towing Lights—Anchor Lights—Regulations for Preventing Collisions at Sea*, 1897, arts. 3, 5, 11.]—Two tugs, which were made fast to the sides of a barque, had their towing lights and their side-lights up, the barque herself had her anchor lights up. The tugs and the barque had moved by the propelling power of the tugs up to a point nearly over the anchor of the barque.

**HELD**—that as a matter of fact the lights showed exactly what was being done—namely, that the barque was still at anchor, and the tugs were towing her up to get her anchor, and that art 3 of the Regulations for Preventing Collisions at Sea, 1897, applied, as the tugs were “under way,” within the meaning of the rules

**Rules for Preventing Collisions—Continued.**

*Semble*, that the barque had the right lights, and that the provisions of art. 5 requiring side-lights were not applicable to her, as she was not a vessel being towed within the meaning of that article, because she was not, strictly speaking, "under way."

THE ROMANCE, [1901] P. 15; 70 L. J. P. 1; [83 L. T. 488; 9 Asp. M. C. 149—Barnes, J.]

**264. Suez Canal—Lights—Duty of Vessel proceeding to the Southward to tie up—Duty of Vessel proceeding to the Northward to approach with Caution—Rules for the Navigation of the Suez Canal, arts 3, 7, 8, sub-ss. 3, 4, 7, 8, 10 and Signal 11]**—The steamship *C.*, whilst proceeding southwards through the Suez Canal, sighted the navigation lights of a vessel approaching from the opposite direction. It was admittedly the practice in that part of the canal for steamships going south to tie up and permit vessels going northward to pass them. The *C.* drew in to the bank, and extinguished her navigating lights, exhibiting the lights required by signal No. 11 of the Suez Canal Rules on the free side of the channel. Whilst being tied up she was run into and damaged by the other vessel, the *C. C.* Those on board the *C. C.* alleged that they had the right of way, and that the *C.* had kept on too long, and had proceeded too fast.

HELD—that though the north-going steamer, the *C. C.*, had the right of way, yet it was her duty to be under such command that, in the event of her coming up to a steamship, which had to tie up for her, sooner than was expected, she could, by stopping or going astern, avoid running into such steamship; and that, as the *C.* was stopped at the time of the collision, she was not to blame.

Decision of Barnes, P. (94 L. T. 174; 10 Asp. M. C. 189) affirmed.

THE CLAN CUMMING, [1907] P. 311; 97 L. T. [14—C. A.]

**265. Torpedo-boat Destroyer at Anchor—King's Ship—Masts not capable of carrying proper Riding Lights—King's Regulations, art. 1069.]**—A torpedo-boat destroyer, over 150 feet in length, was lying at anchor in a harbour at night, with her forward riding light on the jack staff 6 feet above the deck. There were no masts in the vessel upon which lights could be placed in the positions prescribed by art. 1069 of the King's Regulations (which is in the same words as art. 11 of the Regulations for Preventing Collisions at Sea, 1897). Another vessel coming down the harbour saw only the forward light, the after one being obscured by an awning, and being misled into thinking that she was not more than 150 feet in length, came into collision with her. If the destroyer had not exceeded 150 feet in length the other vessel would have passed clear.

HELD—That the destroyer was to blame for the collision, owing to not exhibiting proper lights, this being negligence on the part of the

Admiralty for having sent her to sea in a condition in which she was not capable of complying with the King's Regulations as to lights.

Decision of Deane, J. ((1905) 21 T. L. R. 463) affirmed.

THE HIRONDELLE, (1905) 22 T. L. R. 146—[C. A.]

**(d) Narrow Channel.**

**266. Buoys—River Thames—Sea Reach—"Starboard Hand-buoys" in Mid-river—Narrow Channel—Regulations for Preventing Collisions at Sea, 1897, art. 25.]**—The Trinity House has placed four red conical lighted buoys almost in the centre line of Sea Reach in the Thames, to mark the northern side of the deepest water.

Red conical buoys are "starboard hand-buoys" denoting that side of a channel which would be on the right hand of a captain entering a river or harbour.

HELD—that the water between these four buoys and the Nore Sand buoys to the south of them must be regarded as a "narrow channel" within art. 25, and that an incoming vessel should keep on the starboard side of such channel.

*Quere*, what is the effect of the buoys upon the water to the north of them

THE GUSTAFSBERG, [1905] P. 10, 74 L. J. P. [42; 53 W. R. 350; 92 L. T. 630; 20 T. L. R. 79; 10 Asp. M. C. 61—Barnes, J.]

**267. Narrow Channel Rule—Queenstown Harbour—Regulations for Preventing Collisions at Sea, 1897, art. 25]**—The entrance to Queenstown Harbour is a narrow channel within the meaning of art. 25; therefore, every steam vessel must, if safe and practicable, keep to that side of the mid-channel which lies on her starboard side.

THE GLENGARIFF, [1905] P. 106; 74 L. J. P. [90; 53 W. R. 537; 93 L. T. 281; 21 T. L. R. 299; 10 Asp. M. C. 103—Deane, J.]

**268. Narrow Channel Rule—River Humber—Crossing Rule—Regulations for Preventing Collisions at Sea, 1897, arts 19, 21, 22, 23, 25.]**—An incoming and an outgoing vessel collided on the south side of the entrance to the Humber.

HELD—(1) that the incoming vessel was to blame, for (*semble*) the channel in that place is a "narrow channel," and she ought to have been on the north side, and, even if it is not a "narrow channel," the outgoing vessel coming from Grimsby was obliged to take the course she did, and room ought to have been given to her;

(2) That the outgoing vessel was also to blame, for she ought to have waited, or to have reversed, since, even if the crossing rule did not apply, she saw the lights of the other vessel in a position of danger.

THE ASHTON, [1905] P. 21; 74 L. J. P. 28; [53 W. R. 639; 92 L. T. 811; 21 T. L. R. 126; 10 Asp. M. C. 88—Barnes, J.]

## Rules for Preventing Collisions—Continued.

**269. Narrow Channel Rule**—*To what Waters it applies—Approach to a Harbour—Regulations for Preventing Collisions at Sea, 1897, arts. 19, 21, 22, 25, 27.*—The "narrow channel" rule ought to be regarded as applicable to such waters as those lying between two breakwaters or piers at the entrance to a harbour, and to so much of the water outside such points as is necessary for the negotiation of the passage.

*The Knaresbro* ([1907] P. 38, n.—Barnes, J.) followed.

Even if the rule does not in strictness apply to such waters, good seamanship requires that the principle enunciated in it should be followed.

Decision of Barnes, P. ([1907] P. 36, 76 L. J. P. 97; 96 L. T. 239, 10 Asp. M. C. 361) affirmed.

THE KAISER WILHELM DER GROSSE, [1907] [P. 259, 76 L. J. P. 138; 97 L. T. 366; 23 T. L. R. 554—C. A.]

**270. Vessel coming out of Dock into River—"Starboard-side Rule"**—*Regulations for Preventing Collisions at Sea, 1897, art. 19—Dock Master's Orders—Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcu.), s. 49*—A steam vessel, leaving a dock on the Mersey, was stopped at the entrance by the dock master, and was subsequently told that she might go, but was warned to look out for a tow and tugs coming down the river. She, in fact, collided with them.

In an action by the steamer against the dock board on the ground that the dock master had been guilty of negligence in ordering her to go at the particular moment:—

HELD—that he had, in fact, given no order, and that the claim failed.

As between the colliding vessels:—

HELD—that the starboard side rule did not apply to a vessel coming down the river, and finding another coming out of dock on her starboard side, and also that (on the facts) the steamer could have seen the lights of the tow and tugs by the exercise of due care, and that she had been guilty of negligence in not seeing them in time, and also in her manoeuvres after she did see them.

THE SUNLIGHT, [1904] P. 100; 73 L. J. P. 25; [90 L. T. 32; 9 Asp. M. C. 509—Bucknill, J.]

**271. Vessel turning in River—Duty of Steam Vessel to wait**—*Regulations for Preventing Collisions at Sea, 1897, art. 25.*—Art. 25 of the Regulations for Preventing Collisions at Sea, 1897, which provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel, is not applicable to the case of a vessel turning in a river. The steamer should wait if by so doing she can avoid a collision.

THE WHITLIEBURN, [1901] 83 L. T. 748; 17 [T. L. R. 183; 9 Asp. M. C. 154—Barnes, J.]

## (e) Negligence.

**272. Barge moored in Barge Roads—Necessity for Watchman—Test of Negligence.**—The barge *G.*, moored in the barge roads in the river Thames near Greenwich Pier, was left unattended.

The ketch *W. B.* fouled the barges at the roads and then grounded on the road mooring chains. The *W. B.* got clear of the roads on next flood tide, and at the same time the *G.* and other barges got adrift. The *G.* ultimately caught under a dolphin, and some of her cargo was lost and some damaged.

The cargo owners brought an action to recover their damage against the owners of the *W. B.*, who alleged that the owners of the *G.* had been negligent in leaving her unattended.

HELD—that the question of whether it was negligent to leave a barge unattended was a question of fact, but that it was not negligent to leave a barge unattended in a river or dock if there was no reasonable ground to anticipate danger to the barge, and the fact that if a man had been in attendance he might have prevented the damage was no evidence of negligence.

THE WESTERN BELLE, (1906) 95 L. T. 364, [10 Asp. M. C. 279—Barnes, P.]

**273. Barges in Tow—Position of Anchors—Thames Bye-laws, 1898, r. 11.**—The plaintiffs' barge, *Jubilee*, was lying with three other barges in tow of a steam tug in the river Thames. The defendants' barge *Six Sisters*, one of the three other barges, was astern of *The Jubilee*, and tailed round under the influence of the wind and the eddy tide, ranged up, and on the tug going ahead, *The Jubilee* scraped across the stern of *The Six Sisters*, and sustained damage by being pierced below the water line by the anchor hanging over the bows of *The Six Sisters*, with the peak four feet under water. The plaintiffs sued the defendants for damage by collision.

HELD—that if barges are navigating together their anchors should be placed sufficiently low so as not to be a source of danger to each other, in case any contact takes place between them, and that this danger should be guarded against by lowering the anchor sufficiently to clear the bottom of the barges, and that the plaintiffs were entitled to recover.

THE SIX SISTERS, [1900] P. 302; 69 L. J. P. [139—Barnes, J.]

**274. Contributory Negligence—Thames Bye-laws, 1898, art. 47**—*The Ovingdean Grange* was coming up the river Thames and was about to go into the West India Dock, and when she got opposite Blackwall Point she found it necessary to turn round. She—a large vessel—had a steam tug in attendance to assist her in the operation of turning round and going into the dock. The steamship *Forsete* was coming down the river against the tide, and by art. 47 of the Thames Bye-laws, it is provided that, "steam vessels navigating against the tide shall, before rounding Blackwall Point, wait until any other vessels rounding the point with the tide have



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passed clear." *The Forsete* saw *The Ovingdean Grange* and *The Forsete* slowed, but continued upon her course and brought herself into the position at which the collision ultimately took place. The President found that *The Ovingdean Grange*, in carrying out the manoeuvre, was guilty of negligence and did not keep sufficient look-out, that *The Forsete* ought not to have been where she was at the time of the collision, and this, coupled with the fact that a couple of barges were there also, complicated the manoeuvre which *The Ovingdean Grange* was carrying out in such a way that she was hampered by the wrongful act of *The Forsete* and there was required from *The Ovingdean Grange* a higher degree of care than ordinary.

HELD—that there was abundant evidence to support the conclusion of the President, which was arrived at without any misdirection in point of law.

*The Margaret (Cayzer and Carron Co.)* ([1884] 9 App. Cas. 873, 53 L. J. P. 18, 32 W. R. 564; 50 L. T. 447; 5 Asp. M. C. 204—H. L. (E)) distinguished.

Decision of Jeune, P. ([1901] P. 127; 70 L. J. P. 27; 86 L. T. 344) affirmed.

THE OVINGDEAN GRANGE, [1902] P. 208; 71 [L. J. P. 105; 87 L. T. 15; 9 Asp. M. C. 242, 295—C. A.

**275. Initial Fault.**—*The Chittagong* was anchored in the Bosphorus. In order to continue her voyage to Singapore about 10.30 in the evening she weighed her anchor, and after steaming slowly ahead for a short distance she proceeded to turn short round. At this time *The Kostroma* was coming up the Bosphorus, and *The Chittagong* would whilst turning be running across her course. *The Chittagong* was by her movement on a wrong course or in a wrong position, whilst *The Kostroma* was on a right course. The vessels collided. The nautical assessors considered that the initial fault of *The Chittagong* was in having tried to make too sharp a turn, and that there was negligence on the part of those who had charge of *The Chittagong* in not reversing her engines and going astern when they found that *The Kostroma* was pursuing her course.

HELD—that the collision was solely occasioned by the negligence of those on board *The Chittagong*.

STEAMSHIP CHITTAGONG (OWNERS OF) v. [STEAMSHIP KOSTROMA (OWNERS OF)], [1901] A. C. 597; 70 L. J. P. C. 121; 85 L. T. 430—P. C.

**276. Negligently dragging down towards another Vessel—Slipping Chain and putting out to Sea to avoid Collision—Damage—Expenditure incurred in Coals and Stores consumed and Anchor and Chain lost—Liability of Negligent Vessel.**—If a vessel by negligence drags down towards another, and if it is a natural consequence that the other vessel is obliged to take a step which involves her in some expenditure, that is damage for which the first vessel is liable.

*The Norman* took up a position giving *The Port Victoria*, a vessel riding at anchor, a berth of three-quarters of a mile. *The Port Victoria* dragged towards *The Norman*, and was driving because she had insufficient scope of cable, and was thereby violating the rule of the local authorities, which was that a vessel riding in that anchorage should not have less than seventy fathoms of chain, but *The Port Victoria* chose to ride with forty-five fathoms of chain, and afterwards veered out to only sixty-five. *The Port Victoria* had a bad look-out, because nobody on board her was aware of her dragging until she had dragged a considerable distance and until she was tolerably close to *The Norman*. *The Port Victoria* fouled the chain of *The Norman*, and to avoid a collision the latter vessel slipped her chain and put out to sea. The expenditure thereby incurred in coals and stores consumed and anchor and chain lost was agreed at £308 1s. 6d.

HELD—that under the circumstances the expenditure which *The Norman* had been exposed to was so far the consequence of *The Port Victoria's* negligence as to make her liable therefor.

THE PORT VICTORIA, [1902] P. 25; 71 L. J. P. [36; 50 W. R. 383; 86 L. T. 804; 18 T. L. R. 164; 9 Asp. M. C. 314—Jeune, P.

**277. Steering Gear—Failure of Steam-steering Gear—Failure to have Hand-steering Gear available.**—A vessel was going up the St. Lawrence and approaching the narrowest part, and had opposed to her a strong current. Her steam-steering gear failed, gave her a sheer to port, and she collided with an approaching down-coming vessel. There was a complete failure to have hand-steering gear available or to have anybody there to use it or make any employment of it as a substitute in case the steam gear failed.

HELD—that this was a failure for which the vessel in default must be held responsible

THE TURRET COURT, (1900) 69 L. J. P. 117—[Jeune, P.

**278. Sunken Vessel in Fairway of River Thames—Negligence of Contractor—Liability of Owners of Sunken Vessel.**—The owner of a vessel sunk in the fairway of a navigable river, who has not abandoned the wreck, but has agreed with an independent contractor to raise her for him, is answerable in damages for the loss sustained by the owners of another vessel running foul of the wreck without negligence, in consequence of the wreck being improperly lighted.

HELD—(1) that an obligation was thrown upon the owner of the vessel sunk to see that the independent contractor took the necessary precautions, and as necessary precautions were not taken the owner could not escape liability by seeking to throw the blame on the contractor.

*Penny v. Wimbledon Urban District Council* ([1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 63 J. P. 406; 47 W. R. 565; 80 L. T. 615; 15 T. L. R. 348—C. A., see PRACTICE AND PROCEDURE, 81) followed.

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**HELD**—(2) that so long as, and so far as possession, management, and control of the wreck was not abandoned or properly transferred, there remained on the owner an obligation in regard to the protection of other vessels from receiving injury from her.

*The Utopia* ([1893] A. C. 492; 62 L. J. P. C. 118; 1 R. 394—P. C.) followed.

Decision of Barnes, J. ([1899] P. 74; 68 L. J. P. 22; 47 W. R. 398, 80 L. T. 25; 15 T. L. R. 170, 8 Asp. M. C. 483) affirmed.

**THE SNARK**, [1900] P. 105; 69 L. J. P. 41; [82 L. T. 42; 16 T. L. R. 160, 9 Asp. M. C. 50—C. A

**(f) Sound Signals.**

And see FISHERIES, 30

**279. "Not under Command"—Vessel Aground in the River Thames—Signals—Thames Byelaws, 1898, art. 40—Regulations for Preventing Collisions at Sea, 1897, art. 4 (a)**—Plaintiffs' vessel, while proceeding up the Thames, took ground at Limehouse Reach about 3.20 p.m., and remained hard and fast. She sounded the four-blast signal prescribed by art. 40 of the Thames Byelaws to signify that she was out of command. Defendants' vessel, which was following her up the river, disregarded these signals and ran into her stern.

In an action by the plaintiffs to recover damages, the defendants alleged that the plaintiffs' vessel had failed to carry two black balls as prescribed by art. 4 (a) of the Regulations for Preventing Collisions at Sea in the case of vessels out of command.

**HELD**—that, assuming without deciding that the Regulations for Preventing Collisions at Sea applied to the river Thames, art. 4 (a) of those regulations was not applicable, as it applied only to vessels not under command whilst afloat; and, further, even if that article did apply to vessels aground, the case was governed by art. 40 of the Thames Byelaws.

**THE CARLOTTA**, [1899] P. 223; 68 L. J. P. [87; 47 W. R. 702; 80 L. T. 664; 15 T. L. R. 362, 8 Asp. M. C. 554—Barnes, J.

**280. Collision—"Not under Command"—"Aground"—Not giving Signal as to Course "authorised or required" by Rules—Going Astern in Ordinary Course of Navigation, not from Fear of Collision—Regulations for Preventing Collisions at Sea, 1897, arts. 4, 11, 28.**—Two steamships were approaching the same point before sunrise, but in tropical daylight, on crossing courses. The *C.*, whose duty it was to give way, ported to pass under the *B.*'s stern, but did not clear her. It appeared that the *B.* was at the time slowly dragging through mud in shallow water at a speed of only one mile per hour, and was from time to time, in order to assist her progress and clear her screw, reversing her engines. The *C.* had failed to calculate the slowness of the *B.*'s speed, and had not ported sufficiently.

**HELD** (by Lord Alveystone, C.J., and Kennedy, L.J.)—that the *B.* was free from blame, and was not "aground" or "under no control," and was not therefore bound to exhibit two red lights under arts. 4 or 11, nor was she bound to signal the fact that she was at times going astern, for she did this in the ordinary course of her progress, and it was not a "course authorised or required" by the rules with reference to the position of the *C.*

**HELD** (by Moulton, L.J.)—that the *B.* was to blame because she had not given such a signal, and it was not proved that her omission to do so could not have contributed to the collision.

Per Moulton, L.J.: *Quære*, whether "the departure from the above rules" authorised by art. 27 can apply to art. 28, which is couched in imperative terms.

**THE BELLANOCCH**, [1907] P. 170, 76 L. J. P. [83—C. A.

On appeal, affirmed on the ground that, if the *B.* was to blame, her neglect could not have affected the action of the *C.*, [1907] A. C. 269, 76 L. J. P. 160, 97 L. T. 315—H. L. (B.)

**281. Steamer leaving Dock under Starboard Helm—"Taking any Course authorised or required by these Rules"—Two Short Blasts—Regulations for Preventing Collisions at Sea, 1897, art. 28**—*The Bengal* S.S. was coming out of dock into the Mersey and making a turn as sharp as possible under the action of her starboard helm, to get to the place to which she wished to go. *The Mourne* S.S. was coming down the river close to the wall, was not being carefully navigated, and having starboarded for some reason and blown a two-blast signal, she then, with *The Bengal* on her starboard bow, ported just before the collision and ran into *The Bengal*.

**HELD**—that *The Mourne* was to blame, that the wording of art. 28 of the Regulations for Preventing Collisions at Sea, 1897, did not apply to the circumstances of the case, and *The Bengal* was not compelled to give two short blasts as indicated by the rule, as she was not "taking any course authorised or required by these rules."

**THE MOURNE**, [1901] P. 68, 70 L. J. P. 7, [83 L. T. 748, 17 T. L. R. 194, 9 Asp. M. C. 155—Jeune, P.

**282. Whistling Rule—Indicating Course when Vessels are in Sight of one another—"Course authorised or required by these Rules"—Regulations for Preventing Collisions at Sea, 1897, art. 28.**—By the Regulations for Preventing Collisions at Sea, 1897, art. 28, "when vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules," shall indicate that course by certain signals on her whistle or siren.

**HELD**—that the word "required" was clear enough, as there are certain things required by the rules to be done; that a large interpretation ought to be given to the word "authorised," and that it included any course which, for the safety of the vessels, good seamanship requires to be

**Rules for Preventing Collisions—Continued.**

taken with reference to the other vessel then in sight—although it is quite true that there are certain cases where a more distinct authorisation arises; and that masters of vessels should err, if they err at all, on the side of whistling

THE USKMOOR, [1902] P. 250; 71 L. J. P. [103, 51 W. R. 93; 87 L. T. 55, 18 T. L. R. 727; 9 Asp. M. C. 316—Jeune, P.

**(g) Tug and Tow.**

**283. Fog—Duty of Tug to Stop—Regulations for Preventing Collisions at Sea, art. 16.**—A tug with tow in charge is not necessarily exempt from the duty imposed by art. 16 upon steamers in a fog.

HELD—on the facts of the particular case, that the tug could safely have stopped and allowed the way to run off her tow, and that therefore she had committed a breach of art. 16.

Decision of Barnes, J. ([1904] P. 41, 73 L. J. P. 8; 89 L. T. 481; 9 Asp. M. C. 497) affirmed.

THE CHALLENGE AND THE DUC D'AUMALE, [1905] P. 198, 74 L. J. P. 55, 93 L. T. 390; Asp. M. C. 105—C. A.

**284. Forming One Vessel—Tug with Underway Lights—Liability of Tow—Mersey Rules, 1900, art. 4 (a)—Regulations for Preventing Collisions at Sea, 1897, art. 3—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419, sub-s. 4.**—A screw steam vessel, *The Veritas*, was towed into the Mersey with her engines broken down, and her master, as the holding ground was not very good, arranged with a tug, *The Prairie Cook*, to stop alongside to assist, and to manœuvre, if necessary. The tug was made fast to *The Veritas* with a 7-inch rope, fore and aft, sufficiently strong to serve as a towing hawser if necessary. The tug, while exhibiting a steam vessel's under-way lights, namely, a masthead light and sidelights, was run into by the defendant's steam vessel, *The Devonian*, which was held to blame for bad look-out in not seeing the lights of *The Veritas*.

HELD—(1) that the tug was in such a position and doing such work in the Mersey as made it imperative for her, within the rule, to have two white lights at her masthead, and that there was more than a possibility that the absence of a second white light might have contributed to the collision; (2) that the tug and tow being so attached were under such management and control that they were practically one vessel, that the rule had been infringed by *The Veritas*, the master of which had imposed upon him the duty of controlling and governing the tug and seeing that she had proper lights, and that *The Veritas* was to blame for the improper lights on *The Prairie Cook*.

Decision of Jeune, P. ([1901] 84 L. T. 125; 17 T. L. R. 284) affirmed.

THE DEVONIAN, [1901] P. 221; 70 L. J. P. [66; 49 W. R. 665; 84 L. T. 675; 17 T. L. R. 532, 9 Asp. M. C. 179—C. A.

**285. Merchantmen and Fleet of Warships—Obligation of Warships to observe the Principles of good Navigation—Improper Act of Merchantman—Avoidance of Mischief by exercise of Care and Diligence on part of Navigating Lieutenant—Regulations for Preventing Collisions at Sea, 1897, arts. 19, 21, 22, 27—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 741.**—An action was brought by the owner of the merchant ship *East Lothian* against the navigating lieutenant of H.M.S. *Sans Pareil*. *The East Lothian* was going from Nantes to Cardiff, and was proceeding in a northerly direction in tow of a tug. Both tug and tow had all their lights burning properly, and the tug had two white lights, one above the other, at the regulation distance, which showed that she had another vessel in tow. A fleet of warships, which was proceeding up channel in four lines at a speed of ten knots an hour, was on the port side of *The East Lothian*—that was to the westward—and was seen at a distance of about six miles. All the vessels in fleet had their lights up. *The East Lothian* and her tug kept their course and maintained their speed, which was about six knots an hour. *The East Lothian* and her tug crossed ahead of the *Europa*, the leading ship of the southernmost line of cruisers, and when the tug and tow reached the line of battleships—which was three-quarters of a mile off the southernmost line of cruisers, each of the four lines being three-quarters of a mile apart, and each vessel following the other at a distance of about 400 yards—the navigating lieutenant of *The Sans Pareil*, which was the leading battleship, ported his helm to go astern of the tug, but assuming that the tug had nothing behind it, when in reality it had *The East Lothian*; he then starboarded his helm to get back into line, and so rammed *The East Lothian*, with the result that she sank and one life was lost. It was admitted that this was negligence, and in the Court below *The Sans Pareil* was held solely to blame.

HELD—that (1) when Her Majesty's ships were navigating in water like that above described they must observe the principles of good navigation just like any other of Her Majesty's subjects, and must obey the rules of the road, (2) that *The East Lothian* had broken no statutory regulation, as none applied; (3) that the cause of action by *The East Lothian* against the *Sans Pareil* was really for negligence; (4) that it was an improper act of navigation for *The East Lothian* to continue her course and speed, in the circumstances of the case, and to persist in going across the fleet, which those in charge of her saw coming up on her port side six miles off; (5) that the navigating lieutenant on board H.M.S. *Sans Pareil* could, by the exercise of ordinary care and diligence, have avoided the mischief which happened.

*The Margaret (Cuyzer v. Carron Co.)* ((1884) 9 App. Cas. 873; 53 L. J. P. 17; 32 W. R. 564, 50 L. T. 447; 5 Asp. M. C. 204—C. A.) referred to.

Decision of Gorell Barnes, J. (82 L. T. 356; 16 T. L. R. 241) affirmed.

H.M.S. SANS PAREIL, [1900] P. 267; 69 [L. J. P. 127; 82 L. T. 606; 16 T. L. R. 390; 9 Asp. M. C. 78—C. A.

**Rules for Preventing Collisions—Continued.**

**286 Pilot Cutter lashed to Tow—Third Vessel—Negligence of Tow—Independent Duty of Tug to avoid Danger—Identification of Vessels—Costs**—A sailing vessel in charge of a pilot, and having a pilot cutter lashed alongside, was being towed by two tugs down the Bristol Channel. A collision occurred with a schooner, and both the cutter and schooner were injured. One of the tugs towed the schooner into harbour.

Jeune, P., had held—(1) that, though those in charge of the sailing vessel had been guilty of negligence in not properly directing the tugs, the latter were nevertheless liable to the schooner, for it was their duty to use reasonable care and skill to avoid collision and had failed to do so.

*The Altair* ([1897] P. 105, 66 L. J. P. 42; 45 W. R. 622, 76 L. T. 263, 8 Asp. M. C. 22—Barnes, J.) followed

(2) That the cutter could not be identified with the sailing vessel, and that, therefore, she could recover against the tugs on the same grounds as the schooner.

*The Bernina* (1888) App. Cas. 1; 57 L. J. P. D. & A. 65, 58 L. T. 423—H. L.) followed

On appeal by the tug owners —

**HELD**—that the pilot cutter had in fact also been guilty of negligence, since she might have cast off in time to escape a collision, that the tugs were only liable to the pilot cutter for one moiety of her claim, and that each party must pay their own costs.

Decision of Jeune, P. ([1904] P. 400; 74 L. J. P. 3, 92 L. T. 173, 10 Asp. M. C. 19) varied.

**THE HARVEST HOME**, [1905] P. 177; 74 [L. J. P. 65, 93 L. T. 395, 10 Asp. M. C. 162, 76 L. J. K. B. 31; 93 L. T. 692—C. A.]

**(h) Vessels Crossing.**

**287. Approaching Spot to Take Up Pilots—Regulations for Preventing Collisions at Sea, arts. 19, 21, 22, 23, 27**—Two vessels were converging on a spot in Canadian waters for the purpose of taking up pilots from a pilot cutter, on courses and at speeds which would probably bring them to that spot so as to involve risk of collision when the spot was reached.

**HELD**—that they were crossing vessels within art. 19 of the Regulations for Preventing Collisions at Sea, and the vessel which had the other on her starboard bow must keep out of the way; and that the fact that the former vessel arrived at the spot first with little motion left did not, in the circumstances, alter the position.

**THE STEAMSHIP ALBANO v. THE STEAMSHIP [PARISIAN]**, [1907] A. C. 193; 76 L. J. P. C. 33, 96 L. T. 336, 23 T. L. R. 344; 10 Asp. M. C. 365—P. C.

**288. Keeping Course in Rivers—Navigating on Starboard Side of Channel—Rules for Preventing Collisions at Sea, 1884, arts. 16, 21, and 22.**—Art. 22 of the Regulations for Preventing Collisions at Sea, 1884, which prescribes that in

certain circumstances a vessel must keep her course, may have a different meaning when applied to vessels navigating rivers to that which it bears in the case of vessels in the open sea. Although two vessels may be approaching one another at such a distance and on such bearings that if on the open sea they would be vessels crossing so as to involve risk of collision, when they are navigating a river there may be no such risk. Vessels must follow, and must be known to intend to follow, the curves of the river bank, and they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other.

A steamship which was on the starboard bow of another steamship in a winding river held not to blame for a collision between them although she ported her helm, upon the ground that, in porting, she was pursuing the course which should have been attributed to her, inasmuch as it was necessary for her to do so in order to arrive at that side of the channel which lay on her starboard hand.

**OWNERS OF STEAMSHIP NORMANDIE v. [OWNERS OF STEAMSHIP PEKIN]**, [1897] A. C. 532; 8 Asp. M. L. C. 367, 66 L. J. P. C. 97; 77 L. T. 443, 13 T. L. R. 487—P. C.

**289 River Thames—“Steam Vessels . . . crossing towards the Other Side”—River Thames Bye-laws, 1898, art. 48**—A steamer was, at the time of the collision, partly athwart the river, and not in motion through the water or moving ahead or astern over the ground, but was slowly swinging to her anchor in the act of turning round.

**HELD**—that she was not a vessel crossing the river within the Bye-laws for the Regulation of the River Thames and the Navigation thereof, 1898, art. 48:—“Steam vessels . . . crossing towards the other side shall keep out of the way of vessels navigating up and down.”

*The River Derwent* ((1891) 64 L. T. 509; 7 Asp. M. C. 37—H. L. (E.)) distinguished

**THE JOHN HOLLOWAY**, [1900] P. 37; 69 [L. J. P. 15, 48 W. R. 416, 81 L. T. 726; 9 Asp. M. C. 36—Bucknill, J.]

**290. River Tyne Bye-laws, 1884, arts. 21, 22.**—The river Tyne bye-laws provide that a vessel “requiring to pass over a part of the channel which is not within that half reserved for its navigation,” or “crossing the river,” shall be “navigated . . . so as not to cause obstruction, injury or damage to any other vessel.”

**HELD**—that the rules mean that a vessel may cross if there is time and opportunity to do so without hampering another vessel, other vessels seeing her about to cross must act reasonably and give her a little more room if required, but the responsibility rests mainly upon her, and in any event she must clearly indicate the course which she means to pursue.

*The Thetford* ([1887] 57 L. T. 455, 6 Asp. M. C. 179—Hannay, P.) followed.

**THE SKIPSEA**, [1905] P. 32; 74 L. J. P. 34; [53 W. R. 538, 93 L. T. 181; 10 Asp. M. C. 91—Barnes, J.]

**Rules for Preventing Collisions—Continued.**

**291.** *Steam Trawler lying to—Duty to keep out of Way of another Steamer—Regulations for Prevention of Collisions at Sea, 1897, art. 19.*—The *L.*, a steam trawler, was lying to, with engines stopped, waiting for the tide, with her head pointing north. The steamship *N.*, approaching on a course west-half-south, saw on her port bow the green and masthead lights of the *L.*

The *N.* kept on her course, stopping and reversing just before she ran into the *L.*

HELD—that the *L.* was alone to blame, for under art. 19 it was her duty to keep out of the way.

*The Helvetia* (3 Asp. M. C. 43) distinguished.  
THE BROOMFIELD, (1906) 94 L. T. 109; 10 [Asp. M. C. 194—Div. Ct.]

**XI. COLLISION ACTIONS****(a) Division of Loss**

**292.** *Action against Tug and Tow—Judgment by Default against Tow—Proceeds of Sale of Tow paid into Court—Plaintiffs' Vessel and Tug found Both to Blame—Judgment against Tug for Half the Damage.*—In an action against a tug and a tow for damage by collision, the owners of the tow allowed judgment to go by default, and the proceeds of the sale of the tow—viz; £855—were paid into Court. The plaintiffs' vessel and the tug were found both to blame, and judgment was given against the tug for half the damage. The total damage sustained by the plaintiffs' vessel was £4,146.

HELD—that the plaintiffs were entitled to take the £855 out of Court, and that the owners of the tug were liable to pay the plaintiffs £2,073 without having credit given to them for the £855.

*The Englishman and The Australia* ([1894] P. 239; 63 L. J. P. 133; 43 W. R. 670, 70 L. T. 846—Jeune, P.) distinguished.

THE MORGENGRY AND THE BLACKCOCK, [1900] P. 1, 69 L. J. P. 3, 43 W. R. 121, 81 L. T. 417, 16 T. L. R. 14, 8 Asp. M. C. 591—C. A.

**293.** *Both Ships to Blame—Damage to Third Vessel arising out of Collision—Contribution—Joint Tortfeasors—Interpretation of Decree of Admiralty Court.*—Where two vessels come into collision, *ex hypothesi* by the fault of both, and one of them, in consequence of the collision, comes into contact with another vessel and does damage which has to be paid for, then that is part of the damage arising out of the collision, which, by the decree of the Admiralty Court, is to be shared between the two vessels.

It would be an extension of the doctrine of no contribution between joint tortfeasors to say that you must so construe the decision of the Admiralty Court as to exclude damages arising from tort committed by one of the vessels in consequence of or as the result of the collision.

THE FRANKLAND, [1901] P. 161; 70 L. J. P. [42; 84 L. T. 395, 17 T. L. R. 419, 9 Asp. M. C. 196—Jeune, P.]

**294.** *Both Ships to Blame—Damages Recovered by Crew.*—A collision having occurred between two vessels, an agreement was made between the owners of the vessels that each was to blame, and that "the damages arising therefrom ought to be borne equally by the owners" of both. Subsequently the representatives of the seamen, who were drowned owing to the collision, on board of one of the vessels, made claims against the owners of the other vessel, and these claims were settled by the payment of a sum of money. The owners who paid the claims sought to recover one-half thereof from the owners of the other vessel under the agreement.

HELD—that the sum so paid was not damage arising out of the collision, that the representatives of the seamen could not have recovered against the owners of the vessel on which the seamen were serving, inasmuch as the collision was caused by the negligence of a fellow-servant, and that therefore one-half of the sum so paid could not be recovered from the owners of that vessel.

THE GENERAL HAVELOCK, (1905) 21 T. L. R. [438—Deane, J.]

**295.** *Both Ships to Blame—Foreign Ships—Damages Payable to Crew under Foreign Law.*—A collision between two foreign ships was due to the fault of both. In the assessment of the damage upon that footing the owners of one of the ships claimed to recover from the other ship one-half of the amounts which they were liable under the law of their country to pay to the families of those of their crew who were drowned in consequence of the collision. This law made masters liable to pay compensation to their employees for any accident apart from any question of negligence.

HELD—that the claim could not be sustained, for our Admiralty rule as to the division of loss does not extend to damages for loss of life, and English law recognises no right to indemnity independent of negligence.

THE CIRCE, [1906] P. 1; 74 L. J. P. 106; 93 [L. T. 640, 22 T. L. R. 525; 10 Asp. M. C. 149—Barnes, P.]

**296.** *Dock Company—Tugs and Tows—Gang for Transporting Ship in Dock—Transporting Order—Servants Lent to Third Party—Injury to Another Ship.*—The *Envermen* was lying moored to the east wall of the central branch dock of the Tilbury Docks. At the same time a large steamship, *The Senator*, was being taken down the branch dock and into the main dock by a transporting gang and two tugs, *The Dreadnought* and *The Louise*, supplied on the terms of a transporting order; the transporting gang and the tugs were supplied by the defendants. *The Louise* was fast to the stern of *The Senator*, which was being taken out stern first. While this was being done the barge *Denier* was taken by those in charge of her down the branch dock. She was hauled alongside the starboard side of *The Senator*, and when close to the stern of *The Senator* she hitched on to the stern of *The*

**Collision Actions—Continued.**

*Louise*. She was subsequently driven by the wash from the engines of *The Louise* against the side of *The Envermen* on the other side of the branch-dock and did her damage. The accident was due to the negligence of *The Louise* in pulling her engines ahead suddenly.

**HELD**—that it was clear that the crew of *The Louise* were generally the servants of the defendants, and had not been handed over to the owners of *The Senator*, and the transporting order only provided for the non-liability of the defendants in case of damage done to or by the vessel being towed and her cargo, and in no way provided for the non-liability of the defendants for damage done by the tug; that the crew of the tug and the transporting gang were under the transporting order, only to be deemed the servants of the owners of *The Senator* for certain purposes and in certain contingencies which did not arise and that the defendants were liable.

*THE LOUISE*, (1902) 18 F. L. R. 19—A.M. Div.

**297 Injured Ship damaged by Second Collision—Ship Dry-docked for Repairs—Second Collision causing no Delay in Dock—Apportionment of Expenses**—A ship was damaged by a collision and it was necessary to dry-dock her for the purpose of repairs. While proceeding to a dry-dock she collided with a third ship and sustained further damage. The owners of the third ship admitted liability for this damage. The ship was dry-docked and both sets of damage were repaired at the same time. The damage caused by the first collision took twenty-two days to repair, and the damage by the second collision six days to repair the ship not being detained in dock longer than if the damage by the first collision had alone to be repaired.

**HELD**—(1) that, as it was necessary to dock her in order to repair both sets of damage, the owners of the third ship must bear one-half of the expense of dry-docking her during the time that the damage caused by the second collision was being repaired.

*Marine Insurance Co. v. China Trans-Pacific Steamship Co.* ((1887) 11 App. Cas. 573 56 L. J. Q. B. 101; 35 W. R. 169; 55 L. T. 191, 6 Asp. M. C. 68—H. L.) applied.

But (2) that the owner of the third ship was not liable for any demurrage as no detention was due to the second collision.

Judgment of Barnes, P. (21 T. L. R. 516) varied.

**THE HAVERSHAM GRANGE**, [1905] P. 307, 74 L. J. P. 115; 53 W. R. 675; 21 T. L. R. 628; 93 L. T. 733; 10 Asp. M. C. 156—C. A.

**298. Personal Injuries—Both Ships in Fault—Action in personam—Damages.**—The plaintiff sustained personal injuries in a collision at sea that occurred between a schooner in his charge as pilot, and the defendants' steamer. In an action *in personam* against the defendants, claiming damages for such injuries caused, as alleged, by the defendants' negligence, the jury

found that the defendants were negligent in not getting out of the way of the schooner, or stopping, and awarded the plaintiff £500. It was admitted that the schooner, which was being overtaken by the steamer, displayed no stern light as required by Art. 10 of the statutory regulations.

**HELD**—that sect. 419, sub-sect. 4 of the Merchant Shipping Act, 1894, is not confined to Admiralty cases, but applies to all Courts; that the schooner was in fault in respect of the said breach of the Collision Regulations; and (Bovd, J., dissenting) that the Admiralty rule as to division of loss applied, and that the plaintiff was duly entitled to half the damages assessed by the jury.

*BOUCHER v. CLYDE SHIPPING CO.*, [1904] 2 Ir. R. 129—K. R. D.

**299 Ship Dry-Docked for Collision Repairs—Owner taking Advantage of the Opportunity to add Bilge Keels—Owner's Liability to Contribute to Expenses connected with Dry-Docking Vessel.**—Where there is nothing in common between two persons, except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, then no duty to contribute arises on the principle that a man ought not to get an advantage unless he pays for it.

Where there is an obligation, where there are two things necessary to be done one by one person and one by another if they are done at the same time, then the cost so far as it is common to both should be shared between them. The point is that the two things are obligatory by reason of contract or duty.

A vessel had to be dry-docked for collision repairs. The owner put the ship into dock to repair her at the expense of the wrong-doers. While she was in dry-dock he took advantage of the occasion to add bilge keels, which could not be done without putting the vessel into dry-dock. The owner was under no contract to do so, and had not retained the dock for that purpose. There was not much difference between the cost of the two classes of repairs, and the time required for executing them.

**HELD**—that the owner was entitled to take advantage of the opportunity afforded by the ship being in dry-dock to make the improvement of bilge keels without contributing towards the expenses connected with the dry-docking of the vessel.

The principle of *Ruabon Steamship Co. v. London Assurance* ([1900] A. C. 6; 69 L. J. Q. B. 86; 48 W. R. 225; 81 L. T. 585; 16 F. L. R. 90; 5 Com. Cas. 71 9 Asp. M. C. 2—H. L. (E)) See *INSURANCE*. No 96) followed.

*THE ACANTHUS*, [1902] P. 17; 71 L. J. P. 14; 85 L. T. 696; 11 T. L. R. 160; 9 Asp. M. C. 276—Jeune, P.

**(b) Limitation of Liability**

**200. Ascertainment of Tonnage—Foreign Vessel.**—The owners of a Danish vessel with a

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Danish certificate setting forth her measurements, including the tonnage taken up by crew space, are not entitled in ascertaining the vessel's tonnage for purposes of limiting liability to deduct the tonnage set forth in the certificate as taken up by crew space, if such space has not been certified as required by sect. 6 of the Merchant Shipping Act, 1894.

*The Franconia* ((1870) L. R. 3 Adm. 164; 27 W. R. 128; 39 L. T. 57—C. A.) followed

*THE OLGA v. THE ANGLIA*, (1905) 7 F. 740—  
[Ct. of Sess.]

**301. Costs of Limitation Suit—Discretion of Registrar.]**—In a limitation suit there is a general rule of practice that a person who wishes to limit his liability must pay the costs of doing it. But there are exceptions to the rule, and where the registrar has found that the claimants have made such a claim as cannot be substantiated, and that the circumstances are such that it would be unjust to make the persons seeking to limit their liability pay the costs where they have in reality succeeded, justice demands that those who have succeeded should receive their costs from those who have failed

*THE RIJNSTROOM*, (1899) 80 L. T. 422; 8 Asp. M. C. 538—Bucknill, J.

**302. Decree for Damages—Petition for Limitation of Liability—Cargo Owners seeking to Re-open Question of Damages—Competency.]**—In cross actions by the owners of two colliding ships the *A.* and the *O.*, the owners of the *A.* were awarded £7,149, being one-half of the value of the *A.* under deduction of one-half of the damage to the *O.*

The owners of the *O.* presented a petition to limit their liability; and the owners of the *A.* and also the owners of the *A.*'s cargo presented claims.

**HELD**—that the owners of the cargo on the *A.* could not claim to re-open the question of the true value of the *A.*, although they were not parties to the suit in which it was determined, and although they alleged that the value as assessed was excessive.

*THE OLGA v. THE ANGLIA*, (1905), 7 F. 739—  
[Ct. of Sess.]

**303 Foreign Vessel—Measurement—Double Bottom for Water Ballast—Foreign Certificate—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 81, 84, 503, 724, 725—Order in Council, May 5th, 1873.]**—Where the owners of a French steam vessel, constructed with a double bottom for water ballast, were seeking to limit their liability in respect of damage caused by a collision:—

**HELD**—sufficient proof of tonnage to produce a duly authenticated copy of the Order in Council of May 5th, 1873, the French certificate of Registry (verified by affidavit), giving the gross tonnage exclusive of the double bottom, and a certificate of a French surveyor to the

effect that the space between the two bottoms was not available for the carriage of cargo, stores, or fuel.

*The Zanzibar* ([1892] P. 233; 61 L. J. P. 81; 40 W. R. 702—Jeune, P.) applied

*THE CORDILLERAS*, [1904] P. 20; 73 L. J. P. [13; 89 L. T. 673; 9 Asp. M. C. 506—  
Barnes, J.]

**304 Interest—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503.]**—In addition to the £8 per ton fixed by sect. 503 of the Merchant Shipping Act, 1894, the owners of a ship liable in damages in respect of a collision, must also pay interest at 4 per cent. from the date of the collision until payment.

*THE OLGA v. THE ANGLIA*, (1905) 7 F. 740—  
[Ct. of Sess.]

**305. Life Claims not made within Specified Time—Balance of Life Claim Fund—Payment out thereof—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 504.]**—The liability of the vessel in fault was limited to £8 per ton in respect of property claims, and £7 per ton in respect of life claims. The usual advertisements were issued fixing a day for sending in claims; the property claims exhausted, and were in excess of the £8 per ton; the life claims did not exhaust the £7 per ton.

**HELD**—that other possible life claims were barred by the advertisement in spite of the provision as to twelve months in Lord Campbell's Act (9 & 10 Vict. c. 93), s. 3: and that the balance of the life claim fund should be paid out to the owners who had paid it into Court in the limitation suit.

*THE ALMA* [1903] P. 55, 71 L. J. P. 21; 51 W. R. 415, 88 L. T. 64; 19 T. L. R. 149; 9 Asp. M. C. 375—Jeune, P.

**306. "Owners"—Charterers by Demise—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 503, 504.]**—The charterers by demise of a ship for a term, who are not the registered owners of the ship, but who have complete control of her, are not the "owners" within the meaning of sects 503 and 504 of the Merchant Shipping Act, 1894, so as to entitle them to limitation of liability under those sections.

Decision of Deane, J. ([1906] P. 34, 75 L. J. P. 22; 94 L. T. 344; 22 T. L. R. 218; 10 Asp. M. C. 203) affirmed.

*THE HOPPER*, No. 66, [1907] P. 254; 76 L. J. P. 110; 97 L. T. 360; 23 T. L. R. 414—  
C. A.

(NB—See now, however, sect. 71 of the Merchant Shipping Act, 1906.—ED.)

**307. Retrospective Operation of Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 69.]**—Sect. 69 of the Merchant Shipping Act, 1906, has no retrospective operation.

A reference to assess damages was heard in May, 1907, in pursuance of the decree in a collision action dated July 25th, 1906. On June 1st, 1907, the Act of 1906 came into opera-

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tion; on June 3rd, the Registrar issued his report as to the amounts of claims, and on June 7th a writ was issued by the owners for limitation of their liability.

**HELD**—that the limitation must be governed by sect. 503 of the Act of 1894 and not by sect. 69 of the Act of 1906.

THE LANGDAL, (1907) 76 L. J. P. 154 23  
[1 L. R. 683—Deane J.]

**308 Valuation of Ships—Valuation in Collision Action—Res inter alios acta.**—Although the values of two colliding ships are determined in cross actions between their owners, the values so ascertained are not conclusive upon the cargo owners, who were no parties to the proceedings, and they are entitled to independent valuations in further proceedings.

Decision of the Ct. of Sess. (7 Fraser 739 12  
Sc L. R. 139) reversed.

VAN LEECK AND ZOON AND OTHERS v. SOMMER-  
[VITTE AND GIBSON, 1906] A. C. 489, 75  
L. J. P. C. 67, 95 L. T. 161, 22 T. L. R. 715;  
10 Asp. M. C. 263—H. L. (Sc.)

**(c) Measure of Damages**

**309 Cargo Damaged—Measure of Damages**—A cargo was laden on board a ship at a foreign port for carriage off to an English port. Owing to a collision on the high seas the cargo was damaged, and was subsequently landed at another English port, and sold.

**HELD**—that the damage recoverable against the vessel in fault was the sound value of the cargo as delivered at the English port of destination, less the net proceeds of the sale.

THE ACRY, (1901) 17 T. L. R. 351—  
[Deane, P.]

**310 Delay caused by repairing Ship—Extra Expense of Coal**—Two steamships, A and O, having collided in the Mersey, the A agreed to pay 75 per cent. of the damage to the O. The O carried mails and passengers from Liverpool for South America and after leaving Liverpool her practice was to call at Cardiff to coal and then proceed to Havre, where the bulk of her passengers embarked. Upon the occasion in question she was delayed at Liverpool repairing the damage caused by the collision and in order to save time, and to get to Havre as soon as possible, she filled up with coal at Liverpool and did not call at Cardiff. The extra expense thereby caused was £309.

**HELD**—that this sum could not be recovered as part of the damages.

THE NORMANDY (1900) 16 T. L. R. 567—  
[Baines, J.]

**311 Expenses—Repatriation of Seamen—Norwegian Law.**—By Norwegian law the State bears the expense of repatriating the master and crew of a "lost" vessel.

**HELD**—that as such expenses do not fall upon the owners of a "lost" vessel, such owners cannot

claim them from the vessel which collided with and sank her.

THE CRAFTSMAN, [1906] P. 153; 75 L. J. P.  
[87; 95 L. T. 157; 10 Asp. M. C. 274—  
Deane, J.]

**312 Loss of a Dredger—Owners making no Profit by Use thereof.**—A ship, in consequence of negligent navigation, collided with a dredger, which belonged to the Mersey Docks and Harbour Board, being used by them for dredging the bar at the mouth of the Mersey. The Harbour Board earned no profits out of their undertaking. The dredger had to be laid up for repairs, but no substitute was hired.

**HELD**—that the proper measure of damages in respect of her detention was the value of the work which she would have done during the time reckoned upon the basis of her cost depreciation, and working expenses, but with no allowance for owner's profit.

The Greta Holme ([1897] A. C. 596 66  
L. J. P. 166 77 L. T. 231—H. L.) applied.

Decision of C. A. sub nom. *The Marpessa*  
[1906] P. 95, 75 L. J. P. 18 54 W. R. 339 94  
L. T. 128, 10 Asp. M. C. 232) affirmed.

MERSEY DOCKS AND HARBOUR BOARD v. THE  
[OWNERS OF THE MARPESA, 1907] A. C.  
211 76 L. J. P. 128, 97 L. T. 1 23 T. L. R.  
572—H. L. (D.)

**313 Loss of Freight under Subsequent Charter.**—A ship while proceeding on a voyage under charter from Cardiff to Cadiz was sunk by collision with another vessel, which was to blame. At the time of the collision two other charter-parties had been signed, under which the ship was to proceed from Cadiz to Newfoundland, and from Newfoundland to the United Kingdom.

**HELD**—that in assessing the damages the owners of the ship were entitled to recover the profit which the ship would have earned under the two later charter-parties, subject to a deduction for contingencies.

The Kate ([1899] P. 165, 68 L. J. P. 11, 17  
W. R. 669, 83 L. T. 423; 15 T. L. R. 165 8  
Asp. M. C. 539—Deane, P.) followed.

THE RACING [1905] P. 273 75 L. J. P. 83, 95  
[L. T. 598, 22 T. L. R. 575, 10 Asp. M. C.  
300—C. A.]

**314 Nominal Damages—Loss of Use of a Chattel—Hue of Substitute.**—Where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages. "Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infringement of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages.



**Collision Actions—Continued.**

The Mersey Docks and Harbour Board are bound by law to light the port of Liverpool, and their practice is this: They have four lightships always at their stations; they have a fifth lightship, for the purpose of putting it into the place of any one of the four, if repairs are wanted thereto; and they have a sixth lightship, to supply the place of any lightship, which, as in the present case, has been run down and sunk by a tortfeasor. This sixth lightship costs about £1,000 a year. The lightship *Comet* was at its post, lighting the Mersey. The tortfeasor—*The Mediana*—came in and sank it, and for seventy-four days the harbour board were deprived of her use.

HELD—that the harbour board were entitled to get from the tortfeasor not only the out-of-pocket expenses caused by the collision, but also substantial damages for the seventy-four days' loss of the use of the damaged lightship.

*The Greta Holme* ([1897] A. C. 596; 66 L. J. P. 166; 77 L. T. 231; 8 Asp. M. C. 317—H. L. (E.)) held applicable.

Decision of C. A. ([1899] P. 127, 68 L. J. P. 26; 80 L. T. 173; 15 T. L. R. 205, 8 Asp. M. C. 493) affirmed.

THE MEDIANA, [1900] A. C. 113, 69 L. J. Q. B. [35; 48 W. R. 398; 82 L. T. 95; 16 T. L. R. 194; 9 Asp. M. C. 41—H. L. (E).]

**315. Removing Obstruction—Liability for Expense—Abandoned Vessel—Thames Conservancy Act, 1894** (57 & 58 Vict. c. clxxxvii.), s. 77.]—A vessel collided with and sank a fishing vessel in the Thames. The Thames Conservators raised the sunken vessel, and recovered by action the expenses thereof from her owners. The latter claimed that amount from the owners of the vessel in default.

HELD—that whether the sunken vessel had been abandoned or not the owners of the sunken vessel were entitled to recover that sum from the owners of the vessel in default.

THE WALLSEND, [1907] P. 302, 76 L. J. P. 131; [96 L. T. 851; 23 T. L. R. 356—Deane, J.]

**316. Ship being run at a Loss—Expectation of Future Profit.**]—Shipowners, who had been running their ship at a profit, began to run her with other ships on a different trade route at a present loss so as to secure a footing there in the hope of making a profit in the future. While on one of these voyages the ship was injured by collision with another ship owing to the fault of the latter. At the time of the collision she was still running at a loss.

HELD—that the owners were not entitled to recover, in addition to out-of-pocket expenses, damages for the loss of the use of their ship during the time it was being repaired.

THE BODLEWELL, [1907] P. 286; 76 L. J. P. [61; 96 L. T. 854; 23 T. L. R. 356—Deane, J.]

**317. Substituted Expense—Compromise—Reasonableness of Compromise—Loss arising out**

*of Collision*.]—A collier steamship, chartered by the plaintiffs to carry a cargo of coal from the Tyne to Cape Town, came into collision with a steamship of the defendants and put into the Thames for repairs. An agreement was entered into between the plaintiffs and the owners of the collier by which the voyage was to be abandoned, the cargo was to be sold, and a sum of money was to be paid by the plaintiffs to the owners of the collier as a "substituted expense" in lieu of the estimated greater expense of storing the cargo during the repairs and reshipping it after the repairs had been effected. Both vessels were held to be to blame for the collision, and the defendants paid the owners of the collier a half of the damage sustained by them. The plaintiffs then issued a writ against the defendants and claimed a half of the sum paid by them as a substituted expense. No part of this claim had been dealt with in the proceedings between the two vessels.

HELD—that the plaintiffs were entitled to recover the sum claimed, it being the result of a reasonable arrangement to minimise the loss, and therefore a consequence of the collision.

Decision of Bucknill, J. ([1904] P. 202, 73 L. J. P. 62; 52 W. R. 672; 90 L. T. 354; 9 Asp. M. C. 544) reversed.

THE MINNETONKA, [1905] P. 206; 74 L. J. P. [97; 53 W. R. 521; 93 L. T. 581; 21 T. L. R. 407; 10 Asp. M. C. 142—C. A.]

**318. Total Loss of Vessel in Ballast under Charter—Profits Lost under Charter-party—Value of Vessel at End of Voyage**]—The owners of a vessel totally lost in consequence of a collision with another vessel when bound in ballast on a voyage to take in cargo under a charter-party already entered into can, if such other vessel is proved, in an action of damage instituted against her, to have been to blame for the collision, recover against her damages for the loss of any profits which, but for the collision, they would have gained by carrying out the charter-party, together with the value of the vessel at the end of the voyage.

*The Columbus* (1849) 3 Wm. Rob. 158) and *The Clyde* (1856) Sw. 23) distinguished.

THE KATE, [1899] P. 165; 68 L. J. P. 41; 47 [W. R. 669; 80 L. T. 423; 15 T. L. R. 309; 8 Asp. M. C. 539—Jeune, P.]

**319. Vessel Lost—Assessment of her Value—Principle to be followed.**]—Where there is no market, the real test is, what was the value of the vessel to the owners, as a going concern, at the time when she was sunk? The best witnesses are those who knew the ship; the next best, those with experience of the market. The original cost, subsequent expenditure, amount of depreciation and profits, &c., may all be of assistance.

Dicta in *The Ironmaster* (1859) Sw. 441) approved.

THE HARMONIDES, [1903] P. 1; 72 L. J. P. [9; 51 W. R. 303; 87 L. T. 448; 19 T. L. R. 37; 9 Asp. M. C. 354—Barnes, J.]

## Collision Actions—Continued

## (d) Practice.

**320. Appeal to House of Lords—Question of Fact**—Where the only question on an appeal to the House of Lords is one of pure fact, *i.e.*, whether the lights of the appellant's ship were so dim as not to be seen, that House will hesitate long before upsetting the finding of the Court below.

ROBERTSON *v.* WINDRAIN, [1906] W. N. 140—  
[H. L. (E.).]

**321. Concurrent Actions—Action in rem—Foreign Ships—Action by Cargo Owner—Action by Shipowner Abroad—Writ—Power to Add Parties—R. S. C., Ord. 16, r. 2.**—A collision occurred between two Norwegian ships, *The Fernando* and *The Charlotte*, in the North Sea, and the cargo on board *The Fernando* was damaged. *The Charlotte* was arrested upon arrival in England by the plaintiffs alleging that they were the owners of the cargo on board *The Fernando*. A preliminary objection was taken that the plaintiffs were not the owners of the cargo, and this objection was held to be good and *The Charlotte* was ordered to be released. An application was then made to add the real owners of the cargo as plaintiff.

Held—that the Court had jurisdiction to do so.

*The Charlotte* was then arrested in Norway at the instance of the owners of *The Fernando*, and by Norwegian law the master of a vessel was entitled to act in the interests of and to sue on behalf of the cargo owners, and the liability of a wrong-doing vessel was limited to the value of the ship and freight. The owners of *The Charlotte* gave bail in that amount, and the vessel was released. Upon arrival in this country she was re-arrested in the action by the cargo owners. The owners of *The Charlotte* moved to set aside the writ upon the ground that there was no jurisdiction to entertain the action both vessels being foreign vessels, and there being proceedings in the Norwegian Courts where the plaintiff could be heard.

Held—that the cargo owners had a right to bring their action in this country.

THE CHARLOTTE, [1907] 23 T. L. R. 750—  
Deane, J.

**322. Costs—Action by Tug—Counterclaim against Tow and Tug—Jouder of Tug as Defendant—Costs where Tug successful in whole Action.**—The schooner *Dorset* in tow of tug *Fellgarth*, was sunk by the steamer *Hopper* No. 21. To an action by the owners of *The Dorset*, the owners of *The Hopper* set up a counterclaim against the plaintiffs and *The Fellgarth*, alleging negligence on their part. The plaintiffs thereupon amended their writ and made the owners of *The Fellgarth* defendants. The Court found that *The Hopper* No. 21 was alone to blame. On the question of costs—

Held (following *The Mystery* [1902] P. 115)—that as the plaintiff had acted reasonably in

adding the owners of the tug as co-defendants, the owners of *The Hopper* No. 21 must pay their costs as against both defendants.

THE HOPPER No. 21, [1903] W. N. 114—  
[Bucknill, J.]

**323. "Damage by Collision"—Pier—Damage to Pier by Ship—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3 (3).**—Damage done by a ship to a pier is not "damage by collision" within sect. 3 (3) of the County Courts Admiralty Jurisdiction Act, 1868.

THE NORMANDY, [1904] P. 187; 73 L. J. P. [55]; 52 W. R. 634; 90 L. T. 351; 20 T. L. R. 239—Div. Ct.

**324. Foreign State's Public Vessel—Exemption from Arrest—Arrest—Appearance Entered under Misapprehension—Effect of.**—A foreign State's vessel destined for the State's use is not legally subject to arrest in a damage action *in rem*.

*The Parlement Belge* ((1880) 5 P. D. 197; 28 W. R. 642; 42 L. T. 273—C. A.) followed.

The privilege will not be deemed to be waived because the vessel being arrested in an English port, agents of the government owning her undertook, under a misapprehension, to put in bail in order to secure her release and entered an unconditional appearance.

THE JASSY [1906] P. 270; 75 L. J. P. 93; 95 L. T. 363; 10 Asp. M. C. 278—Barnes P.

**325. Interrogatories—Damage to Cargo—Action by Freight Owners for Negligence**—The barge *Bernard*, carrying a cargo of maize, towed by the tug *Rover* was injured by collision with the steamship *Minerva*. The owners of the maize commenced an action in the High Court against the owners of *The Bernard* and *The Rover*, alleging negligent navigation. The plaintiff sought to interrogate as to the circumstances of the collision in relation to matters usually contained in the preliminary act required by the County Court Rules, 1903, Ord. 39, r. 32. Amongst other questions they asked whether any other vessel besides *The Minerva* contributed to the collision and damage and what negligence was alleged against *The Minerva*.

Held—that the interrogatories were admissible.

THE BERNARD, [1905] W. N. 73—C. A.

**326. One Vessel Sunk in Thames—Wreck Raised by Conservancy—Arrested by Marshal in Collision Action—Priorities—Thames Conservancy Act, 1891 (54 & 55 Vict. c. clxxxvii), s. 77.**—A steamship was sunk by a collision in the Thames, and was raised by the Conservators under their statutory powers. She was then arrested by the Admiralty marshal at the suit of the owners of the other vessel.

Held—that as the ship had been preserved, by the Conservators their claim for expenses incurred ranked first, that they might sell the

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vessel and reimburse themselves, and pay the surplus into Court for the benefit of the persons establishing a claim thereto.

THE SEA SPRAY, [1907] P. 133; 76 L. J. P. [48; 96 L. T. 792—Deane, J.

**327. Reference to Registrar—Tender only about £8 less than the Amount Allowed—Plaintiffs Recovering more than three-fourths of Claim—Costs—Discretion of Registrar.]**—The defendants' steamship collided with the plaintiffs' *Rjukan*. The defendants admitted that they were liable for the damage sustained by the plaintiffs through the collision, and it was referred to the Registrar, assisted by merchants, to assess the amount of the damage. The plaintiffs claimed £501 12s. 9d., of which sum £237 4s. 3d. was claimed in respect of demurrage. The defendants tendered the sum of £385 in satisfaction of the plaintiffs' claim. The Assistant Registrar allowed the sum of £393 1s. 3d. in respect of the whole claim, of which sum £136 was for demurrage, being for eight days at the rate of £17 a day. On the ground that the amount allowed only exceeded the amount tendered by about £8 he directed that each party should pay a moiety of the reference fees and bear their own costs from the time of the tender, the plaintiffs being entitled to the costs previous thereto. The plaintiffs appealed on the ground that they had recovered more than three-fourths of the amount of their claim.

HELD—that the Court did not think it could challenge the exercise which the Assistant Registrar had made of his discretion as to either the time or the rate of the demurrage, and that with reference to the costs the report must be confirmed.

THE DANIA, (1902) 18 T. L. R. 159—Jeune, P.

## XII. SALVAGE.

### (a) Agreements for Salvage

**328. Acceptance of Services—Constructive Acceptance.]**—A steamer with two tugs in attendance was rendered unmanageable by an accident, and, drifting on to a barque, forced her ashore. After they had been ashore for an hour, the steamer's tugs towed her clear of the barque, and the latter was then towed off by the tugs in attendance upon her. In an action of salvage against the owners of the barque by all the tugs:—

HELD—that the barque's tugs were entitled to succeed, but not so the two tugs in attendance on the steamer; for there was nothing in the facts from which a constructive acceptance of their services could be inferred.

THE EMILIE GALLINE, [1903] P. 106; 72 [L. J. P. 39; 88 L. T. 743, 9 Asp. M. C. 401—Bucknill, J.

**329. Agreement by Salvors to share Award with Master of Salvaged Vessel—Forfeiture of Rights to any Award.]**—If intending salvors, before rendering the service, should agree with the

master of the vessel in distress to give him a share of any salvage award made to them, the Court will probably view such agreement as misconduct, disentitling them to any award.

THE KOLPINO, (1904) 73 L. J. P. 29—[Barnes, J.

**330. Agreement under Compulsion to Pay Exorbitant Sum—Set Aside.]**—Two vessels were sheltering from a gale, when the windward one began to drag her anchors. As she was gradually dragging towards the other vessel her master signalled for a tug, which came alongside, but demanded £1,000. After some demur the master agreed to her terms, and was towed to a new berth. In an action for salvage against both vessels:—

HELD—that the tug had rendered no salvage service to the leeward vessel; and that, as to the vessel actually assisted, the agreement was extortionate, and must be set aside, and an award made for £200 with county court costs.

THE PORT CALEDONIA AND THE ANNA, [1903] P. 184; 72 L. J. P. 60, 89 L. T. 216; 52 W. R. 223; 9 Asp. M. C. 479—Bucknill, J.

**331. Agreement with Ship's Agent—"No Cure no Pay"]**—A steamship having gone ashore, the master sent the mate with a letter to the plaintiffs, who had acted as the ship's agents at the last port at which she had called, asking for a powerful tug, and saying that a salvage boat would be of assistance, on the principle of "no cure no pay." The plaintiffs, having received the letter, telegraphed to the shipowners that their interests had attention. Having decided that a "no cure no pay" agreement was impracticable, they then chartered a tug at a certain rate per day, making themselves personally liable for the hire. Upon the tug and the plaintiffs' representative arriving at the stranded vessel the master refused to accept the services of the tug except upon the basis of "no cure no pay," and the master thereupon agreed to pay the plaintiffs, on the "no cure no pay" basis, £4,000 if they succeeded in floating the vessel. The tug was then made fast, and the vessel was floated. In an action to recover £4,000.—

HELD—that the plaintiffs were not entitled to recover this sum, upon the ground that there was no necessity for the master to make the agreement, there being an existing agreement for the services of the tug; and by Fletcher Moulton, L. J., upon the further ground that the evidence showed that the plaintiffs were acting as the shipowner's agents, and that therefore they could not enter a contract with the master.

The plaintiffs were entitled to recover their disbursements and usual agency charges.

Decision of Barnes, P. ([1907] P. 15; 76 L. J. P. 19; 96 L. T. 126; 10 Asp. M. C. 353) affirmed.

THE CRUSADER, [1907] P. 196; 76 L. J. P. [102; 97 L. T. 20; 23 T. L. R. 382, 10 Asp. M. C. 442—C. A.

**332. Authority of Master to enter into a Bargain for Past and Future Services—Continuous Service—Discontinuous Service.]**—Where there

**Salvage—Continued.**

is one continuous service, and some small step has been made in that service—a step which of itself would not give any right to salvage even though the vessel should be subsequently salvaged—it is within the scope of the authority of the master of the salving vessel to enter into a bargain to cover both the past as well as the future services.

Where the service is discontinuous, with hours between in which nothing is done at all, and where the past services give vested rights, it is not within the scope of the authority of the master of the salving vessel to bargain away the rights of his owner, or that of the crew for those past services. Still less has he the right to make it part of the condition upon which he and his co-salvors are to be employed for the future services.

**THE INCHMARKEE**, [1899] P. 111, 68 J. J. P. 30, 80 L. T. 201, 8 Asp. M. C. 186—  
Phillimore, J.

**333 Services Rendered by Request—No actual Benefit resulting therefrom—Principle upon which Awards will be made**—Where a vessel stands by or renders services to another, upon request, even though no beneficial results from her so doing, she is entitled to salvage remuneration.

**THE PELVETIA**, (1894) 8 Asp. M. T. C. 264, n. cited in *The Cambrian*, 1897, 8 Asp. M. C. 263, 76 L. T. 501.

**334 Ship reported in want of Aid—Tug-owners agreeing to send Tug on Towage Terms—Tug having already rendered Aid—Rights of Owners Master and Crew**—An owner can bind his master and crew as to future services to be rendered by them, but not as to past or partly performed services.

Owners agreed to send a tug on towage terms to aid a vessel, and accordingly wired to the tug's supposed mooring. The tug was in fact at sea, fell in with the disabled vessel and had performed part of the services required before the hour when the agreement was come to.

Held—that the master and crew were not bound by the agreement, and were entitled to a salvage award, but that the owners were bound, as they had not made the agreement conditionally upon their tug being still at her mooring.

**THE FRIESTLAND**, [1901] P. 345; 73 L. J. P. [121, 91 L. T. 321, 20 T. L. R. 699—Jeune, P.

**335 Signals of Distress—Tug going to Vessel's Aid—Services no longer Required—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 431 (2).**—Sect. 431 (2) of the Merchant Shipping Act 1894, contemplates a case where signals of distress are improperly made.

Where such signals are properly made, and another vessel starts to render assistance, such vessel is not entitled to salvage remuneration for labour and risk, if the danger has been avoided before her arrival.

**THE ELSWICK PARK**, (1903) 72 L. J. P. 79, [89 L. T. 217, [1904] P. 76; 9 Asp. M. C. 181—  
Bucknill, J.

**(b) Apportionment of Award.**

**336 Charter-Party—Interpretation—“All Salvage shall be for Owners' and Charterers' equal Benefit”—Deduction of Losses and Expenses in rendering Salvage Services for Sum awarded by Admiralty.**—The plaintiffs were the charterers of a steamship of which the defendants were the owners. The plaintiffs claimed their proportion—a moiety—of a sum awarded to the defendants in respect of salvage services rendered by the ship, and to a return of hire. The steamship's engines and towing gear were strained and damaged, and part of her cargo lost, and losses and expenses incurred in rendering the salvage services. By cl. 20 of the charter-party all salvage shall be for owners' and charterers' equal benefit.

Held—that ‘equal benefit’ could not be accorded to the shipowners and charterers without taking into account what each contributed towards securing the benefit that ‘salvage’ in cl. 20 meant the net pecuniary result of the salvage operations, so that from the sum awarded by the Admiralty Court all the losses and expenses in rendering the salvage services must be deducted by the shipowner and the balance divided.

**BOOKER & CO. v. POCKLINGTON STEAMSHIP CO.**, [1899] 2 Q. B. 690, 69 L. J. Q. B. 10, 81 L. T. 521; 16 T. L. R. 19, 5 Com. Cas. 15, 8 Asp. M. C. 22—Bigham, J.

**337 Differentiating between Salvors—Real Workers of Ship—Workers of such Parts of Ship as are concerned with Passengers and Otherwise.**—The *Minneapolis* a vessel of 13,401 tons gross register, whose value, with cargo, was £300,000 at last, and freight about £8,000, with a crew of 118 persons, passengers, horses and cattle, homeward bound, fell in during bad weather, with *The Comet* a disabled four-masted barque, bound in ballast to Philadelphia to load a cargo of oil for Japan. The crew of *The Comet* were taken off the wreckage was cut away, and *The Comet* taken in tow and brought safely to the Azores. The owners of *The Comet* subsequently paid the owners of *The Minneapolis* £8,250 in English money by way of salvage remuneration. The owners of *The Minneapolis* were put to expense amounting to about £2,000 for coal, stores, extra victualling and disorganisation of their service. In an action for apportionment of salvage—

Held—that the real instrument of salvage was the large powerful steamer, *The Minneapolis*, and that the apportionment should be as follows: To the owners, £6,175, to the master, £500 as he had a very serious responsibility to those on board the lifeboat, who in the course of three trips succeeded in bringing the whole of the crew of *The Comet* and the master and his wife on board *The Minneapolis*, £150, to be divided amongst them in proportion to their ratings; to those who were sent to cut away the masts of *The Comet*, a very risky and difficult matter to do £300, to be distributed according to their ratings, and £25 to those who were left in the boat whilst the masts were

**Salvage—Continued**

being cut away; to those who went to pass ropes and make connection, £75, to be divided according to their ratings; the residue, £1,025, to be divided amongst the crew—without the master—147 persons, according to their ratings, subject to the following qualifications. The navigating members according to their ratings, those not in the navigating and working department of the ship as a navigating machine, *e.g.*, surgeon, cook, steward, stewardess, purser, and so forth, according to one-third of their ratings, that is to say, they would take a share as if their rating was a third of what it really was; and the horsemen and horse foreman were to be treated as rated at one-third of the rating of an A.B., and to take a proportion on that basis.

The reasons pointed out for differentiating between those who were the real workers of the ship, both on deck and down in the engine-room department, and those who were mere members of the crew attending, not to working the ship at all, but to working such parts of her as were concerned with the passengers and otherwise in *The Spree* ([1893] P. 147, 1 R. 584; 69 L. T. 628, 7 Asp. M. C. 397—Barnes, J.), adhered to. *THE MINNEAPOLIS*, [1902] P. 30; 71 L. J. P. D. [A. 28; 86 L. T. 263; 9 Asp. M. C. 270—Barnes, J.]

**338. Different Risks to Ship, Cargo and Freight—Perishable Cargo—Separate Awards.**—A Norwegian steamship, valued at £1,875, ran short of coal 100 miles from Spain, and was towed into the Humber by a steam trawler. She was bound for Hull with a cargo of fresh herrings, valued at £1,060, the freight being valued at £136. Having regard to the perishable nature of the cargo—

**HELD**—that the Court would make salvage awards of £180 against the ship, and £420 against cargo and freight.

*THE VELOX*, [1906] P. 263; 75 L. J. P. 81, [95 L. T. 271; 10 Asp. M. C. 277—Barnes, P.]

**339. Navigating and Engineer Officers—Some Members of Crew Represented Separately—Costs.**—The steamship *L.* towed the *B.* some 300 miles to Halifax. No members of the *L.*'s crew performed any special service, the *B.*'s boat passing the hawsers.

**HELD**—that the navigating officers, not having taken any extraordinary part in the salvage service, the award to the *L.*'s crew must be apportioned according to their ratings, although it was contended that the navigation officers had had harder extra work than the engineer officers, who would, according to ratings, receive a larger award.

The solicitors for the *L.*'s owners issued the writ on behalf of owners, master and crew without any direct authority from the crew. After defence, twelve members of the crew gave notice of change of solicitors, and briefed separate counsel from those representing the owners, master and other twenty-four members of the crew.

**HELD**—that the twelve were not entitled to any costs.

*THE BREMEN*, (1906) 94 L. T. 380; 10 Asp. [M. C. 229—Deane, J.]

**340. Navigating and Engineer Officers.**—The Court, in apportioning salvage awards, allowed the navigating officers their share as though they served at the same rating as, and not at a lower rating than, the engineer officers, and though they had done no special service

*The Bremen (supra)* not followed.

*The Lincoln* (22 T. L. R. 682—Deane, J.)

*THE ITALIA*, (1906) 95 L. T. 398, 10 Asp. [M. C. 284—Barnes, P.]

**341. Pilot—Services not within Scope of his Employment—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), s. 593.—The Court, in awarding remuneration for salvage services, awarded a sum in favour of the pilot of the steamship rendering the salvage services, on the ground that he ran more risk than could ordinarily be expected from his contract of employment, and that the services which he rendered were not such as to come within the ordinary scope of his duties

*Akerblom v. Price* ((1881) 7 Q. B. D. 129; 50 L. J. Q. B. 629; 29 W. R. 797; 44 L. T. 837; 4 Asp. M. C. 441—C. A.) followed.

*THE SANTIAGO*, (1900) 83 L. T. 439; 17 T. L. R. [22; 70 L. J. P. 12; 9 Asp. M. C. 147—Barnes, J.]

**342. Rating of Engineer and Navigating Officers.**—It is now an established rule in apportioning salvage awards to treat the rating of a navigating officer as equal to that of the corresponding grade of engineer officer.

*THE BIRNAM*, (1907) 76 L. J. P. 28; 96 L. T. 792; [10 Asp. M. C. 462—Deane, J.]

**343. Special Award to Engineers.**—On an application to apportion £4,500 agreed salvage amongst owners, master and crew, it was shown that the operations caused a delay of two and a half days; that the ship which performed the services was worth £308,386, and that the main service performed was towage.

**HELD**—that the owners should have £3,750; the master £300; the balance to be divided amongst the crew, but (following *The Minneapolis, supra*), the non-navigating portion to have share as if rated at one-third. But held that the shares of the engineers should be increased by one-half as they had to work double shifts.

*THE DUNNOTAR CASTLE*, [1902] W. N. 70 [—Barnes, J.]

### (c) Basis of Valuation.

**344. Appraisalment—Finality.**—In a salvage action, if an appraisalment is applied for (there being no agreement and the plaintiffs disputing the defendants' affidavit of value) the basis of appraisalment is the value of the vessel to her

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owners in her damaged condition on the completion of the salvage services.

Under ordinary circumstances the appraisal is conclusive.

*The Harmonides* ([1903] P. 1; 72 L. J. P. 9; 51 W. R. 303; 87 L. T. 448; 19 T. L. R. 37; 9 Asp. M. C. 354—Barnes, J., No 319, *supra*) applied

*THE HOBENZOLLERN*, [1906] P. 339, 95 L. T. 585, 76 L. J. P. 17, 10 Asp. M. C. 296; 22 T. L. R. 778—Deane, J.

**345. Vessel brought within reach of Tug—Vessel refusing help at Tug—Stranding in Consequence—Original Value or Value as Stranded.**—A trawler towed a disabled vessel, then worth £8,500, to the mouth of Aberdeen Harbour and being unable to take her in without risk, signalled for a tug. The master of the disabled vessel declined the tug's services; and subsequently, without any fault on the part of the trawler, the hawser parted, and the vessel drifted ashore. To cost some £7,000 to float and repair her.

Held—that the trawler had done all that could reasonably be expected, and was entitled to a salvage award based on the value of the vessel when brought within reach of a tug, *i.e.*, £8,500.

*THE GERMANIA* [1904] P. 131, 73 L. J. P. 52; 90 L. T. 296; 9 Asp. M. C. 538—Barnes, J.

**(d) Derelicts.**

**346. Award of Total Proceeds.**—A derelict barque, dis-masted and on fire, was saved by a tug. She was sold by the Court and realised £255. Marshall's expenses and other matters reduced the net balance to £37.

In a salvage action judgment went by default, and the Court awarded to the salvors the total proceeds without a reference.

*THE LOUISA*, [1906] P. 115, 75 L. J. P. 76, 94 L. T. 558, 10 Asp. M. C. 256—Deane, J.

**347. Wreck—Duty to Deliver to Receiver of District—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) s. 518.**—Salvors found a derelict ship, with a cargo, off the coast of Pembroke-shire, and beached her, and communicated with the coast-guard there, the chief officer of whom was the receiver of wrecks for the district. The salvors then with the knowledge of the coast-guard, emptied her of water, and took her into port.

Held—that the salvors were entitled to salvage, as they had "reasonable cause" for their failure (if there was any failure) to comply with sect. 518 of the Merchant Shipping Act, 1894, in not delivering the wreck to the receiver of the district.

*THE GYNOERON*, (1905) 21 T. L. R. 641—Deane, J.

**(e) Generally.**

**348. Detention by Receiver of Vessel, Cargo or Apparel—Salvage due under the Act—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 544, 546, 552.**—By sect. 552 of the Merchant Shipping Act, 1894, "where salvage is due to any person under this Act," the receiver shall, if the salvage is due in respect of services rendered in assisting any vessel or in saving life thereon, or in saving the cargo or apparel thereof detain the vessel, or cargo or apparel.

Held—that the words "salvage due under this Act" were not confined to cases where there was a claim for life salvage under sects. 544 and 545 of the Act, or where the claim was for salvage services rendered to a wreck or vessel stranded or in distress on or near the coasts of the United Kingdom under sect. 546, but extended to all cases where salvage was recoverable under any of the provisions of the Act.

Judgment of Barnes, J. ([1898] P. 206; 67 L. J. P. 78, 17 W. R. 62; 79 L. T. 127, 11 T. L. R. 507; 8 Asp. M. C. 125) affirmed.

*THE FURIA*, [1899] P. 251; 68 L. J. P. 75, 17 W. R. 598, 81 L. T. 19, 15 T. L. R. 101; 8 Asp. Cas. 559—C. A.

**349. Employment—Beneficial Service—No Beneficial Service—Right to Salvage Award.**—If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect.

If a salvor is employed to complete a salvage and does not but, without any misconduct on his part, fails after he has performed a beneficial service he is entitled also to a salvage award.

If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices but does no good at all, he is not entitled to salvage.

*The Melpomene* ((1873), L. R. 4 A. & E. 129; 29 L. T. 405) distinguished.

*FIRE DART*, (1899) 80 L. T. 23, 8 Asp. M. C. 1491—Phillimore, J.

**350. Injury to Salvaging Vessel in Performing Salvage Services—Compensation—Presumption against Default of Salvors—Burden of Proof of Negligence—Reduction of Sum Awarded.**—When the vessel of a salvor has, without default on his part, been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained, and damages consequent thereon.

When the vessel of a salvor is injured or lost while engaged in a salvage service the presumption is that the injury or loss was caused by the necessities of the service, and not by the default of the salvors; and the burden of proof lies upon the parties who allege that the loss was caused by the salvor's own act.

It is not the custom of the Judicial Committee to vary the decision of a Court below on a question of amount, merely because they are of opinion that, if the case had come before them

**Salvage—Continued.**

in the first instance they might have awarded a less sum.

**BAKU STANDARD STEAMSHIP (MASTER AND [OWNERS OF] v. ANGELE STEAMSHIP (MASTER AND OWNERS OF),** [1901] A. C. 549; 70 L. J. P. C. 98, 84 L. T. 788, 17 T. L. R. 584; 9 Asp. M. C. 197—P. C.

**351. Mutual Insurance Association—Agreement by Owners to Render Mutual Assistance to Vessels broken Down or in Distress—Remuneration to be Determined by a Committee of the Association—Notice to Master and Crew of Salvaging Vessel—Whether Master and Crew bound to accept Amount awarded by Committee.]**—The master and crew of the steam drifter *Fifteen* claimed for salvage in respect of services rendered to the steam drifter *Margery*. *The Fifteen* was insured in the Total Loss Mutual Steamship Insurance Co. of Sunderland. The terms of that insurance incorporated the rules of that association, which provided that steamers insured in it bound themselves to give assistance to any vessel broken down or in distress insured in that association or certain other associations; that it had been arranged that the vessels in those other associations should be bound by like conditions; and that questions of remuneration for services rendered should be determined by the committee of the associations in which the vessels were insured. The master and crew entered, under their articles, into an agreement that they should have half of whatever salvage amount should be taken. A "Notice to Masters" was exhibited on *The Fifteen*, which stated, "the above association is amalgamated with the under-mentioned associations and companies for the settlement of towage cases," and went on to say that "all masters of vessels insured in the Total Loss Insurance Co., Sunderland, are bound to render and accept assistance when necessary, to and from any vessel insured in the above association and companies." The master and crew knew nothing of the terms of this notice, and knew nothing whatever about the provision to go to arbitration.

**HELD**—that the "Notice to Masters" fell very short indeed of giving the master and crew such notice of the arrangement as would cause them to be bound by the arbitration, and was wholly insufficient to fix them with acquiescence in a contract of which they knew nothing; and that the master and crew never, in fact, thought they were bound as salvors, by what it was suggested was an intimation to them that they were so bound; and that the amount of salvage services must be determined by the Court.

**THE MARGERY**, [1902] P. 157, 71 L. J. P. 83; [50 W. R. 654, 96 L. T. 863; 9 Asp. M. C. 304—Adm. Div. Ct.

**352. Salvage Vessels specially equipped.]**—The House of Lords will not interfere with an award of salvage made by the Admiralty Court and affirmed by the Court of Appeal, except in a very exceptional case in which some of the elements which ought to have been taken into account

appear to have been overlooked, or exaggerated importance has been given to others.

The Court will attach great importance to the fact that salvage services have been rendered by ships specially fitted for the purpose, and kept in constant readiness with all necessary appliances

In a case in which valuable services were rendered by specially equipped salvage steamers to a ship worth, with freight and cargo, £76,600, which was saved from becoming a total loss—

**HELD** (affirming the judgment of the Court below)—that an award of £19,300 was not so exorbitant or manifestly excessive that it ought not to be upheld

Decision of C. A. ([1898] P. 97; 8 Asp. M. L. C. 341; 67 L. J. P. 48, 78 L. T. 139, 14 T. L. R. 231, 46 W. R. 308) affirmed.

**GLENGYLE (OWNERS OF THE) v. NEPTUNE [SALVAGE CO., LD., THE GLENGYLE,** [1898] A. C. 519; 67 L. J. P. D. A. 87; 78 L. T. 801; 14 T. L. R. 522; 8 Asp. M. C. 436—H. L. (E.).

**353. Tug and Tow to Blame for Collision with another Vessel—Master of Tug Negligent—Tow subsequently Salvaged by Tug—No Claim for Salvage by Owners, Master or Crew of Tug.]**—A tug and tow were both found negligent and to blame for a collision between the tow and another vessel, the negligence of the tug being that of her master. After the collision the tug rendered services to the tow, and her owners, master and crew claimed salvage.

**HELD**—(1) that the owners could not recover because the negligence of their servant, the master, had contributed to the collision in consequence of which the tow required assistance.

(2) That for the same reason the master could not recover.

*The Altair* ([1897] P. 105; 66 L. J. P. 42; 45 W. R. 622; 76 L. T. 263; 8 Asp. M. C. 224—Gorell Barnes, J.) followed.

(3) That the crew could not recover, for on the ground of public policy it is undesirable that a crew should be rewarded for rendering simple services to a vessel damaged through the contributory negligence of their master.

*Cargo ex Capella* ((1867) L. R. 1 A & E. 356; 16 L. T. 800—Dr. Lushington) followed.

**THE DUC D'AUMALE**, (No. 2), [1904] P. 60; [73 L. J. P. 8; 52 W. R. 319; 89 L. T. 486; 20 T. L. R. 14; 9 Asp. M. C. 502—Barnes, J.

**(f) Life Salvage**

**354. Foreign Vessel—Crew saved outside British Waters and brought into British Port—Service in part within British Waters—Jurisdiction—The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 544.]**—A British vessel rescued the crew of a foreign vessel whilst outside British waters and brought them within British waters and landed them in an English port. The foreign vessel was subsequently brought within the jurisdiction.

**Salvage—Continued.**

**HELD**—that the services were rendered in part within British waters, and that therefore sect. 544, sub-sect. 1, of the Merchant Shipping Act, 1894, which provides for the payment of salvage to life salvors where the services are rendered in part within British waters in saving life from any foreign vessel, applied, and the salvors were entitled to life salvage.

THE PACIFIC, [1898] P. 170; 67 L. J. P. 65; [79 L. T. 125; 46 W. R. 686; 8 Asp. M. C. 422—Jeune P

**355. Lifeboat Crew—Person giving Information—Consequent Salvage by another Person.]**—When lifeboat men go out to save life, the onus is upon them to show that they have rendered services entitling them to a salvage award as against the property in peril.

A person may be entitled to a salvage award who, outside his duty, merely gives information which leads to other persons rendering services.

A vessel grounded in the mouth of the Humber, and the coxswain of the Spurn lifeboat wired for tugs. The lifeboat herself went out, but the master of the stranded vessel declined the services of the crew as salvors, and waited until the arrival of the three tugs which towed his vessel off on the next flood. Before receiving the coxswain's telegram, the owner of the tugs had received an official telegram from the Spurn lighthouse, and had already ordered steam to be raised.

**HELD**—that the coxswain and crew of the lifeboat could sustain no claim.

THE MARGUERITE MOLINOS, [1903] P. 160; [72 L. J. P. 56; 89 L. T. 192; 9 Asp. M. C. 421.—Bucknill, J

**356. Lifeboat Crew—Launchers of Lifeboat.]** When a lifeboat belonging to the National Lifeboat Institution is launched in order to save life, the launchers look to the Institution for payment under its rules. But if, on arriving at the distressed vessel, the boat is used in an endeavour to save property, the crew become a party of salvors who have borrowed the boat for salvage purposes, and both they and the launchers are entitled to look to the owners of the property for remuneration for their respective services.

THE CAYO BONITO, [1904] P. 310; 73 L. J. P. [93; 91 L. T. 102; 20 T. L. R. 576; 9 Asp. M. C. 608—Barnes, J.

**(g) Practice.**

**357. Caveat—Solicitors' personal Undertaking to give Bail—Subsequent Arrest of Ship without "good and sufficient reason" — Damages —** *H. S. C.*, 1883, *Ord. 29, rr. 12, 18.*—The plaintiffs were the owners, master and crew of the Hamburg steamship *Helene Woermann*, the defendants were the owners of the British steamship *Crimdon*, her cargo and freight. The plaintiffs commenced an action in law claiming salvage for services rendered to the *Crimdon*, her cargo and freight. On the same day the writ

was issued a warrant to arrest was extracted in the same registry. Before the warrant was issued, the agents of the plaintiffs and the registrar of the district inquired, in accordance with the practice, whether a *caveat* had been filed against the arrest of the *Crimdon*, and the principal registry communicated by telegram the fact that there had been a *caveat* against the arrest already entered. It appeared that on the same day the defendants' solicitors filed the usual undertaking under *Ord. 29, r. 12*, which is termed the *præcipe for caveat* warrant and had signed it without any qualification. The plaintiffs, however, were not satisfied with the undertaking of the solicitors, and decided that the ship should be arrested. The ship was arrested under *Ord. 29, r. 18*, and remained arrested till the evening of the following day.

**HELD**—that, as the plaintiffs had a reasonable time—practically a day—in which to decide whether they ought to accept or not the undertaking upon which the defendants' solicitors were personally responsible, and that they had not shown to the satisfaction of the Court "good and sufficient reason" for objecting to the undertaking within the meaning of *r. 18* and therefore there was no reason for arresting the vessel, and that the plaintiffs were liable for the costs and damages occasioned by the arrest.

THE CRIMDON, [1900] P. 171, 69 L. J. P. [108; 48 W. R. 623; 82 L. T. 660, 16 T. L. R. 403; 9 Asp. M. C. 104—Barnes, J.

**358. Charterers Responsible for Safe Delivery—Cargo of Government Stores—Charterers' Interest in Goods—Action in Personam—Negligence of Master and Crew—Liability of Charterers.]**—The defendants chartered a ship, in which they agreed to carry, amongst other cargo, certain Government stores from London to Jamaica upon the terms that they were to be responsible for the safe delivery of the cargo, subject to certain exceptions. During the voyage the ship, through her own default, came into collision with another vessel, and salvage services were rendered to her by the plaintiffs. A salvage award was made against the ship, cargo and freight, the award including a sum in respect of the Government stores. The Government having refused to pay salvage, the plaintiffs brought an action *in personam* against the defendants to recover the amount payable in respect of the Government stores.

**HELD**—that, as the defendants had a direct interest in the preservation of the Government stores and they were liable to pay salvage remuneration, the salvage service was a benefit to them; and that an action *in personam* lay.

*Five Steel Barges* ((1890) 15 P. D. 142; 59 L. J. P. 77, 39 W. R. 127, 63 L. T. 499, 6 Asp. M. C. 580—Hannen, P.) and *Duncan v. Dundee Shipping Co.* ((1878) 5 R. 712) followed.

Decision of Jeune, P. ([1901] 84 L. T. 363; 17 T. L. R. 538) affirmed.

THE CARGO EX PORT VICTOR, [1901] P. 243; [70 L. J. P. 52, 49 W. R. 578, 84 L. T. 677; 17 T. L. R. 538, 9 Asp. M. C. 163, 182—C. A.



**Salvage—Continued.**

**359. Co-salvors—Consolidated Suits—Separate Representation—Counsel—Costs.**—The *P.*, while on a voyage from Belfast to Antwerp in tow of the tug *H.*, which was under contract to tow her to Flushing, met with heavy weather, and, while running for shelter, broke adrift from the *H.*, but managed to bring up with a full scope of chain out on both her anchors. When the *H.* came up to the *P.* it was found that the anchor chains of the latter were foul, and that the anchors would have to be slipped. The master of the *P.* then sent the *H.* for further assistance, and the *H.* brought back the tug *F. S.* The *H.* and *F. S.* then took the *P.* to Greenock, where she was safely moored.

The owners, masters, and crews of both tugs instituted proceedings for salvage, the owners of the *H.* claiming that the towage contract had been superseded by the events which had happened. The salvage suits were consolidated, the conduct of the action being given to the owners of the *F. S.* At the trial of the action the *H.* and the *F. S.* were each represented by two counsel. The Court awarded each salvor £300.

**HELD**—that as the defendants had alleged that the *H.* was not entitled to salvage, but was only fulfilling her agreement, the owners of the *H.* were entitled to be separately represented by two counsel.

**THE POLTALLOCH**, (1906) 94 L. T. 556; 10 [Asp. M. C. 255—Deane, J.]

**360 Costs—Consolidated Salvage Action—Country Solicitor's attendance in London**—In a consolidated salvage action, where a country solicitor has the responsibility thrust upon him, he is entitled, when there is reasonable ground for it, to attend the hearing of the action in London, although the two actions may be consolidated, if, in the circumstances of that case, the solicitor who has the conduct of the consolidated action is not in a position to do full justice to both sets of plaintiffs.

**THE METROPOLIS**, (1899) 81 L. T. 236, 8 [Asp. M. C. 583—Bucknill, J.]

**361 Lloyd's Agreement—Arbitration—Authority of Master staying Proceedings—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.**—A large vessel, *The City of Calcutta*, got into difficulties. The captains of two salving vessels signed an agreement which contained clauses that certain persons might object, and among others the committee of Lloyd's, and if so then the matter was to go to arbitration, and the arbitrators were to be the committee of Lloyd's, and the expenses of the arbitration might be ordered to be paid either by the salvors or the objectors.

**HELD**—that as it was extremely doubtful whether the master has authority to bind his owner to an arbitration or lay law-suit in regard to the amount of salvage, there were very good grounds on which Barnes, J. might exercise his discretion under sect. 4 of the Arbitration Act, 1889, and refuse to stay the salvage action brought by the salvors.

**THE CITY OF CALCUTTA**, (1899) 8 Asp. M. C. [442; 79 L. T. 517—C. A.]

**362 Removal of Wreck—Liability for Expenses—Summary Remedy—Aire and Calder Navigation Act, 1889 (52 & 53 Vict. c. cxxii.), s. 47.**—Sect. 47 of the Aire and Calder Navigation Act, 1889, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), provides that, if any vessel shall be sunk in any part of the navigation, and the owner, or person in charge, shall not remove it, it shall be lawful for the undertakers to remove it, and recover the expenses of such removal from the "owner" in a court of summary jurisdiction.

**HELD**—that the remedy being prescribed by the section which gave the right to recover the expenses, it was not competent for the undertakers to recover them by action in the High Court, and, in any case, an owner of a sunken ship who had abandoned it to the underwriters as a total loss before any expenses had been incurred was not "the owner" within the meaning of the section.

Judgment of C. A. ((1896) 8 Asp. M. L. C. 134) affirmed.

**BARRACLOUGH v. BROWN**, [1897] A. C. 615; 8 [Asp. M. L. C. 290; 2 Com. Cas. 249; 62 J. P. 275; 66 L. J. Q. B. 672; 76 L. T. 797; 13 T. L. R. 527—H. L. (E.).]

**363 Ship salvaged the Property of the Crown—No Action maintainable**—No action *in rem* or otherwise for salvage lies when the ship salvaged is Crown property. This rule applies to a vessel built for the Canadian Government, and destined for use as a ferry boat to connect two Government lines of railway.

**YOUNG v. STEAMSHIP SCOTIA**, [1903] A. C. [501; 72 L. J. P. C. 115; 89 L. T. 374; 9 Asp. M. C. 485—P. C.]

**364. Sum awarded to Master—Claim therefor by Master against Owners—Not an Admiralty, but a Common Law Claim.**—The owners of *The Gloxinia* had been awarded a sum of money for salvage, and claimed to be entitled to deduct from the £50 awarded to the master a share of the costs of the excessive bail, as well as of the solicitor and client costs of the plaintiffs in the salvage suit, and certain other sums, and offered the master £36 5s. 9d. The master declined to accept this sum, and brought an action in the county court on the Admiralty side to recover the £50 which he claimed without any deduction. The county court judge dismissed the action with costs, on the ground that sitting on the Admiralty side he had no jurisdiction to entertain the suit.

**HELD**—that the county court judge was quite right; that it was not an Admiralty action at all, there being no question either as to salvage or apportionment which was in dispute; and that the claim should have been brought on the common law side of the county court.

**THE GLOXINIA**, (1902) 18 T. L. R. 227— [Adm. Div.]

**Salvage—Continued.**

**365. Tug and Tonn—Negligence of Tug rendering Salvage necessary—Services rendered by other Tug—Costs of Action—Liability of Tug for ]—**Two tugs and a pilot claimed salvage awards against a sailing vessel, and the latter counter-claimed against one of the tugs, which was towing her at the time of the accident, for negligence.

The Court found that the negligence of this tug caused the damage, and rendered the salvage necessary.

**HELD**—that the tug in default was liable to the sailing vessel for the amount of the damages, the salvage rewards awarded to the other tug and the pilot, and the costs of the salvage suit; but that such costs were recoverable only as damages, and were subject to the tug's right to limit her liability; the Court had no power to order them to be paid in full as costs.

**THE KAUSS**, (1904) 20 T. L. R. 326—Barnes, J.

**(h) Towage.**

**366 Attempting to Tow—Standing by—Principles on which Award made.]—**An oil-tank steamer, valued at £27,000, lost her steering gear about 1,000 miles from Falmouth; and was eventually taken in tow by steamship No. 1, the master of which attempted to get her to Fayal. After two days, however, during which only about sixteen miles were gained, he was obliged by bad weather to leave the disabled vessel. Steamship No. 2 then towed her towards England some 265 miles, sustaining some damage in so doing, but then lost sight of her upon the hawser parting. Steamship No. 3 next towed her for twelve miles, and had to leave her in consequence of running short of provender for the horses which she herself had on board. Steamship No. 4 towed her 468 miles to Falmouth, whilst steamship No. 5, belonging to the same owners as the disabled vessel, came up just after No. 4 had made her tow ropes fast, and herself stood by in case of emergency until Falmouth was reached. The disabled vessel had on board naphtha worth £7,000, freight at risk £1,743, and petroleum belonging to her owners worth £7,578, making the total value of the property saved £43,321.

The Court made the following awards:—To No. 1 £800, as having attempted though unsuccessfully, for two days to perform the task she had undertaken; to No. 2 £2,500, for having meritoriously contributed to a successful result, although her part, standing by itself, would not have produced such result; to No. 3 £800, as having helped to bring the disabled vessel within sight of the principal salvor; to No. 4 £4,000, as being the principal salvor; to the owners of No. 5 £300 against the naphtha cargo, and to her master and crew £150 against ship, cargo, and freight.

*The Benlarig* ((1888) 14 P. D. 3; 58 L. J. P. 24; 60 L. T. 238—Butt, J.); *The Camelra* ((1888) 9 P. D. 27; 53 L. J. P. 12; 32 W. R. 495; 50 L. T. 126; 5 Asp. M. C. 197—Hannen, J.),

and *The Atlas* ((1862) Lush. 518—Dr. Lushington) approved and applied.

**THE AUGUST KORFF**, [1903] P. 166; 72 L. J. [P. 53; 89 L. T. 194; 9 Asp. M. C. 428—Bucknill, J.

**367. Negligence of Tug—Contributory Negligence of Ship—Negligence of Pilot on Board Ship.]—**The owners, masters and crew of a steam-tug brought an action against the owners of a ship for salvage services rendered to that vessel by towing her off the Sheerness Middle Sand, upon which she had grounded. The defendants pleaded and proved that the grounding was due to the negligence of those on board the steam-tug, and counter-claimed for the damages sustained by them by reason thereof. The plaintiffs alleged, by way of defence to the counter-claim, that there was contributory negligence on the part of the pilot on board the ship.

**HELD**—(1) that the claim for salvage must be dismissed; (2) that if it had been shown that the contributory negligence alleged was the negligence of a compulsory pilot, then that would have been an answer on the part of the owners of the ship, and they would not have been affected by the contributory negligence, but would, notwithstanding, have been able to make good their claim for the negligence of the tug; but that this had not been shown, no evidence having been given that the man was a licensed pilot at all; and that, therefore, the counter-claim failed.

**THE ADAM W. SPIES**, (1901) 70 L. J. P. 25—[Jeune, P.

**368. No Benefit—Reasonableness of Agreement—Award reduced—Costs.]—***The Tintore*, a Spanish steamship of 1,326 tons, with a crew of 29 hands, fell in with *The Kilmaheo* exhibiting signals of distress. *The Kilmaheo* was a steamship of 2,155 tons, with a crew of 20 hands, and had struck some submerged wreckage with her propeller and had broken off the blades. It was agreed that *The Tintore* should endeavour to tow *The Kilmaheo* to Ferrol for £2,000, and a written agreement to that effect was entered into. When *The Tintore* had towed *The Kilmaheo* about 50 miles she was able to tow her no longer. The position of *The Kilmaheo* was worse at that time than at the beginning of the towage. She was left on a lee shore out of the track of vessels with a north-west wind blowing.

A second agreement was then made to the effect that *The Tintore* should go into Ferrol, about forty miles away, give notice of the situation of *The Kilmaheo*, and seek assistance for her. For those services the sum of £2,000 was to be paid.

**HELD**—that nothing could be recovered in respect of the services rendered under the first agreement. The £2,000 was an exorbitant sum for the services rendered under the second agreement. Moreover, the master had no authority to pledge his owners' credit for past services for which the owners were not liable, and therefore that part of the £2,000 could not be for the

**Salvage—Continued.**

towage services already rendered. The claim must be reduced to £500, and the appellants were entitled to have the costs of the appeal, the costs in the Court below not to be interfered with.

THE KILMAHO, (1900) 16 T. L. R. 155—C. A.

**369. Towing Contract—Contract to Dock Ship—Unable to Dock—Claim for Towing back to Anchorage.]**—Tugs agreed to take a vessel from her anchorage in Grimsby Roads, and dock her at Grimsby. On arrival at the docks it was found impossible to dock her owing to the state of the tide.

HELD—that the tugs were not entitled to salvage for helping her to get back to her anchorage.

THE *ABOUKIR*, (1905) 21 T. L. R. 200—  
[Barnes, J.]

**370. Tug-boat and Lifeboat—Services of Lifeboat Crews—Reasonable but not Necessary Services—Right to Salvage—Award.]**—A French screw steamer, *The Auguste Legembre*, valued at £11,400, met with severe weather in Cardigan Bay, with this unfortunate result, that a manilla warp was washed overboard and became entangled in her propeller, and the engines were brought up and could not be worked any more. The vessel drifted on right across the entrance to the Bristol Channel, and ultimately brought up with both anchors. *The Helen Peele*, a tug-boat belonging to the National Lifeboat Institution, stationed at Padstow, manned by eleven hands, and of the large value of £10,500, went out solely for the purpose of towing the lifeboat *Edmund Harvey*, manned by a crew of fifteen men, and of the value of £1,500. The next morning *The Helen Peele* was made fast to *The Auguste Legembre*, and *The Edmund Harvey* made fast astern of *The Auguste Legembre*. When they got into Cardiff Roads, *The Victor*, a tug belonging to Falmouth, worth £7,000, was taken and made fast. After some considerable time *The Dragon*, another tug from Falmouth, worth £6,000, at the request of *The Victor*, and notwithstanding the objection of the master of *The Auguste Legembre*, also made fast ahead, and *The Auguste Legembre* was brought to Cardiff Roads in safety. It was treated as if the crew of *The Helen Peele* took the salvage and ran the risk of paying for any damage to the tug or lifeboat. In an action of salvage:—

HELD—that the case must be dealt with on the footing that the crew of *The Helen Peele* had rendered a service and were liable for any repairs that had to be done, and should be awarded £325; that the lifeboat men formed part of the crew of the tug-boat, and should be awarded £75; that although in fact it did not turn out to be necessary to take *The Dragon*, yet it was a reasonable thing to do, and she should be awarded £100; and that *The Victor* should be

awarded £500, the awards making the aggregate sum of £1,000.

THE *AUGUSTE LEGEMBRE*, [1902] P. 123; 71 [L. J. P. 53; 50 W. R. 622; 86 L. T. 358; 18 T. L. R. 373; 87 L. T. 750; 9 Asp. M. C. 279—Barnes, J.]

**XIII. TOWAGE CONTRACTS.**

**371. Incomplete Performance—Accident Beyond the Control of Either Party—Salvage.]**—Where the complete performance of a contract to tow a vessel from one place to another is prevented by an accident which is beyond the control of those in charge of the tug, and of those on board the tow, the owners of the tug cannot recover the towage agreed upon, nor are they entitled to any payment in respect of the part performance of the contract.

Tug-owners contracted to tow a ship from Kingroad to Sharpness Dock, but during the towage, and when the vessels had arrived just outside the dock entrance, a fog came on, and the ship stranded without any fault on the part of either tug or tow, and could not be taken into the dock.

HELD—that the tug owners were not entitled to recover anything.

Subsequently, at the request of those on board the ship, the tugs towed so as to keep the ship from slipping off the rocks on which she had grounded, and so enabled cargo to be saved and freight to be earned.

HELD—that this was a salvage service for which the tugs were entitled to remuneration.

THE *MADRAS*, [1898] P. 90; 8 Asp. M. C. 397; [67 L. J. P. 53; 78 L. T. 325—Jeune, P.]

**372. Inefficient Towage—Reasonable Care and Skill—Damages—Liability.]**—The appellants were the port and harbour authority of Preston, and were entitled to make contracts for towage of vessels using that port. The respondents' ship, under the directions of the harbour authority, was towed up the river on the flood tide towards Preston, preceded by two other vessels, also in tow. These tugs were hired by the appellants. Owing to the delay of the foremost tug, the respondents' ship grounded and received considerable damage.

HELD—that the appellant corporation were liable for the damage caused.

Decision of C. A. (*The Ratata*, [1897] P. 118; 66 L. J. P. 39; 67 L. T. 224; 8 Asp. M. C. 236) affirmed.

PRESTON CORPORATION *v.* BIORNSTEAD, THE [*RATATA*, [1898] A. C. 513; 67 L. J. P. 73; 47 W. R. 156; 78 L. T. 797; 8 Asp. M. C. 427—H. L. (E.).]

**373. Interpretation—Tug-owners made Third Party—Indemnity—Damages, Measure of—Costs of Defending Action—R. S. C., Ord. 16, rr. 48, 52, 53, 55.]**—The plaintiffs loaded a cargo upon a barge belonging to the defendants, D. Brothers, who engaged, on their own behalf and not as agent for the plaintiffs, a tug belonging to their co-defendants, G. and Son, to tow the

**Towage Contracts—Continued.**

barge to a ship which was loading in the Thames. While being towed the barge came into collision with a vessel at anchor, and, in consequence, the plaintiffs' cargo was damaged. The plaintiffs brought an action to recover the damage against both the defendants, and the tug owners served upon the barge owners a third party notice claiming indemnity from them in respect of any damages and costs which the plaintiffs might recover upon the ground that the contract of towage was upon the following terms: "G. and Son hereby give notice that they will not be answerable for any loss or damage which may happen to, or be occasioned by, any barge or vessel, or its cargo, while in tow, however such loss or damage may arise, and from whosoever fault or default such loss or damage may arise; and the services of their tugs must be understood and agreed to be engaged or accepted upon the terms that they are to be held harmless and indemnified from any loss or damage, and against the faults or defaults of their servants, or any claim therefor by whosoever made. And the customers of the said G. and Son undertake and agree to bear, satisfy, and indemnify them accordingly." No order had been made under Ord. 16, r. 53, as to the mode and extent in or to which the barge owners should be bound or made liable by the judgment in the action as against the tug owners. At the trial the barge was held not to blame and the tug alone to blame for the collision, and judgment was entered for the barge and against the tug, the plaintiffs to recover from the tug owners all the costs. Upon the claim for indemnity the barge owners were held liable to indemnify the tug owners against the damages and costs which they had been held liable to pay to the plaintiffs and against their own costs (74 L. J. P. 13, 91 L. T. 695; 10 Asp. M. C. 15).

The barge owners appealed, first, against so much of the first judgment as held the tug owners liable to the plaintiffs, contending that the above clause exempted them from liability, and, secondly, against the judgment holding them liable to indemnify the tug owners.

HELD, as to the first appeal, that the barge owners had no right to appeal against the judgment holding the tug owners liable to the plaintiffs.

HELD, as to the second appeal, (1) that, assuming that the barge owners could upon that appeal question the judgment against the tug owners, that judgment was right, as the clause in the tug owners' contract did not release them from liability to third persons, but only gave them a right of indemnity against such liability from the person employing them; and (2) that the tug owners, having reasonably defended the action brought against them, were, in the circumstances, entitled to recover from the barge owners the costs which they had been held liable to pay, or had incurred, as well as the damages.

THE MILLWALL, [1905] P. 155, 74 L. J. P. [61, 82, 53 W. R. 471, 93 L. T. 426, 429; 21 T. L. R. 346; 10 Asp. M. C. 110, 113—C. A.

**374. Interpretation—Collision between Tow and Ship through Negligence of Tug—Judgment against Owners of Tug—Claim for Indemnity against Owners of Tow**—A barge, whilst in tow of a tug, came into collision with and damaged another vessel. The owners of the other vessel obtained judgment against the owners of the tug; and the owner claimed to be indemnified by the barge owners. It was admitted that the collision was due to the negligence of those in charge of the tug, but the tug owners relied on the following words in the contract of towage:—"We will not be answerable for any loss or damage which may happen to or be occasioned by or to any vessel or barge or their or its cargo while in tow, . . . nor will we be responsible for any loss or damage which may happen to be caused by or through any act done or omitted to be done by any person or persons we employ."

HELD—that this clause only restricted their own liability to the barge owners, and did not amount to a contract by the latter to be responsible for damage negligently done by the tug to other persons.

THE RICHMOND, (1903) 19 T. L. R. 29—  
[Div. Ct.]

**375 Collision—When Towage ended—Third Party Notice—Indemnity**—Two dock tugs brought a steamer to her berth in the docks, but a barge moored to a buoy prevented her hauling quite close alongside the quay to which her ropes had been already made fast. The dock-master directed two men from the tugs to unmoor the barge, and directed a third tug to tow her away. This operation was so negligently performed that the barge collided with the steamer and sank.

In an action by the barge owners against the dock owners the latter admitted liability, but claimed indemnity against the steamship owners. It appeared that a firm of repairers had undertaken to berth the vessel, and for this purpose hired the tugs from the dock owners, upon the terms that the masters and crews thereof should cease to be under the control of the dock owners, and should be under the orders of the master of the steamer, and be deemed the servants of the steamer's owners.

Deane, J., having held that the steamship owners were not liable, because (1) they were not parties to the contract in question, and (2), in any case, the towage contract was finished, and the tugs and their crews were again under the control of the dock owners when the collision occurred:—

HELD—that his decision must be upheld for the second reason given by him.

Decision of Deane, J. ([1906] P. 317; 75 L. J. P. 104; 10 Asp. M. C. 347) affirmed.

THE KATE, [1907] P. 296; 76 L. J. P. 134; [97 L. T. 502—C. A.]

**XIV. PILOTAGE.****(a) Authority of Pilot.**

**376. Collision—Compulsory Pilotage—Dutch Law—Liability of Owner for Fault of Pilot**—

**Pilotage—Continued.**

*The Prinz Hendrik*, an outward-bound sea-going vessel, within the pilotage district of the mouth of the Scheldt, having on board, as she was required to have, a duly licensed pilot for the district, collided with the British screw steamship *Gotha*.

**HELD**—that the position of the pilot according to Dutch law is very much the same as in other countries where a pilot has to be taken and paid for; but the charge of the ship is not surrendered to him. The pilotage, therefore, is not compulsory in the sense in which it has to be compulsory according to English law in order to discharge the owner from liability for the fault of the pilot.

**THE PRINZ HENDRIK**, [1899] P. 177; 68 [L. J. P. 86; 80 L. T. 838, 8 Asp. M. C. 548—Barnes, J.

**377. Collision — Compulsory Pilotage — Liability of Pilot—Full Charge of Vessel—Pilot placed by Owner in Disadvantageous Position—Duty of Pilot to Resist.**—When a licensed pilot is placed in charge of a vessel, in a place where pilotage is compulsory, it is his duty to take full charge of her, and to give such orders as are necessary to carry out what he thinks requires to be done. On the happening of a collision it is no excuse for him to say that he was placed by the owner of the vessel in a disadvantageous position. His duty is to see that he is placed in the position from which he can best manage the requisite operation, and to resist being placed in a disadvantageous position. If he takes no steps to resist being placed in a disadvantageous position, he must be held to have acquiesced in the arrangement, and will not escape responsibility for damages to another vessel by collision.

**GREENOCK TOWING CO. v. HARDIE**, (1902) 4 F. [215.

**378. Compulsory Pilotage—Assistance from Master.**—Though the master of a ship is not entitled to interfere with the pilot in the navigation of the ship, the pilot is entitled to competent assistance from the master and crew. Where, therefore, the pilot, who was in compulsory charge of a steamship, mistook the lights of a vessel at anchor for those of a vessel in motion, it was held to be the duty of the master to call the pilot's attention to the fact that the lights were stationary, and the steamship was held to blame for a collision with the vessel at anchor.

**THE TACTICIAN**, [1907] P. 244; 76 L. J. P. [80; 23 T. L. R. 369—C. A.

**(b) Defence of Compulsory Pilotage.**

**379. Collision in Belgian Waters—Owner held liable for Pilot's Negligence.**—A collision in the Scheldt was found to be due to the pilot's default. By art. 221 of the Belgian Code, "the presence of a pilot on board is no defence": held also, upon the authorities, that a Belgian pilot, though compulsory in the sense that his fee must be paid, is not compulsorily in charge, because the

master need do no more than pay his fee; the result being that, even if the master does hand over the sole charge to the pilot, the owner remains liable for negligent navigation.

*The Augusta* ((1887) 57 L. T. 326, 6 Asp. M. C. 161—C. A.), *The Guy Mannering* ((1882) 7 P. D. 52, 132; 51 L. J. P. 57; 30 W. R. 835; 46 L. T. 905—C. A.), and *The Prinz Hendrik* ([1899] P. 177; 68 L. J. P. 86; 47 W. R. 183; 80 L. T. 838; 8 Asp. M. C. 513—Barnes, J., No. 376, *supra*) followed.

"**THE DALLINGTON**," [1903] P. 77; 72 L. J. P. [17; 51 W. R. 607; 88 L. T. 128; 19 T. L. R. 250; 9 Asp. M. C. 377—Bucknill, J.

**380. Defence of No Negligence—Negligence of Compulsory Pilot.**—He who sues for damages caused by the negligence of another must, in Admiralty as well as in other cases, make out that negligence.

The defendants denied that there had been any negligence on board their ship, *The Burma*; but alleged that if there had been such negligence it had not been the negligence of themselves or their servants. On the trial it was found that the negligence of *The Burma* was not that of the defendants' servants, but of the person—the agent—whom they were by law compulsorily bound to employ.

**HELD**—that the suit must be dismissed with costs.

**THE BURMA**, (1899) 80 L. T. 808; 8 Asp. [M. C. 547—Bucknill, J.

**381. Failure to Stand by—Effect—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 422.**—Where a collision is proved to be due solely to the negligence of a pilot employed compulsorily, the owners of the vessel are not rendered liable by the fact that the master committed a breach of sect. 42 of the Merchant Shipping Act, 1894, by failing to stand by the other vessel. The statutory presumption referred to in that section only arises in the absence of "proof to the contrary."

*The Queen* ((1869) L. R. 2 A. & E. 354; 38 L. J. Ad. 39; 20 L. T. 855—Phillimore, J.) followed.

**THE SUSSEX**, [1904] P. 236; 73 L. J. P. 73; [90 L. T. 549; 9 Asp. M. C. 578—Barnes, J.

**382. Fault not that of the Pilot alone.**—Those who rely upon a plea of compulsory pilotage as a defence to an action arising out of a collision must prove to the satisfaction of the Court that the fault was that of the pilot alone, and that his mistake was not induced by an officer of the vessel.

**THE BEN MOHR**, (1904) 52 W. R. 686—[Barnes, J.

**383. Fault of Pilot.**—In an action arising out of a collision on the Clyde the owners of the injured vessel, which was at the time lying at a wharf, pleaded that the colliding vessel was not properly trimmed for navigating a narrow river, and that she was negligently navigated.

**Pilotage—Continued.**

The defendants proved that the pilot had deliberately elected not to have her trim altered, that he was compulsorily in charge, and that all his orders were obeyed.

**HELD**—a sufficient answer to both allegations, assuming them to be well founded.

LONDON AND GLASGOW ENGINEERING CO. v. [ANCHOR LINE, (1904) 5 F.1089—Ct. of Sess.]

**384. Harwich Harbour—Vessel Anchored Temporarily—Berthed on Tide Rising—Collision while being Berthed—Duration of Compulsory Pilotage**—Pilotage "into and out of" Harwich Harbour is compulsory. A vessel was brought in in charge of a pilot, and (the tide being low) was anchored for a few hours before being brought to her discharging berth in the harbour. While being brought to her berth from the anchorage in charge of the same pilot she came into collision with another vessel which was lying at her moorings.

**HELD**—that the vessel remained in charge of a compulsory pilot until she arrived at her discharging berth, although a small extra fee was paid to him for berthing her, and the owner was not liable for the damage caused by the collision.

THE OLE BULL, [1905] P. 52; 74 L. J. P. 75; [53 W. R. 590, 92 L. T. 807; 21 T. L. R. 133, 10 Asp. M. C. 84—Barnes, J.]

**385. Moving and Stationary Vessels—Presumption—Proof of Pilot's Default—Defective Equipment of Ship.**—Where a moving vessel collides with a stationary one, the presumption is that the former is to blame. Nor is it sufficient for the defendants to prove that she was compulsorily in charge of a pilot, it is necessary to prove also that the collision was due to his default.

So held, where the anchors of the moving vessel were not available for use, and it was not shown that the pilot had been consulted as to the advisability of moving her in that condition.

*Semble*, also, if the pilot was in default, the owners were also in default for not having the vessel properly equipped

MANN MACNEAL & CO. v. ELLERMAN LINES, [(1905) 7 F. 213—Ct. of Sess.]

**386. Port Natal—Collision while Mooring Ship in Berth—Regulations of Ports**—By Regulation 17 of the Regulations of Port Natal, in which pilotage is compulsory except for certain exempted ships, "no master or person in charge of an unexempted vessel shall cross the bar in such a vessel or shift the berth of such vessel in the harbour without a pilot or otherwise without permission." By Regulation 29, "the master of every vessel shall occupy the berth assigned to such vessel and change the berth if so directed, in default whereof the removal may be effected by the port authorities at the risk and expense of vessel and owners."

The port authorities directed a vessel which was not within the exemption from compulsory

pilotage to change her berth, and, as the master failed to comply with the direction, the port authorities sent a pilot with a tug to shift her. While being so shifted she came into collision with another vessel solely through the fault of the pilot.

**HELD**—that under the above regulations the pilot was at the time acting as a pilot compulsorily in charge, and the shipowners were not liable for the collision.

THE SUFFOLK, (1905) 21 T. L. R. 267—Deane, [J.]

**387. Tyne Pilotage Confirmation Act, 1865 (28 Vict. c. 44)—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 604**—The Tyne Pilotage Order Confirmation Act, 1865, which provides that nothing in the order confirmed shall extend to oblige the owner or master of any vessel to employ a pilot within the Tyne pilotage district, does not prevent the application of sect. 601 of the Merchant Shipping Act, 1894, which makes pilotage compulsory on a vessel carrying passengers between places in the British Isles where neither her master nor mate possesses a pilotage certificate.

Where, therefore, a steamer, whilst on a voyage from Leith to Newcastle with passengers, was proceeding up the river Tyne in charge of a duly licensed pilot, and came into collision with another vessel solely owing to the fault of the pilot, and neither her master nor mate held a pilotage certificate.—

**HELD**—that the employment of the pilot was compulsory by law, and that consequently the owners of the steamer were not liable for the loss occasioned by the collision.

*The Johann Scedrup* (6 Asp. M. L. C. 73, 12 P. D. 43) distinguished.

THE WARSAW, [1898] P. 127; 8 Asp. M. L. C. [399; 67 L. J. P. 50; 78 L. T. 327; 14 T. L. R. 275; 46 W. R. 638—Barnes, J.]

**(c) Exempted Ships.**

**388. Coasting Trade—Trinity House Outport Districts—Trading to any Port in Europe North and East of Brest—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 622, sub-s. 1, s. 625, sub-s. 1, 3**—*The Glanystwyth*, a British steamship employed in the Mediterranean and Atlantic trades, arrived at Ipswich from Gaza, in Turkey, and discharged part of her cargo, viz., 1,400 tons of barley, and was proceeding with 1,400 tons of barley, the remainder of her cargo, without passengers, but in charge of a duly licensed Trinity House pilot, for the port of Ipswich, down the river Orwell, on her voyage to Leith, when she came into collision with and damaged the ketch *Sarah Lizzie*, lying at anchor. Where the collision occurred was within the limits of the port of Ipswich, one of the Trinity House outport districts.

**HELD**—that *The Glanystwyth* was not a vessel employed in the coasting trade of the United Kingdom within sub-sect. 1 of sect. 625 of the Merchant Shipping Act, 1894, nor was she trading from any port of Great Britain within

**Pilotage—Continued.**

any of the Trinity House outport districts to any port in Europe north and east of Brest within the exemption contained in sub-sect. 3 of that section. Therefore *The Glanystwyth* was bound to have a compulsory pilot on board.

"Europe" in the sub-section means the continent of Europe, and does not include the United Kingdom.

*The Winestead* ([1895] P. 170; 64 L. J. P. 51; 72 L. T. 91; 7 Asp. M. C. 547; 11 R. 720—Bruce, J.) followed.

THE GLANYSTWYTH, [1899] P. 118; 68 L. J. P. 371, 80 L. T. 204, 15 T. L. R. 224, 8 Asp. M. C. 513—Jeune, P.

**389. "Coasting Vessel"**—*Vessel Sailing under Foreign-going Articles—Vessel taking Cargo at Port in United Kingdom to be Discharged at another Port in United Kingdom—Compulsory Pilot—Bristol Wharfrage Act, 1807* (47 Geo. 3, sess. 2, c. xxxiii.), s. 9—*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 603, sub-s. 2—A ship sailing under foreign-going articles left Swansea and went to various ports within and without the United Kingdom. She went from Dieppe to Hull in ballast, and there took in a cargo for Bristol, where she discharged such cargo, still sailing under the same articles. When on the voyage from Hull to Bristol, the ship was proceeding up the Bristol Channel, and was within the limits of the port of Bristol, within which, by sect. 9 of the Bristol Wharfrage Act, 1807, pilotage by a British pilot is compulsory for all vessels except "coasting vessels and Irish traders." The master refused to take a compulsory pilot on board, on the ground that the ship during the voyage from Hull to Bristol was a "coasting vessel" within the meaning of the exemption, by reason of her having taken in cargo at Hull destined to be discharged at Bristol, both ports being within the United Kingdom.

HELD—that the ship was not a "coasting vessel" at the time in question, and the fact that she took in cargo at Hull, a port in the United Kingdom, which she was going to discharge at Bristol, another port in the United Kingdom, did not make her a "coasting vessel" on the voyage from Hull to Bristol, and that the master was properly convicted, under sect. 603, sub-sect. 2, of the Merchant Shipping Act, 1894, for having, within a district where pilotage was compulsory, refused to take a pilot on board.

PHILLIPS v. BORN, (1906) 93 L. T. 634; 10 Asp. [M. C. 131—Div. Ct.]

**390. London District—"Constant Trader"**—*Pilotage Act, 1825* (6 Geo. 4, c. 125), s. 59—*Order in Council, February 18th, 1854—Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 603—*The Cayo Bonito*, a new vessel and British ship, belonged to the defendants, the Cuban Steamship Co., which had several other vessels and ships which they chartered from time to time. The vessels were worked in two lines; one was from Antwerp to London, and then on

to America and back, and the other from London to New Orleans direct with liberty to call at Bermuda. *The Cayo Bonito* had made one voyage previously to the collision, going from London to Antwerp and then on to Mexico. On the voyage in question she, having some cargo on board and one passenger, was on the same round from London to Antwerp, and then on to Mexico. In the course of the passage from London to Antwerp a collision took place near the Black Deep Lightship in the estuary of the Thames, for which the pilot of *The Cayo Bonito* was alone to blame.

HELD—that *The Cayo Bonito* was, as a matter of law and of fact, within the exemption in the Order in Council of 1854, viz., of "ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages"; that she was a "constant trader" within sect. 59 of the Pilotage Act, 1825, and therefore exempt from the compulsion to take a pilot, and that the defendants were responsible for the collision.

Decision of Barnes, J. ([1902] P. 216; 71 L. J. P. 88, 86 L. T. 867; 18 T. L. R. 680) affirmed.

THE CAYO BONITO, [1903] P. 203; 72 L. J. P. 70, 89 L. T. 260; 19 T. L. R. 609; 52 W. R. 133, 9 Asp. M. C. 445—C. A.

**391. "Passengers"**—*Distressed Seamen—Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), ss. 190—193, 625, 627—Distressed seamen shipped under an order of a British consular officer at a foreign port, pursuant to the Merchant Shipping Act, 1894, s. 192, are not "passengers" within the meaning of sect. 625 of the Act, which exempts ships navigating within the limits of the port to which they belong "when not carrying passengers" from compulsory pilotage in the London district and in the Trinity House outport districts.

Where, therefore, a collision occurred in the river Thames, within the limits of the port of London, between a barge and a steamer belonging to that port which carried five distressed seamen shipped under an order of the British consul at Leghorn, and a Trinity House pilot who was in charge of the steamship was found solely to blame for the collision, it was

HELD—that the owners of the steamship were liable for the damage done to the barge, as the steamship was not under compulsory pilotage.

THE CLYMENE, [1897] P. 295; 8 Asp. M. C. [287; 66 L. J. (P. D. A.) 152; 76 L. T. 811; 46 W. R. 109—Barnes, J.]

**392. Ship passing through Pilotage District—Isle of Wight and Southampton District—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 605, sub-s. 1—A collision occurred in the Solent between two vessels, both of which were in charge of pilots. One of the vessels was on a voyage from New York to Southampton, and at the time of the collision had on board an Isle of Wight pilot, who would have had to give up charge of the vessel to a Southampton pilot upon entering Southampton Water.**

**Pilotage—Continued.**

**HELD**—that the Solent and Southampton Water were one pilotage district, which was divided into two parts—namely, the Isle of Wight and Southampton Water parts—for the purpose of licensing pilots; and that therefore the vessel in question was not exempt from compulsory pilotage at the time of the collision under sect. 605, sub-sect. 1, of the Merchant Shipping Act, 1894, as being on a voyage between two places, both situate out of the pilotage district.

**THE ASSAYE**, [1905] P. 289; 74 L. J. P. 145; [21 T. L. R. 677; 54 W. R. 203; 94 L. T. 102; 10 Asp. M. C. 183—Deane, J.

**393 Ship Trading from any Port in Great Britain—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 625, sub-sect. 3.**—By the Merchant Shipping Act, 1894, s. 625, sub-sect. 3, "ships trading from any port in Great Britain within the London district" to any port in Europe south and east of Brest are exempted from compulsory pilotage within the London district.

A ship on a voyage from South America to Rotterdam, with leave to carry cattle to London, came into the Thames and landed the cattle, and then proceeded on her voyage.

**HELD**—that while on the voyage from the Thames to Rotterdam she was within the exemption.

Decision of C. A. [1896] P. 281, affirmed.

**OWNERS OF STEAMSHIP RUTLAND, EDEN-BRIDGE v. GREEN**, [1897] A. C. 333, 8 Asp. M. C. 270, 66 L. J. (P. D. A.) 105, 76 L. T. 662—H. L. (E)

**394 Ship, when not carrying Passengers, Trading from Port in Europe North and East of Brest—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 603, 625.**—The defendants were the owners of the Norwegian vessel *The Columbus*, which arrived within the limits of the London district from the port of Christiania, in Norway, laden with timber, but with no passengers on board.

The plaintiff, a duly licensed Trinity House pilot, tendered his services to pilot the ship to Gravesend. The master refused his services. The plaintiff brought an action to recover the amount of his pilotage and costs.

**HELD**—that a foreign vessel was not exempt under the Act of 6 Geo. 4. c. 125, s. 59, because she was not a vessel with a British register. A foreign vessel without passengers is, however, exempted under the Merchant Shipping Act, 1894, as it trades within the meaning of sect. 625 (4) of that Act, and that consequently *The Columbus* was exempt.

**THE COLUMBUS**, (1899) 80 L. T. 203; 15 [T. L. R. 221, 8 Asp. M. C. 488—Jeune, P.

**(d) Limits of Compulsory Pilotage.**

**395. Port of Blyth—"Creeks or Members" of Port of Newcastle-on-Tyne—Foreign Vessel—Newcastle Pilot Act, 1801 (41 Geo. 3, c. lxxxvi.),**

s. 6.]—There is nothing to be found in the statutes or the bye-laws made pursuant to sect. 333 of the Merchant Shipping Act, 1854, the provisions of which section are repeated in sect. 582 of the Merchant Shipping Act, 1894, which in any way abolishes the compulsion by sect. 6 of the Newcastle Pilot Act, 1801, so far as the port of Blyth is concerned, for that port is one of the "creeks or members" of the port of Newcastle-upon-Tyne. Pilotage is, therefore, necessary for foreign vessels navigating the port of Blyth.

**THE HOLAR**, [1901] P. 7; 69 L. J. P. 140; [49 W. R. 224; 83 L. T. 436; 17 T. L. R. 17; 9 Asp. M. C. 143—Barnes, J.

**396. Port of Bristol—Overlapping Pilotage Districts of Bristol, Cardiff, Newport, and Gloucester—Bristol Wharfrage Act, 1807 (47 Geo. 3, sess. 2, c. xxxiii), s. 9—Bristol Channel Pilotage Act, 1861 (24 & 25 Vict. c. cxxxvi.), ss. 4, 29—Pilotage Order Confirmation (No. 1) Act, 1891 (54 & 55 Vict. c. clx.), Sched., s. 3**—Under the true construction of the Acts governing the overlapping pilotage districts round Bristol a vessel, not being exempt from compulsory pilotage in the port of Bristol must, if bound for that port, take on board a Bristol pilot as soon as she gets within the limits of the port, this is so even though she be bound from Cardiff, Newport, or Gloucester, and is still within the pilotage district of her port of sailing, and the pilot from such port must, on demand, give up charge to a Bristol pilot as soon as the vessel enters the limits of the port of Bristol.

**REED v. GOLDSWORTHY**, (1904) 90 L. T. 126; 9 [Asp. M. C. 529—Div. Ct.

**397. Port of Leith—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 604—Port of Leith Act (1 Geo. 4, c. xxvii.), s. 35**—The master of a ship carrying passengers between places in the British Isles must employ a qualified pilot within the district for which the Leith Trinity House was entitled to license pilots.

The general exemption in sect. 35 of 1 Geo. 4, c. xxxvii., was impliedly repealed by sect. 604 of the Merchant Shipping Act, 1894, as regards the class of vessels to which it applies.

**RANDALL v. RENTON**, (1904) 5 F. (J. C.) 16—Ct. [of Justy.

**398 Port of Liverpool—Inward-bound Vessel—Taking Vessel to Stage to Discharge Cattle—Vessel in Course of Progress to her Dock—Outward-bound Vessel—Taking Vessel to Stage to Embark Passengers—"Proceeding to Sea"—Pilot's Extra Remuneration for taking Vessels to Stages—Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), ss. 121—125, 127, 128, 130, 133, 138, 139, 221**—Pilotage is compulsory in the case of all vessels, other than coasters in ballast and vessels under the burthen of 100 tons, proceeding into or out of the port of Liverpool. By the Mersey Docks Acts Consolidation Act, 1858, the Mersey Docks and Harbour Board is constituted the pilotage authority for the port, with power to license pilots for the port, and power to fix pilotage rates for piloting



**Pilotage—Continued.**

vessels out of and to the port of Liverpool. It is the duty of the pilot of an inward-bound vessel to pilot the same into one of the wet docks within the port without making any additional charge for so doing, unless his attendance is required on board such vessel while at anchor in the Mersey and before going into dock, in which case he is entitled to receive five shillings per day for such attendance. In the case of outward-bound vessels it is provided that in case the master of any such vessel shall "proceed to sea," and shall refuse to take on board or employ a pilot, he shall, nevertheless, pay the full pilotage rate.

An inward-bound steamer was boarded by a duly licensed pilot and by him brought into the Mersey; but, before going into dock, she was brought to two stages to discharge cattle and sheep. The owners of the vessel paid the pilot the inward compulsory pilotage rate, and the sum for two days' attendance, to which he was entitled under the Act. An outward-bound steamer left the dock in charge of a duly licensed pilot, and, after anchoring, was brought alongside the stage by the pilot and embarked her saloon passengers, their baggage, and the mails. She then proceeded on her voyage, being piloted by her pilot to the outward compulsory pilotage limit. The owners of the vessel paid the pilot the outward compulsory pilotage rate. The Mersey Docks Acts Consolidation Act, 1858, gives the Board power to make bye-laws, and by a bye-law so made the Board fixed a sum as extra remuneration for removing vessels to the landing stages. The pilots claimed such sum as the remuneration fixed as aforesaid, or, in the alternative, as a reasonable remuneration for extra services in taking the vessels to the stages.

**HELD**—that an inward-bound vessel, if she cannot go direct into dock on her arrival in the river, is in course of progress to her dock while she remains at anchor with the intention of docking as soon as weather and tide will permit, and that the rates of pilotage, in addition to the proper charge for attendance, were fixed to cover the duties of the pilot in such case, but that these rates do not cover the services of the pilot in taking the vessel to the stages.

**HELD** that, if an outward-bound vessel is loaded, equipped, and prepared ready for sea, and in that condition makes such progress to sea as tide and weather permit, from her point of starting on her voyage she is proceeding to sea within the meaning of the Act; but that a vessel is not so proceeding to sea if after leaving her dock she remains waiting in port for the purpose of performing operations which are necessary in order to complete her loading, or other preparations required in order to render her ready for sea; and that the compulsory rate does not cover the service rendered by the pilot in taking the outward-bound vessel to the stage to take on board her passengers, their baggage, and the mails.

**HELD**, therefore, that in both cases the pilots were entitled to the extra remuneration claimed.

*Semble*, that vessels outward-bound from, and

inward-bound to, the port of Liverpool, and in charge of a duly licensed pilot, are not under compulsory pilotage whilst proceeding to the stages for the aforesaid purposes.

**MERSEY DOCKS AND HARBOUR BOARD v. [CUNARD SS. Co., LD., THE SERVIA, THE CARINTHIA, (1898) 8 Asp. M. L. C. 353; 78 L. T. 54—Barnes, J.]**

**399. Port of Liverpool—Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), ss 127, 133.]**—One of the limits of the port of Liverpool for pilotage purposes was fixed in 1858 as the fairway buoy of Queen's Channel; this buoy has now been removed.

**HELD**—that the pilot's duties now extend not merely to the spot originally occupied by the buoy, but to the Bar Lightship, which marks the present exit from the Channel.

**THE SUSSEX, [1904] P. 236; 90 L. T. 549; [20 T. L. R. 381; 9 Asp. M. C. 578—Barnes, J.]**

**400. Port of Manchester—Passing through limits of Port of Liverpool—8 Anne, c. viii. s. 3—Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 128—Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.), ss. 3, 211—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 605—Mersey Docks (Pilotage) Act, 1899 (62 & 63 Vict. c. clxii.), ss. 3, 4, 5.]**—All vessels (other than coasters in ballast, or under 100 tons) must employ a pilot on entering the port of Liverpool from the sea, even though bound only for Manchester *via* the Ship Canal, in which case the duties of the pilot cease at Eastham.

*Semble*, vessels outward bound from Manchester must take a pilot on leaving the canal at Eastham though not intending to call at Liverpool.

**THE MERCEDES DE LARRINAGA, [1904] P. [215, 73 L. J. P. 65; 90 L. T. 520; 20 T. L. R. 375—Barnes, J.]**

**(e) Miscellaneous.**

**401. Appeal from Pilotage Authority—Extension of Time for Appeal—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 610—Pilotage Appeal Rules, 1890, r. 1.]**—By rule 1 of the Pilotage Appeal Rules, 1890, an appeal by a pilot from a pilotage authority under sect. 610 of the Merchant Shipping Act, 1894, to a police or stipendiary magistrate must be instituted by notice of appeal served within seven days or "such further time as may be allowed by the magistrate."

**HELD**—that under this rule a magistrate may extend the time, although the seven days have elapsed before the application is made to him to do so.

**REX v. LEWIS, [1906] 2 K. B. 307; 75 L. J. K. B. [508; 95 L. T. 476; 10 Asp. M. C. 270—Div. Ct.]**

**402. Loss Occasioned by Negligence of Pilot—Pilotage paid by Charterers—Payment of Hire during Repairs.]**—The plaintiff chartered the

**Pilotage—Continued.**

defendants' ship for a specified period, the ship to be employed between safe ports of the continent of Europe, where she might always safely lie. By the charter-party the charterers were to pay for pilotages, and in the event of loss of time from damage preventing the working of the ship the payment of hire was to cease until the ship should be again in an efficient state to resume her services. While under the charge of a pilot the ship grounded in getting to her berth in a harbour, and, in consequence, she was prevented working for a time. The berth was a safe one, and the grounding was due to the negligence of the pilot.

**HELD**—that the pilot, though paid by the charterers, was not their servant, and he had no authority to involve them in liability, and the charterers were not bound to pay for the hire of the ship during the period she was prevented from working.

**FRASER AND WHITE v. BEE**, (1901) 49 W. R. [336; 17 T. L. R. 101—Mathew, J.]

**403. Master's Pilotage Certificate—Misstatement in Preliminary Part—Ships belonging to the "same Owner"**—*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 599.]—A collision occurred on March 26th, 1901, between *The Peri* and *The Bristol City* within a district in which pilotage was compulsory on *The Bristol City*, and she had on board, at the time, a duly licensed pilot; but the master of *The Bristol City* was in possession of a pilotage certificate annually renewed by indorsement and originally dated December 8th, 1891, which recited that "A. S., master of the ship *Jersey City*, whereof Charles Hill & Sons are the owners," and it was granted "to enable him to pilot the said ship or any other ship or ships belonging to the same owners." Both *The Jersey City* and *The Bristol City* belonged to the Bristol City Line, which was managed by Charles Hill & Sons. C. G. Hill, a member of the last-named firm, appeared on the register of *The Jersey City* as the holder of three shares at the date of the original issue of the certificate, and twenty-three shares at the time of the collision, and managing owner, whilst other individual members of the firm held certain shares, and the remainder of the sixty-four shares were held by other parties. *The Bristol City* was built in 1899 and the master of *The Jersey City* was transferred to that vessel. At the date of the last renewal of the certificate, and at the time of the collision, C. G. Hill appeared on the register as managing owner and holder of the whole of the sixty-four shares; but in fact he was only trustee for beneficial owners.

**HELD**—that the certificate was bad, as it was a certificate enabling A. S. to pilot *The Jersey City*, owned by Charles Hill & Sons, and any other vessel owned by Charles Hill & Sons; and if Charles Hill & Sons were not the owners of *The Jersey City*, then it followed that supposing A. S. was transferred to another vessel not owned by Charles Hill & Sons, then it could not be in accordance with the terms of the certificate; but, on the other hand, if it was owned

by them, then it would be in violation of the Act of Parliament because it would not be owned by the same persons as owned *The Jersey City*, and that the certificate was bad on the further ground that in point of fact *The Bristol City* was not owned by the same owners as *The Jersey City* at any material time, viz., at the time of renewal or at the time of the original granting of the certificate.

Section 599 of the Merchant Shipping Act, 1894, uses the word "owner" in its ordinary sense, so that there cannot be the same owners unless all the sixty-fourths belong to the same persons, and the change of ownership of one sixty-fourth is a change of ownership of the ship.

*The Earl of Auckland* ((1861) Lush. 164, 387, 30 L. J. A. 121—Dr. Lushington) followed. **THE BRISTOL CITY**, [1902] P. 10, 71 L. J. P. 5, [50 W. R. 383; 85 L. T. 691; 18 T. L. R. 101—Jeune, P.]

**404. Pilotage Dues—Crown—Ships belonging to Her Majesty**—*Liability to pay Dues—Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), ss. 591, 741.]—A steam collier was owned by the British Government, and was used for conveying coal between various ports to ships in the Navy. She flew the Devonport Dockyard flag, and was not registered under the Merchant Shipping Act, 1894. She appeared in the Navy List. Her master was not in the Royal Navy, but held a Board of Trade certificate, and was employed as master by the dockyard authorities. The crew were also engaged at the dockyard.

**HELD**—that the collier was a ship belonging to His Majesty within sect. 741 of the Merchant Shipping Act, 1894, and her master was therefore not liable to pay pilotage dues under sect. 591.

**SYMONS v. BAKER**, [1905] 2 K. B. 723, 74 L. J. [K. B. 965; 93 L. T. 518; 21 T. L. R. 734; 54 W. R. 159; 10 Asp. M. C. 129—Div. Ct.]

**405. Unqualified Pilot—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 586, 596, 598).]—A pilot in charge of a coasting ship, and qualified as a pilot for the first part of her voyage, does not, by continuing in charge after the ship has proceeded beyond the point to which his licence extends, commit an offence under sect. 598, sub-sect. 1, even although an offer had been made by a pilot qualified for the whole voyage, at the point from which the voyage had commenced, to take charge of the ship for the whole voyage.**

**BLAIR v. WARDEN**, (1898) 35 Sc. L. R. 932—[Ct. of Justy.]

**XV. HARBOURS AND DOCKS.****(a) Authority of Harbour Master.**

**406. Collision—Dock Company—Vessel entering Dock—Direction of Dock Master—Assistant of Dock Master—Lock Foreman's Mistake—Harbours, Docks and Piers Clauses Act, 1847** (10 & 11 Vict. c. 27), s. 53—*Co-Defendants*

**Harbours and Docks—Continued.**

*Reasonably Joined—Costs* ]—A shipowner is not to be held responsible for obeying, under compulsion of statute, any order of a harbour master who is a stranger to him.

*The Bulbao*, (1860) Lush. 149.

By rule 17 of the Rules and Regulations of the London and India Docks Company, not only are the regulations with regard to going into dock to be obeyed, but also any other order which is thought fit to be given by the dock-master or his assistants or deputies.

The master of *The Mystery*—a ketch—who was about to enter the Victoria Dock of the London and India Docks Company, obeyed the order or orders of the lock foreman, who was an official of the dock company, a person in uniform. He was there for the purpose of looking after the barges and was a person authorised to give necessary orders to the barges in going into the docks. He gave, by mistake, a wrong order, and by reason of this order *The Mystery* swung round rapidly and struck with her bowsprit the wheel of another vessel, thereby doing her the damage for which the plaintiffs sought to recover from the owners of *The Mystery*. The London and India Docks Company were subsequently added as defendants.

HELD—that the docks company were alone liable as the lock foreman was acting within the scope of his authority, and he was the assistant of the dock master within the meaning of the Harbour, Docks and Piers Clauses Act, 1847, and not the servant of the owners of *The Mystery*.

HELD, also, that the plaintiffs acted reasonably in joining both parties as defendants, and that, as the docks company threw the blame on the owners of *The Mystery*, the plaintiffs' costs against both defendants and the costs of the defendants must fall on the unsuccessful defendants.

*The River Luggan* ((1888) 57 L. J. P. 28; 53 L. T. 773; 6 Asp. M. C. 281—Hannen, P.) followed.

THE MYSTERY, [1902] P. 115; 71 L. J. P. [39; 50 W. R. 414; 86 L. T. 359; 9 Asp. M. C. 281.—Div. Ct.

**407. Incoming and Outgoing Ship—Order of Harbour Master.** ]—The *T*, a screw steamer, was approaching a lock leading from a basin into a dock at the time when two paddle-tugs were coming out. The first tug passed out safely. The master of the second thought that there was not room to pass between the *T*. and the lock wall and stopped. The harbour master, whose orders he was bound to obey, ordered him to go ahead, and at the same time ordered the *T* to go astern. The *T* reversed her engines, but only sufficiently to keep her stationary, as the wind and tide were drifting her towards the lock. A collision took place between the port sponson of the tug and the port bow of the *T*.

HELD (reversing the judgment of the Court below), that the tug was not to blame, because (1) an incoming ship should give way to an out-

going ship; (2) the master of the tug was bound to obey the order of the harbour master to go ahead; (3) the *T*. had disobeyed the order to go astern.

TAYLOR v. BURGER, (1898) 8 Asp. M. L. C. 364; [78 L. T. 93; 14 T. L. R. 228—H. L. (Sc.)

**408. Injury to Ship while lying in Harbour—Interference by Harbour Master.** ]—The master of a steamship, owing to the threatening condition of the weather, determined to keep her in harbour for the night. Owing to an order given him by the harbour master, he moved his ship from the spot where she had been loading, and placed her in a berth assigned to her by the harbour master. This berth was safe, unless in a storm from the west or north-west. From the then state of the weather it was not unlikely that the wind might during the night veer to the west, and this in fact occurred, and a storm of unusual and extraordinary violence broke over the harbour and injured the steamship. The owner sued the harbour trustees for damages; but the Court held that the damage to the ship was the result of the extraordinary violence of the storm, and not of any negligence on the part of the harbour master, and that the defenders were not liable.

NIVEN v. AYR HARBOUR TRUSTEES, (1898) 25 [R. (H. L.) 42; 35 S. C. L. R. 688—H. L. (Sc.)

**(b) Dues.**

**409. Dock Dues Owing—Right to Retain Vessel—Maritime Lien for Crew's Wages—Priority—Mersey Docks Acts Consolidation Act, 1858** (21 & 22 Vict. c. xcii), ss. 248, 253. ]—Sect. 253 of the Mersey Docks Acts Consolidation Act, 1858, provides that while any dock tonnage rates remain unpaid in respect of a vessel the Dock Board may cause her to be detained.

HELD—that this section gives the Board a paramount right overriding the maritime lien of master and crew in respect of wages due before the vessel entered the dock.

THE EMILIE MILLON, [1905] 2 K. B. 817 [—C. A.

**410. Exemption—Lighter entering Dock to Discharge into Vessel Lying therein—Lighter Leaving Dock without unloading—West India Dock Act, 1831** (1 & 2 Will. 4 c. 52), ss. 76, 83. ]—By sect. 76 of the West India Dock Act, 1831, the dock company are empowered to take certain rates in respect of every lighter entering into any of the docks or lying therein; and by sect. 83 all lighters entering into a dock to discharge or receive goods to or from on board of any ship or vessel lying therein shall be exempt from payment of rates so long as such lighter shall be *bonâ fide* engaged in discharging or receiving such goods. A lighter entered into one of the docks for the purpose of discharging her cargo into a vessel lying therein, but was unable to do so because the vessel was already full, and the lighter thereupon left the dock without discharging any part of her cargo.

**Harbours and Docks—Continued.**

**HELD**—that as the lighter entered the dock *bond fide* for the purpose of discharging into a vessel lying therein, she was exempt from rates under sect. 83, though she did not in fact discharge any cargo.

Decision of Div. Ct. (*sub nom. London and India Docks Co. v. Union Lighterage Co., Ltd.* (1906), 95 L. T. 506; 22 T. L. R. 636) affirmed

**LONDON AND INDIA DOCK CO. v. THAMES [STEAM TUG AND LIGHTERAGE CO., LD.,** (1907) 97 L. T. 357; 23 T. L. R. 590—C. A.

**411. Exemption—Lighter Entering Dock to Discharge into Vessel "Lying Therein"—Lighter in Dock before Entry of Ship—Barge not Leaving by Next Available Tide—Sunday—London and St. Katharine's Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), s. 136.]**—Sect. 136 of the London and St. Katharine's Docks Act, 1864, provides that "All lighters and craft entering into the docks . . . to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as the lighter or craft is *bond fide* engaged in so discharging or receiving the ballast or goods"

A lighter entered a dock for the purpose of discharging into a ship which was then lying in the dock. The ship was unable to take the cargo owing to want of cargo space. The lighter then discharged into a ship which came into the dock after the lighter.

**HELD** (by Vaughan Williams and Buckley, L.JJ., Fletcher Moulton, L.J., dissenting)—that the lighter was exempt from rates under sect. 136, as it was not a condition of exemption that the ship into which the barge discharged should be lying in the dock at the time when the lighter entered.

A lighter finished discharging into a ship in a dock on the afternoon of Saturday, and the next high tide was at midnight. The ship left the dock by that tide, but the lighter remained in the dock until 1 a.m. on Monday. The dock company claimed 6*d.* per ton on the lighter's tonnage under a rate which provided that lighters, having discharged or received goods to or from a ship and remaining in dock beyond the first available tide, should pay 6*d.* per ton register per week.

**HELD** (by Vaughan Williams and Buckley, L.JJ., Fletcher Moulton, L.J., dissenting)—that, considering that the next day was Sunday, the lighter left the dock within a reasonable time after discharging, and must, therefore, be taken to have been *bond fide* engaged in discharging within the meaning of sect. 136 during the time she was in the dock, and was exempt from the rate.

Decision of Walton, J. (96 L. T. 13; 22 T. L. R. 823; 12 Com. Cas. 56; 10 Asp. M. C. 334) affirmed.

**MCDougALL AND Bonthron, LD. v. LONDON [AND INDIA DOCK CO.; PAGE, SON, AND EAST, LD. v. LONDON AND INDIA DOCK CO.,** (1907) 23 T. L. R. 765—C. A.

**412. "For every Quarter of Coals Landed within the Harbour, 3*d.*"—Lower Rate Levied for many Years—Inference of Alteration of Tolls—17 Geo. 3, c. xxxv., s. 6; Sched.]**—A private Act was passed to enable the lord of the manor of Aberayron, his heirs and assigns, to repair and enlarge the quay or pier within the harbour or port of Aberayron; and, in order to defray the expenses of the work, the lord of the manor for the time being, or any officer acting under his authority, was entitled to demand and receive for all vessels using the harbour, and for all goods landed within the harbour, the tolls specified in the schedule to the Act. In the case of coals the toll specified was—"For every quarter of coals landed within the harbour, 3*d.*" The plaintiffs were the lord of the manor, his mortgagees and collectors of the tolls, and claimed on a cargo of coal, of which the defendant was the consignee, which had been landed within the harbour, 3*d.* per quarter of 720 lb. The defendant claimed to pay only 1*s.* per ton on the registered tonnage of his vessel, which had been accepted as the rate for 60 years past.

**HELD**—that as the lord of the manor could reduce the toll, and as the statute prescribed no way in which this must be done, the proper inference was that the toll had been reduced under the authority conferred by the Act, and that, therefore, it was unnecessary to consider whether "quarter" meant a quarter of a ton, or a quarter of a chaldron.

Decision of Walton, J. ((1902) 18 T. L. R. 228) reversed.

**PHILLIPS AND OTHERS v. WILLIAMS, (1903) 19 [T. L. R. 233—C. A.**

**413. "Goods Imported from Parts beyond the Seas or Coastwise"—Goods Shipped from Singapore to Liverpool—Trans-shipment at London—Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 234.]**—Goods, shipped from Singapore for carriage to Liverpool were transhipped at London and forwarded to Liverpool in a steamer bound on a voyage from London to Liverpool, and thence to China.

**HELD**—that the goods were liable to the dock rates imposed on "goods imported from parts beyond the seas . . . into the port of Liverpool" by sect. 234 of the Mersey Docks Acts Consolidation Act, 1858.

**MERSEY DOCKS AND HARBOUR BOARD v. [TWIGGE, (1898) 3 Com. Cas. 176; 67 L. J. Q. B. 604; 14 T. L. R. 371—Mathew, J.**

**414. "Limits of Port" for Purposes of Dues—Fiscal or Customs Port—Local or Commercial Port—Natural Harbour Artificially Enlarged.]**—Port Dinowic, which is within the fiscal or customs port of Carnarvon, is within "the limits of the port" of Carnarvon for the purposes of the Carnarvon Harbour Acts, 1793 and 1809.

So held upon consideration of those statutes and of the facts that persons using Port Dinowic benefited to some extent by work done by the trustees of the Carnarvon Harbour, and had paid dues to the trustees for many years.

**Harbours and Docks—Continued.**

HELD, also, that new docks at Dinowic inside the old high-water mark were also within the fiscal port of Carnarvon, the limits of such a port following the high-water line when carried inland by an artificial enlargement of the old harbour.

Decision of C. A. ([1906] 1 Ch. 179; 75 L. J. Ch. 187; 94 L. T. 42; 22 T. L. R. 182; 10 Asp. M. C. 164) affirmed.

ASSHETON SMITH v. OWEN, [1907] A. C. 124; [76 L. J. Ch. 308; 96 L. T. 478; 23 T. L. R. 385—H. L. (E)]

**415. Liverpool Town Dues — Upper Mersey Dues Act, 1860** (23 & 24 Vict. c. cxxv.), s. 17.]—The Mersey Docks and Harbour Board are disentitled, by reason of the Upper Mersey Dues Act, 1860, s. 17, to levy town dues on goods imported into Duke's Dock, Liverpool, *via* Manchester and the Manchester Ship Canal.

Judgment of C. A. affirmed.

MERSEY DOCKS AND HARBOUR BOARD v. R. [HUNTER, CRAIG & Co., (1899) 80 L. T. 96; 15 T. L. R. 213, 4 Com. Cas. 142; 8 Asp. M. C. 489—H. L. (E.)]

**416. Local Dues on Shipping—Exemption—“Ship”—Open Bonts, Lighters, or Barges—Poole Harbour Act, 1756—Shipping Dues Exemption Act, 1867** (30 & 31 Vict. c. 15), s. 4, sub-s. 4—*Pier and Harbour Order Confirmation* (No. 3) Act, 1891 (54 & 55 Vict. c. clxix.), ss. 2, 18; *Sched.*]—The Pier and Harbour Order Confirmation (No. 3) Act, 1891, making alterations in the rates for goods shipped or unshipped to or from any ship or vessel in the harbour of Poole, has not abolished the exclusion from rates allowed by the Poole Harbour Act, 1756, in respect of goods, wares, or merchandise brought or conveyed in open boats, lighters, or barges without decks to or from Poole and places within a certain locality.

Decision of Kekewich, J. ((1901) 17 T. L. R. 251) affirmed.

POOLE HARBOUR COMMISSIONERS v. PIKE, [(1902) 18 T. L. R. 289—C. A.]

**417. Maximum Sum — Lease from Harbour Company — Power of Lessee to raise Rates — Pargnton Harbour Act, 1838** (1 & 2 Vict. c. i.), ss. 75, 78, 79, 83.]

HELD—(1) that upon the true construction of the Pargnton Harbour Act, 1838, under sects. 75 and 79, the harbour company are entitled to levy quay dues on goods landed in the harbour, which are not specified in Sched. D to the Act, at the rate of 1s. per ton; or at the option of the company to fix quay dues of a sum not exceeding one-tenth part of the freight, so that such rate does not exceed 1s. per ton.

(2) That under sect. 83 of the Act the company only, and not the lessee of the rates, can raise and reduce the rates.

MILLMAN v. RENWICK, WILTON & Co., LD., [(1906) 22 T. L. R. 168—Eady, J.]

**418. Obligation of Harbour Authority to provide Buoys, Lights, &c.**—A harbour authority were given by their special Act power to levy a toll on every vessel lying within the limits of their harbour for more than one tide. They were also empowered by the same Act to raise a sum of £2,500, to be spent on buoys, beacons, lights, and moorings, and a similar sum on other harbour works; they had, in fact, borrowed and spent £5,000, but all except £370 of this sum had been spent on works of the second class. They had, however, spent a substantial sum out of revenue on buoys, lights, &c. In an action to recover tolls in respect of certain sailing barges.

HELD—that the toll was a general toll, payable by every vessel sheltering in the harbour as above, and that the fact of the whole £2,500 not having been applied to buoys, lights, &c., afforded no defence to the action.

QUEENBOROUGH CORPORATION v. SMEED, DEAN [& Co., LD., (1904) 68 J. P. 244; 20 T. L. R. 271—Walton, J.]

**419. River Thames — Conservancy — Toll for Use of Pier—Time of Calling—Illegal Charges—Thames Conservancy Act, 1894** (57 & 58 Vict. c. clxxvii), ss. 68, 165]—By sect. 165 of the Thames Conservancy Act, 1894, the conservators are authorised to levy a toll of sixpence “for each and every time of call” on any vessel using any of their piers or landing stages to embark or discharge her passengers and goods.

The plaintiffs owned a pleasure steamer which ran day trips between the Old Swan Pier, London Bridge, and Hampton Court. The steamer was brought alongside the Old Swan Pier about three-quarters of an hour before the advertised starting time, and remained there until she started, her officers meanwhile doing all they could to get persons to take tickets for the trip.

The conservators by resolution decided that the plaintiffs used the pier for a longer period daily than would be covered by a mere “call” at the pier by their vessel, for which the sixpenny toll was payable; and they alleged their right to impose a terminal charge for this use of the pier by the plaintiffs of £2 a week. For a time this increased charge was paid.

HELD—that although the conservators might have a right to ask for special payment from a vessel using the pier other than for the purpose merely of embarking passengers or goods, that would be based on contract; but there was nothing in the Act which gave the defendants the right to levy more than the sixpence toll on a vessel merely because she was more than a few minutes alongside a pier embarking or discharging her passengers or goods, and that the extra charge already paid, being unauthorised, was paid without consideration, and could be recovered back.

QUEEN OF THE RIVER STEAMSHIP CO., LD. v. [CONSERVATORS OF THE RIVER THAMES, (1899) 47 W. R. 686; 15 T. L. R. 474—Phillimore, J.]

**Harbours and Docks—Continued.**

**420. Ship Entering Harbour "only for Convenience"—*Ship Entering Harbour to be Placed at Disposal of Charterer.***—By the Leith Harbour and Docks Act, 1892, the harbour commissioners are empowered to levy rates from the owners of every ship coming into or going out of the harbour and docks of Leith, and the statutory regulations provide that all vessels entering the harbour "only for safety, convenience, or repairs, shall be charged half rates, but if they shall land or take on board goods or remain in the harbour or docks above one month they shall be charged full rates." A charterparty provided that a vessel should be let to the charterers for a period of six calendar months commencing from May 5th to 10th, 1905, "at which date she is to be placed, with clear holds, at the disposal of the charterers at Leith," in such dock, wharf, or place as the charterers might direct, the charterers to pay all port charges. The vessel arrived at Leith on May 8th in ballast, and was there handed over to the charterers, who loaded her. She paid the full harbour rates for entry at Leith, and the charterers deducted the full rates on paying the stipulated hire to the owners. The owners admitted liability for half the rates, but sued the charterers for the other half.

**HELD**—that as the vessel had entered Leith docks under a contract between the owners and the charterers that she should be delivered there to the charterers, she had not entered "for convenience only," within the meaning of sect. 58 of the Leith Docks and Harbours Act, and that the owners were liable for the full rates due for her entry.

**AKTIESELSKABET LINA v. TURNBULL, (1907)**  
[S. C. 507—Ct. of Sess.]

**(c) Liability of Harbour Authority.**

**421. Dangerous Berth in Harbour — Ship Taking Ground — Unfit Condition of Berth — Liability of Harbour Trustees and Owner of the Wharf—*New Shoreham Act, 1816* (56 Geo. 3, c. lxxxi.), s. 27.**—A ship came into Shoreham Harbour and went alongside a wharf belonging to a railway company. The harbour authority and the railway company respectively received payment for the use of the harbour and wharf. With the fall of the tide she took the ground, and in consequence of an accumulation of rubbish in the berth she was severely strained and injured. The harbour authority were under a statutory duty of doing such things as were necessary or proper for rendering the harbour safe and commodious. Neither the harbour authority nor the railway company took any steps to ascertain whether the berth was in a fit condition for ships to lie at.

**HELD**—that both the harbour authority and the railway company were liable for the damage to the ship.

The harbour company could not escape liability by shifting the duty of periodical inspection on to local pilots who were not their servants, nor, having failed to do their duty, could they excuse

themselves by saying that, even if they had inspected periodically, the danger would not have been discovered, inasmuch as it had only existed for a few hours. The railway company similarly could not rely on the pilots performing the duty put upon them, but ought themselves to have inspected a berth out of which they made a profit.

**"THE BEARN," [1906] P. 48; 75 L. J. P. 9;**  
[94 L. T. 265; 22 T. L. R. 165; 10 Asp. M. C. 208—C. A.]

**422. Duty of Commissioners to Maintain Free Ingress and Egress—Advertisement as to Depth of Water on Dock Sill—Warranty—Duty to Exercise Care.**—Harbour commissioners were required by statute to improve a harbour, and maintain docks in connection therewith, and to take tolls and dues in respect of the use of the harbour and docks. They advertised that there was a certain depth of water on the sill of one of their docks, but allowed silt to accumulate at the harbour entrance, thus causing a ship to be detained in their dock for several days.

**HELD**—that they were liable for the detention of the ship.

*Semble*, such an advertisement amounts to a warranty that, so far as the commissioners' jurisdiction extends, a ship capable of floating over the dock sill can reach and leave such dock. In any case there is an obligation to use reasonable care to ensure access to and egress from the dock under normal conditions for all ships capable of using a dock with the advertised depth of water on the sill.

**Williams v. Swansea Harbour Trustees ((1863)**  
14 C. B. (N. S.) 845) discussed

**BEDE STEAMSHIP CO. v. RIVER WEAR COMMISSIONERS, [1907] 1 K. B. 310; 76 L. J. K. B. 434; 96 L. T. 370; 10 Asp. M. C. 370—C. A.**

**423. Injury to Vessel from Defects of Berth**—A vessel sustained injuries while lying at a quay under the control of harbour commissioners. The commissioners had laid a berth with skids in the form of a grid, on which vessels would rest at low tide, and the injuries were due to the berth having become defective, the skids not having a uniform gradient and several of them being wanting. The defects could have been ascertained by the exercise of reasonable care.

**HELD**—that the harbour commissioners were bound to use reasonable diligence to keep the berth safe; that they had failed to do so, and were liable to the ship-owners.

**STEAMSHIP FULWOOD v. DUMFRIES HARBOUR COMMISSIONERS, (1907) S. C. 456—Ct. of Sess.**

**424. Negligence — Mooring Vessel close to Another—Injury Resulting therefrom.**—The *F.*, a fishing boat, was laid up in the defendants' harbour, moored to a quay at a place where the bottom slopes rapidly downwards from the quay wall. Another fishing boat, the *V.*, was lying in the harbour in a waterlogged condition, and the

**Harbours and Docks—Continued.**

harbour master ordered her to be moved to a certain berth. Instead of so moving her, those in charge moored her alongside of and to the *F*. Next day at low tide, when both boats were resting on the bottom, one of the crew of the *V*. removed the plug from her, and, having allowed the water to escape, replaced the plug. The result of this lightening of the *V*. was that at next low tide she failed to take the bottom as soon as the *F*., and by straining at her moorings capsized the latter and damaged her. The owner of the *F*. sued the defendants, alleging negligence on their part in allowing the *V*. either to take up or remain in the position alongside the *F*.

**HELD**—that the facts did not import fault on the part of the harbour authority or of those for whom they were responsible, and that they were not liable.

**MACKENZIE v. STORNOWAY PIER AND HARBOUR**  
[COMMISSION, (1907) S. C. 435—Ct. of Sess.]

**(d) Liability of Wharf Owner.**

**425. Injury to Barge hired by Wharf Owner to deliver Cargo at Wharf—Obstruction in Bed of River.**—The defendants, who were lessees of a wharf in a tidal river, hired a barge of the plaintiff to carry goods to the wharf at a place where the barge must necessarily ground at low water. The defendants had no control over the bed of the river. A block of hardened cement had fallen off the quay into the river; it was visible at low water, but its existence was not known to the defendants. The plaintiff's barge, whilst alongside the wharf for the purpose of discharging its cargo, grounded on the block of cement when the tide fell, and was injured. In an action for damages for the injury:—

**HELD** (Holmes, L.J., dissenting)—that the defendants, having invited the plaintiff to discharge the goods at the wharf, were bound to take reasonable care to ascertain that the berthage was reasonably safe, and, not having discharged this duty, were liable for the injury.

*The Moorcock* ((1889) 14 P. D. 64; 58 L. J. P. 73) followed.

**BUTLER v. M'ALPINE**, [1904] 2 Ir. R. 445—  
[C. A.]

**426. Unfit Condition of Wharf—Negligence—Damage to Vessel lying in Berth.**—The owner of a wharf does not warrant that a berth is in a fit and proper condition, but there is an implied obligation on him to use reasonable care to have it in such condition, or to warn shipowners, if he knows it to be unsafe.

The plaintiffs' vessel, which was found to be in a fit condition to take the ground for the purpose of unloading a cargo of iron ore, was damaged through straining by reason of her lying on an uneven bottom in the defendants' wharf.

The Court held the defendants to blame in not keeping the berth in a fit and proper condition to receive the vessel, and held the plaintiffs

entitled to recover such damages as were assessed by the registrar and merchants.

Decision of Bucknill, J. ((1903) 51 W. R. 590) affirmed.

**THE VILLE DE ST. NAZAIRE**, 52 W. R. 68—  
[C. A.]

**(e) Miscellaneous.**

**427. River Thames—Requisition to remove Vessel—Obstruction—Regulations—West India Docks Act, 1831 (1 & 2 Will. 4, c. lii), s. 101.**—Sect. 101 of the West India Docks Act provides that every master or other person in charge or command of a vessel, having placed such vessel within two hundred yards of the entrance to any of the docks to which the Act applies, "who shall not immediately remove such vessel from within such distance on being therewith required by the dock master," shall incur a penalty "for every hour that such obstruction shall remain after such requisition."

**HELD**—that a notice or requisition, signed by a dock master, with the name of the vessel left blank, and handed by him to his deputy, with instructions to serve it upon any master who should place his vessel within the prescribed limit, and which was afterwards served by such deputy upon the respondent, was a sufficient requisition within the Act.

**HELD** also—that it is not necessary that the vessel should be proved to have actually obstructed navigation to constitute the offence.

**DUCKHAM v. GIBBS**, [1900] 1 Q. B. 394; 69 L. J. Q. B. 127; 48 W. R. 239—Div. Ct.

**428. Special Agreement for letting fixed Quay Berths—Tonnage Rates—Charges for use of Quay for the Manipulation of Goods.**—The defendants agreed with the plaintiffs to appropriate for the use of the plaintiffs' steamers three permanent quay berths, at Tilbury Docks, on payment of tonnage rates.

**HELD**—that the agreement did not, nor did any statute affecting the legal rights and duties of the defendants, impliedly prevent the defendants from charging the plaintiffs, in common with all other shipowners using the docks who had not signed a special agreement for the letting of the fixed berths, in respect of the use of the quay for the manipulation of goods upon it, the charge being made a charge in respect of goods, and against the person, whether shipowner or goods owner, who so used the quay for the manipulation of the goods.

**ORIENT STEAM NAVIGATION CO., LD. v. [LONDON AND INDIA DOCKS JOINT COMMITTEE]**, (1901) 17 T. L. R. 436—Kennedy, J.

**429. Tug for Moving Steam Trawlers in Dock—Right of Owners of Steam Trawlers to have their own Tug—Manchester, Sheffield and Lincolnshire Railway Company Act, 1849 (12 & 13 Vict. c. lxxxii), ss. 6, 247; Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 33.**—The owners of steam trawlers are not entitled under sect. 33 of the Harbours, Docks

**Harbours and Docks—Continued.**

and Piers Clauses Act, 1847, and sect 247 of the Manchester, Sheffield, and Lincolnshire Railway Company Act, 1849, to have one of their own tugs in the Grimsby Docks for the purpose of moving the trawlers to different parts of the docks as required.

THE GREAT CENTRAL RY. CO. v. THE NORTH [EASTERN STEAM FISHING CO., LD., AND OTHERS, (1906) 22 T. L. R. 520—Walton, J.

**XVI. MISCELLANEOUS SHIPPING REGULATIONS.**

**430 Deck Cargo—Coat for Use of Ship Carried on Deck—“Timber, Stores, or Other Goods”—Liability for Light Dues—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 85—Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44), s. 5, Sched. II, r. 8.]—By sect. 85 of the Merchant Shipping Act, 1894, “if any ship . . . carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship’s registered tonnage, timber, stores, or other goods, all dues payable on the ship’s tonnage shall be payable as if there were added to the ship’s registered tonnage the tonnage of the space occupied by those goods at the time at which the dues became payable.” A steamship leaving a port in England carried, besides the coal in her bunkers, 100 tons of bunker coal on the awning deck for use in the ship’s boiler fires, and this coal was during the voyage out transferred to the bunkers and used in the boiler fires. Light dues were claimed in respect of the space occupied by the 100 tons of coal carried on deck.**

**HELD**—that “deck cargo” in sect. 85 was not limited to freight-earning cargo, that the word “goods” was wide enough to include bunker coal, and that therefore the tonnage of the space on deck occupied by the 100 tons of coal must be added to the ship’s registered tonnage to ascertain the light dues payable.

*Richmond Hill Steamship Co. v. Trinity House Corporation* ([1896] 2 Q. B. 134, 65 L. J. Q. B. 561, 75 L. T. 8, 45 W. R. 6—C. A.) discussed.

**CAIRN LINE OF STEAMSHIPS, LD. v. CORPORATION OF TRINITY HOUSE**, [1907] 1 K. B. 604, 76 L. J. K. B. 377, 96 L. T. 846, 23 T. L. R. 341, 12 Com. Cas. 244—Bray, J.

**431. Deduction of Crew Space—Foreign Sole—Limitation of Liability—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, sub-s. 2 (a), Sixth Sched.]**—To entitle the owners of a foreign ship in limiting their liability to deduct crew space from the gross tonnage it is necessary to prove that the certificate mentioned in the third paragraph of the sixth schedule of the Merchant Shipping Act has been given by a surveyor of ships to the collector of customs.

THE CATHAY, (1900) 69 L. J. P. 89, 82 L. T. [823, 16 T. L. R. 381, 9 Asp. M. C. 100—Barnes, J.

**432. Exemption from Registration—Limitation of Liability—Ship not exceeding Fifteen “Tons Burden”—“Gross Tonnage”—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 2, 3, sub-s. 1; s. 503, sub-s. 2 (a).]**—Sect. 2 of the Merchant Shipping Act, 1894, provides:—“(1) Every British ship shall, unless exempted from registration, be registered under the Act. (2) If a ship required to be registered is not registered under this Act, she shall not be recognised as a British ship”; whilst among the ships exempted under the Act are, by sect. 3 of the same Act, “ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom.” By sect. 503, the owners of a steamship shall not, where without their actual fault or privity any loss or damage is caused to any other vessel by reason of the improper navigation of their steamship, be liable to damages beyond £8 for each ton of the “gross tonnage” of the steamship, without deduction on account of engine room, but deducting the space “certified” under the Act to be occupied by seamen.

**HELD**—that the words “tons burden” in sect. 3 meant the tonnage measured in accordance with the provisions of the Act, and the tonnage regulations thereof.

**HELD**, consequently, that a ship employed solely in navigation on the rivers or coasts of the United Kingdom, and not exceeding fifteen tons burden so ascertained, was properly exempted from registry; and that her owners were entitled to limit their liability under sect. 503 to £8 per ton of her “gross tonnage.” To entitle crew space to be deducted, it should be “certified.”

The decision of Baines, J. ([1899] P. 45; 68 L. J. P. 1, 47 W. R. 288; 79 L. T. 527; 15 T. L. R. 92, 8 Asp. M. C. 477) affirmed.

THE BRUNEL, [1900] P. 24; 69 L. J. P. 8; [18 W. R. 243, 81 L. T. 500; 16 T. L. R. 35, 9 Asp. M. C. 10—C. A.

**433 Passage Broker—Person Acting as—Receipt of Money for Passage in Ship—Sale or Letting of Steerage Passages—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 320, 344, 342.]**—The respondent undertook for the sum of £22, paid to him by C, to place C’s son as a farm pupil with a farmer in Canada, and out of the £22 to procure for him a second-class steamship passage from Liverpool to Quebec, and thence by rail to his destination, but at the time no particular ship was named. Some days afterwards the respondent forwarded a contract ticket for a passage on a named ship which was to leave at a specified time, for which he paid £8. This contract ticket was procured by the respondent from, and the £8 named therein was paid by him to, duly authorised passage brokers who had obtained the same from the ship-owners.

The respondent made a small profit out of the £22, but made no profit out of the sum paid for the contract ticket.

**HELD**—that the sale or letting of passages contemplated by sect. 341 of the Merchant Shipping Act, 1894, meant a sale or letting of a



**Miscellaneous Shipping Regulations—Continued.**

passage in a named ship to commence at a definite time for a specified voyage, and that, as the agreement made by the respondent was merely an agreement to procure a passage at a convenient time in a fitting ship, it was not an agreement for the sale or letting, and that the procuring the contract ticket was not the sale or letting of a passage within sect. 341, and that the respondent, therefore, had not acted as a passage broker within sect. 342.

HELD, also, that the respondent had not received money in respect of a passage in any ship within sect. 320, as the receipt of money in that section meant a receipt of money paid for a specified passage at a fixed time in a named ship.

MORRIS v. HOWDEN, [1897] 1 Q. B. 378; 8 Asp. [M. C. 249; 18 Cox, C. C. 501; 61 J. P. 246, 66 L. J. Q. B. 264; 76 L. T. 156; 45 W. R. 221—Div. Ct

**434 Receipt of Money for Steerage Passage—No Contract Ticket given—No Ship specified—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 320.**—Upon a charge against a person under sect. 320 of the Merchant Shipping Act, 1894, of receiving money in respect of a steerage passage without giving to the payer a signed contract ticket as required by the section, it is not necessary to allege that the money was paid in respect of a specified passage commencing on a given day in a specified vessel.

*Morris v. Howden* ([1897] 1 Q. B. 378; 66 L. J. Q. B. 264; 61 J. P. 246; 45 W. R. 221; 76 L. T. 156, 18 Cox, C. C. 501—Div. Ct., *supra*) commented on.

HART v. HUNTER, (1906) 8 F. (J. C.) 35—Ct. of [Justy.

**SHOP HOURS REGULATIONS.**

See LOCAL GOVERNMENT; PUBLIC HEALTH.

**SHOWS.**

See THEATRE.

**SIERRA LEONE.**

See DEPENDENCIES AND COLONIES.

**SLANDER.**

See LIBEL AND SLANDER.

**SLANDER OF TITLE.**

See TORTS.

**SLAUGHTER-HOUSE.**

See PUBLIC HEALTH.

**SMALL DWELLINGS.**

See LOCAL GOVERNMENT.

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See REVENUE

**SOLICITORS.**

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And see BANKRUPTCY, 26; EXECUTORS, 214; LIBEL, 34, 35; MAGISTRATES, 5; MORTGAGE; PRACTICE AND PROCEDURE; PUBLIC AUTHORITIES, 50.

**I. IN GENERAL.**

**1. Appeal to Court of Appeal—Copies of Judge's Notes**—On appeal to the Court of Appeal, copies of the judge's notes must be provided for the use of the Court. Costs thrown away by an omission to supply the notes may have to be paid by the appellant's solicitors.

LEWIS v CORY, [1906] W. N. 95; 121 L. T. Jo. [39—C. A.

**2. Appeal—Final or Interlocutory Order—Summons to Review Taxation of Solicitor's**

**In General—Continued.**

*Bill—Refusal to Review—Judicature (Procedure) Act, 1894* (57 & 58 Vict. c. 16), s. 1 ]  
—An order dismissing a summons to review taxation of a solicitor's bill, under the Solicitors Act, 1843, is an interlocutory order. Leave to appeal therefrom is consequently necessary under sect. 1 of the Judicature (Procedure) Act, 1894.

N RE JEROME, [1907] 2 Ch. 145, 76 L. J. Ch. 432; 96 L. T. 866—C. A.

3. *Application for Solicitors to deliver Lists of Securities, &c.—Appeal from Dismissal of Order—Length of Notice of Appeal—R. S. C., Ord. 52, r. 25; 58, r. 3.*—On an application for an order under Ord. 52, r. 25, to direct the defendants, a firm of solicitors, to deliver a list of securities, to bring them into Court, and to deliver a cash account to the plaintiff, the Master refused to make an order, and the judge affirmed his decision. On appeal to the Court of Appeal, a four day notice was given as if the order was interlocutory. It was objected that the order was really final, and that, pursuant to Ord. 58, r. 3, fourteen days notice should have been given.

HELD (following *In re Herbert Rees*, [1902] 1 Ch. 29. See PRACTICE AND PROCEDURE, No 229)—that the order was final. The time for appealing would be extended.

HAYDON v. CARTWRIGHT, [1902] W. N. 163, [113 L. T. Jo. 353; 37 L. J. N. C. 420—C. A.

4. *Auctioneer Employed by Country Solicitor—Costs received by London Agent—Action by Auctioneer against London Agent—Privity of Contract.*—H. had been employed in a foreclosure action by D. and B., a country firm of solicitors, as auctioneer, and when the costs came to be taxed by the London agent S. he received a voucher from H. for his fees. S. thereupon took the money out of Court after taxation, which included this item of H.'s fees. Before he received this money it came to his knowledge that H. had not been paid.

In an action by H. against S. to recover these fees as money had and received.—

HELD—that there was no privity of contract between them, and the action therefore failed.

HANNAFORD v. SYMS, (1898) 79 L. T. 30; 14 T. L. R. 530—Channell, J.

5. *Commission—Trustee—Attachment—Debtors Act, 1869* (32 & 33 Vict. c. 62), s. 4 ]—L., a solicitor, prior to his becoming a trustee received £200 as commission on premiums paid by the late Lord B. on policies on his life. The judgment in the action for the administration of the estate of Lord B. declared that he was not entitled to retain that sum, and he was ordered to pay it to the plaintiff. He was also ordered to pay to A. £200 which, after he became trustee of a will, he had received from the purchaser of heirlooms for facilitating the sale under the will. L. did not pay either of the sums. Attachment was moved for against L.

HELD—that attachment must not issue in respect of the £200 received by L. from the

insurance company, as it did not come within the exceptions mentioned in sect. 4 of the Debtors Act, 1869, but that attachment should issue in respect of the £200 received in connection with the sale of the heirlooms only.

Order of Kekewich, J. (81 L. T. 722) varied.

IN RE LORD BERWICK, LORD BERWICK v. LANE, [(1900) 81 L. T. 797—C. A.

6. *Discovery—Privilege—Solicitor's Correspondence and Bill of Costs—Note by Solicitor of Order in Chambers—R. S. C., Ord. 31, r. 18 (2).*—A statement in a letter from a solicitor to his client reporting proceedings in chambers, and communicated for the purpose of obtaining information or instructions from the client necessary for the conduct of the action, is privileged as a professional confidential communication. But those parts of a bill of costs which consist merely of memoranda or notes of proceedings in chambers recorded by a solicitor are not so privileged.

Semle, there is no valid distinction between notes of proceedings in open Court and of those in chambers.

*Greenough v. Gaskell* ([1833] 1 My. & K. 98, at pp 102—104) and *In re Worswick* ((1888) 38 Ch. D. 370, at p. 373; 58 L. J. Ch. 31; 36 W. R. 685, 59 L. T. 399—North, J.) followed.

AINSWORTH v. WILDING, (1900) 48 W. R. 539—[Stirling, J.

7. *Executors and Administrators—Course of Administration—Action against Personal Representatives—Negligence of Deceased as a Solicitor—Survival of Cause of Action—Actio personalis moritur cum persona.*—An action for negligence against a solicitor is not founded (at any rate not exclusively) on tort. It arises out of the contract of employment, of which it is an implied term that the solicitor will use due skill and diligence. Therefore an action will lie in respect of the negligence of a deceased solicitor against his personal representatives after his death.

*Finlay v. Chirney* ((1888) 20 Q. B. D. 494; 57 L. J. Q. B. 247; 52 J. P. 324; 36 W. R. 534, 58 L. T. 664—C. A.) discussed.

*Wilson v. Tucker* ((1825) 3 Stark. N. P. 154; D. & R. (N. P. C.) 30) followed.

DAVIES v. HOOD AND OTHERS, (1903) 88 L. T. [19, 19 T. L. R. 158—Ridley, J.

8. *Mortgage—Priority—Contributory Mortgages by Trustees and their Solicitors—Breach of Trust—Negligence by Solicitors—Subsequent Transfer.*—By an indenture of mortgage dated in 1864, certain freeholds were conveyed by A. to B. to secure the repayment of £6,000 and interest at  $\frac{1}{4}$  per cent. In December, 1876, this mortgage was transferred to P. & W. in consideration of the like sum, stated to be advanced by them on a joint account, and interest thereon at the like rate. This was not the fact, but £3,000 belonged to the N. P. & G., of which P. & W. were trustees; and as to the other £3,000 it belonged to the trustees of C. M. N. P. & G. acted as solicitors for the trustees of C.

**In General—Continued.**

By a memorandum of January 1st, 1877, P. & W. admitted that they were trustees for £3,000 for the C. trustees at  $\frac{1}{4}$  per cent., and for the residue for N. P. & G. By a guarantee of January 2nd, 1877, N. P. & G., in consideration of the difference between  $\frac{1}{4}$  and  $\frac{1}{8}$  per cent., guaranteed to the C. trustees the goodness of the security for £3,000, and due payment of the interest and repayment on two months' notice. In 1880 N. P. & G.'s £3,000 was transferred to the D. trustees, and two similar documents were executed. They here also acted as solicitors to the D. trustees. On December 22nd, 1891, £1,370 was paid off by N. P. & G. to the D. trustees, leaving the balance advanced by them of £1,630 and a deed of that date between P. & W., N. P. & G., and the D. trustees, contained a declaration that P. & W. stood seized of the said mortgaged properties as to £3,000 and £3,000 for the parties interested *pari passu*, without any priority other than that then granted to the D. trustees by N. P. & G. for the sum of £1,630. In 1894 N. P. & G. were adjudicated bankrupts.

In an action by the C. trustees claiming priority over the D. trustees and the trustee in N. P. & G.'s bankruptcy.—

**HELD**—that the sum advanced being in excess of that allowed by law, and the trust security not being taken in the names of the trustees, it constituted a breach of trust, and that, in omitting so to advise the trustees N. P. & G. were guilty of a breach of duty; that, while they were not liable as for a breach of trust, proof was possibly admissible in the bankruptcy in respect of it; that, to hold that N. P. & G. were prevented from taking any benefit to the disadvantage of the C. trustees would be to go much further than the decided cases on the point, and that neither on the construction of the memorandum and guarantee, nor in the circumstances were the plaintiffs entitled to priority.

**STOKES v. PRANCE**, [1898] 1 Ch. 212; 67 L. J. [Ch. 69; 77 L. T. 595; 46 W. R. 113—Stirling, J.]

**9. Mortgage — Transfer of Solicitor's own Security — Security realised and Deficit made good out of deceased Solicitor's Estate.**—Trustees of a marriage settlement in 1891 had a sum of £1,100 for investment. S., a solicitor, who was the solicitor to the trust, without telling the trustees of the true facts transferred a security of his own to them and received the £1,100. The trustees had no knowledge that S. was making them take over his own mortgage. At this date the property was in one of the worst districts in Cardiff, and was in a most dilapidated condition, and, according to the plaintiff's—the trustee's—evidence, would realise £200 at most. The trustees sued S.'s legal personal representative.

**HELD**—that the claim was not barred, as the trustees never knew the true facts until after S.'s death; that S.'s executor—the defendant—admitting assets, the security must be realised

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and the defendant ordered to make the deficit good.

**MITCHINSON v. SPENCER**, (1902) 86 L. T. 618—[Eady, J.]

**10. Right of Audience in High Court—Absence of Counsel Instructed.**—Counsel for the defendant having been compelled to absent himself during the hearing of a cause on the Northern Circuit, Bruce, J. gave the defendants' solicitor leave to appear for the defendants for the purpose of cross-examination, and subsequently gave further leave to him to address the jury.

**DOXFORD & SONS, LD. v. SEA SHIPPING CO.**, [LD., (1898) 14 T. L. R. 111—Bruce, J. Northern Circuit.]

**11. Transactions between Solicitor and Client—Solicitor's Duty—Commission—Not Paid by Client but with his Knowledge—Improper Bargain with Client.**—All transactions between solicitor and client which result in the solicitor's obtaining a benefit for himself are subjected by courts of law to strict scrutiny when called in question by the client, and are treated as imposing on the solicitor obligations of greater or less stringency.

Solicitors were retained by O., since deceased, to act for him in negotiating and carrying into effect the purchase of certain patent rights. The solicitors had obtained from the vendor a commission note, under which they were entitled to a certain commission in the event of their introducing to him a purchaser. This commission note was handed to O., and remained in his possession for some days previously to the contract of sale being entered into. The purchase was carried into effect, and the solicitors, with O.'s knowledge, recovered payment of the commission from the vendor. After this O. died, and subsequently to his death the solicitors delivered a bill of costs to his executors, who had procured an order for its taxation. In the course of the taxation the executors sought to charge the solicitors with the amount of the commission received by them. The solicitors established that they gave O. full information. It appeared, however, that the solicitors also bargained with O. that they should be allowed a reasonable commission from himself in the event of their not being able to recover a commission from the vendor.

**HELD**—that as the commission was paid, not by the client, but by the vendor as remuneration for services rendered to him, the rule in *O'Brien v. Lewis* ((1863) 9 Jur. (N.S.) 528, 32 L. J. Ch. 569; 11 W. R. 318, 8 L. T. (N.S.) 179) did not govern the case, and that the solicitors were entitled to retain the commission; that the bargain made was not merely improper in the eye of the law, but placed the solicitors in a position in which it was scarcely possible for them to fulfil the duties which they had undertaken to both vendor and purchaser of the patent.

**IN RE HASLAM AND HIER-EVANS**, [1902] 1 Ch. [765, 71 L. J. Ch. 374; 50 W. R. 444; 86 L. T. 663, 18 T. L. R. 461—C. A.]

**In General—Continued.**

**12. Writ of Attachment for Contempt of Court—Who may Apply for.]—**A country solicitor may apply for a writ of attachment against a London solicitor employed by him for contempt of Court in not obeying an order to pay over to him money recovered in action.

IN RE FARMAN, EX PARTE TRUMAN, (1898) 14 [T. L. R. 20—Div Ct.

**II. AUTHORITY.**

**13. Authority to Compromise—London Agent of Country Solicitor—Country Agent of London Solicitor—Express Prohibition—What Constitutes—R. S. C., Ords. 4, r. 3, and 12, r. 10.]—**A solicitor on the record has a general authority to compromise. A London agent of a country solicitor, who enters an appearance under Ord. 4, r. 3, and a country solicitor, who enters an appearance under Ord. 12, r. 10, have the same authority as their principals, although, as between the lay client and themselves, there is no privity.

The lay client may expressly prohibit a compromise, and if a solicitor compromises in defiance of such prohibition, or unreasonably, or without exercising due diligence, he will be liable to an action for negligence; he will also be responsible for his agent's disobedience to instructions or negligence. The prohibition, however, must be express.

The following letter was held not sufficiently explicit to forbid a compromise on reasonable terms:—"Failing an order dismissing their application, you will please adjourn the matter to the judge."

*Prestwick v. Foley* ((1865) 18 C. B. (N.S.) 806; 34 L. J. C. P. 189; 12 L. T. 390); and *Wethers v. Parker* ((1859) 28 L. J. Ex. 292, 4 H. & N. 524, (1860) 29 L. J. (Ex.) 320; 5 H. & N. 725; 2 L. T. 601) followed.

IN RE NEWEN, CARRUTHERS v. NEWEN, [1903] 1 Ch. 812; 72 L. J. Ch. 856; 51 W. R. 297; 88 L. T. 264; 19 T. L. R. 247—Farwell, J.

**14. Authority to Defend Action in Name of a Company—Revocation of Authority—Dissolution of Company—Notice of Revocation—Judgment against Company—Liability of Solicitor to pay Plaintiff's Costs.]—**A company had been dissolved by reason of the expiration of three months from the registration of the return made by the voluntary liquidator to the Registrar of Joint-stock Companies under sect. 143 of the Companies Act, 1862.

Subsequent to the dissolution of the company, an action against the company, which had been commenced before the dissolution, came on for trial. On March 16th, the day of the trial, the solicitor of the company was informed that the final meeting had taken place, but he did not use due diligence to ascertain whether the company was dissolved. Judgment was given against the company.

**HELD—**that the solicitor of the company was liable to pay costs as from March 16th.

*Whiteley Exor'or, Ltd. v. Gamage* ([1898]

405; 67 L. J. Ch. 560; 47 W. R. 296; 79 L. T. 20; 5 Mans. 249—North, J., see PRACTICE, 291) distinguished.

The principle laid down in *Smout v. Ilbery* ((1842) 10 M. & W. 1; 12 L. J. (Ex.) 357) applies just as much to the dissolution of a legal entity as to the death of a living person.

SALTON v. NEW BEESTON CYCLE CO., [1900] 1 [Ch. 43; 48 W. R. 92, 81 L. T. 437; 16 T. L. R. 25—Stirling, J.

**15. Authority to receive Mortgage Money—Mortgagor's Signature obtained by his Solicitor's Fraud—Estoppel—Receipt in body of deed—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 54, 56.]—**K., who was not a man of much education employed E., a solicitor. K. signed a deed which E. advised him was necessary. The deed was a mortgage. E. applied the mortgage money to his own uses, paid interest on the mortgage to the mortgagees for some time, and then absconded. K. brought an action to obtain a declaration that the mortgage was void.

**HELD—**that K.'s recollection of the circumstance of the execution of the deed was an absolute blank; he never meant to execute a mortgage; he was never told that the true effect of the deed was a mortgage; he had absolute confidence in E. and executed any deed relating to his property that E. put before him, but K. knew that he was doing something with his property when the deed was put before him. Therefore the mortgage was a valid deed as against K. in the hands of the mortgagees.

**HELD** also, that K. was estopped from saying that it was not his solicitor who produced the deed and received the mortgage money.

The meaning of the word "solicitor" in sect. 56 of the Conveyancing Act, 1881, considered.

Dictum of North, J., in *Day v. Woolwich Equitable Building Society* ((1888) 40 Ch. D. 491; 58 L. J. Ch. 280; 37 W. R. 471; 60 L. T. 752—North, J.) questioned.

KING v. SMITH, [1900] 2 Ch. 425; 69 L. J. Ch. [598; 83 L. T. 815; 16 T. L. R. 410—Farwell, J.

**16. Authority of Solicitor to keep Deeds and receive Interest—No General Authority to receive Principal—Forged Deed—Enforcing Security against Mortgagor.]—**Certain property was conveyed to the plaintiff as security for an advance, the mortgage deed being prepared by the plaintiff's solicitor, who kept the deeds and received the interest from the mortgagor on behalf of the plaintiff. The solicitor was in the habit of making investments for the plaintiff on mortgage, purchase, or otherwise, and of keeping the various deeds in his possession. The solicitor, without the plaintiff's knowledge or authority, gave notice to the mortgagor calling in the principal money due under the mortgage, and the mortgagor repaid the money to the solicitor upon being handed a deed of reconveyance purporting to be signed by the plaintiff, and the title-deeds of the property. The plaintiff's signature to the reconveyance was a forgery, and the

**Authority—Continued.**

plaintiff never received the money, nor did he know that it had been paid off.

**HELD**—that the solicitor had no general authority to receive the principal when paid off by the defendant; and that the plaintiff was entitled to have his security enforced against the defendants, and to have the title-deeds delivered up, with a declaration that the signature on the deed was a forgery.

JARED v. WALKE, (1902) 18 T. L. R. 569—  
[Byrne, J.]

**III. CERTIFICATE.**

**17. Uncertificated Solicitor—Costs not allowed on Taxation on Client's Petition—37 & 38 Vict. c. 68, s. 12.]**—A client had obtained the common order to tax bills delivered by his solicitor for work done between May, 1896, and March, 1897. It appeared that the solicitor had been without a certificate during the whole time after November 16th, 1896.

**HELD**—that no costs ought to be allowed in respect of work done while the solicitor had no certificate, notwithstanding that the order contained the usual submission by the client to pay what was due.

*Re Jones* (L. R. 9 Eq. 63) held not to apply since the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, was passed.

*Semble*, that the section prevents any debt arising for work done by an uncertificated solicitor and does not merely take away the remedy.

IN RE SWEETING, [1898] 1 Ch. 268; 67 L. J. Ch. [159; 78 L. T. 6; 14 T. L. R. 171; 46 W. R. 242—North, J.]

**18. Solicitor Suspended for Professional Misconduct—Undischarged Bankrupt—Application for Certificate after Expiration of Suspension—Discretion of Registrar—Order to issue Certificate—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 23, 24.]**—A solicitor was suspended from practice for professional misconduct, and during the period of suspension he became bankrupt. After the period of suspension had expired, he—being an undischarged bankrupt—applied under sect. 23 of the Solicitors Act, 1843, to the registrar of the Incorporated Law Society for a certificate, but the registrar refused to grant the certificate upon the ground that the applicant was an undischarged bankrupt, the applicant thereupon applied under sect. 24 to the Court for an order that the certificate should be granted.

**HELD**—that the registrar was not bound under sect. 23 to issue a certificate, but had a discretion to refuse to issue the same, and that, upon application to the Court under sect. 24, the Court were not bound to make an order for the issuing of the certificate, but could make such order "as shall be just", and that in this case the dis-

cretion of the registrar should not be interfered with.

IN RE A SOLICITOR, (1899) 47 W. R. 575; 80 [L. T. 720; 15 T. L. R. 314—Div. Ct.]

[Overruled by *In re a Solicitor*, [1902] 1 K. B. 128, *infra*.]

**19. Professional Misconduct—Undischarged Bankrupt—Discretion of Registrar—Jurisdiction of Judge—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 23, 24.]**—The Incorporated Law Society, as the registrar of solicitors, has a ministerial and judicial duty under sect. 23 of the Solicitors Act, 1843. It has, therefore, no jurisdiction to refuse to renew an annual practising certificate to a solicitor provided he has satisfied the requirements of that section, and the jurisdiction of the judge under sect. 24 is no higher.

Therefore the registrar has no jurisdiction to refuse the renewal of a certificate to a solicitor merely on the ground that he is an undischarged bankrupt.

*In re a Solicitor* ((1899) 47 W. R. 575; 80 L. T. 720; 15 T. L. R. 314—Div. Ct., *supra*) overruled.

Decision of the Div. Ct. ((1900) 18 T. L. R. 77—Div. Ct.) reversed.

IN RE A SOLICITOR, [1902] 1 K. B. 128; 71 [L. J. K. B. 36; 50 W. R. 196; 85 L. T. 619; 18 T. L. R. 114—C. A.]

**IV. CONFIDENTIAL RELATION.**

**20. Benefits Conferred by Client on Solicitor—Competent and Independent Advice—Purchase by Client's Children and Solicitor from Client—Gifts Jointly to Donor's Children and Solicitor.]**—Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them.

Down to 1898 the plaintiff was the senior partner in a banking business. The firm sold the goodwill of the business. The plaintiff's financial affairs were getting into a very complicated state, and he consulted the defendant, a solicitor, and from 1899 till August, 1901, the defendant acted as the plaintiff's solicitor and confidential adviser in all his affairs. Early in 1900 the plaintiff contemplated making a voluntary settlement upon himself and family with a view of preventing the whole of the property from being swept away by the bank, and he was also desirous of conferring some benefit upon the defendant, who had received nothing for his services. This scheme was carried out by two deeds, both prepared in the office of the defendant, dated May 15th, 1900. By the first deed some real estate and other property were vested in trustees, and the plaintiff proposed to give the defendant one-tenth of the ultimate residue thereof after making certain provisions for himself, his son and daughter. By the second deed certain furniture and chattels were vested in

**Confidential Relation—Continued.**

trustees for sale, and out of the proceeds thereof the defendant was to receive £500. These two deeds were in fact shown by the plaintiff to another solicitor, but it did not appear that such solicitor really acted as an independent adviser in the matter. A further deed, dated March 14th, 1901, was executed by the plaintiff, which was supplemental to the first of the two deeds of May 15th, 1900. This deed revoked the trusts of the former deed, and the plaintiff conveyed and assigned the whole of his property of every description, present and future, to trustees upon trust for the defendant, the plaintiff's son and the plaintiff's daughter in equal shares in consideration of a covenant by them to pay the plaintiff £500 a year, to be increased to £800 in certain contingencies. On this occasion the deed was prepared by another independent solicitor who advised the plaintiff. On July 13th, 1901, the plaintiff executed a deed supplemental to the second deed of May 15th, 1900, whereby a portion of the furniture was to be purchased by his daughter at a valuation, and the residue was to be sold forthwith and the proceeds applied in the first instance in paying £200 to the plaintiff, in lieu of his life interest in the furniture under the former deed, and £425 to the defendant, and the balance was to be divided equally between the plaintiff's son and daughter. The deed was prepared by independent solicitors who advised the plaintiff. The plaintiff sought to set aside the deeds which conferred benefits upon the defendant.

No fraud was found against any of the solicitors; but it was clear that neither of the two independent solicitors were sufficiently informed of the circumstances to enable them to give proper advice to the plaintiff.

**HELD**—that the two deeds of May, 1900, must be set aside as against the solicitor, as infringing the rule as to gifts from a client to a solicitor, as laid down by Lord Eldon in *Hatch v. Hatch*. The duties of an independent solicitor advising a donor in such a case as this are well described by Farwell, J., in *Powell v. Powell*. But that as against the donor's children these deeds were not vitiated.

**HELD**, also, that the deed of March 14th, 1901, was bad as infringing the rule as to purchases by a solicitor from a client, laid down in *Holman v. Loynes*; and that all the parties were so mixed up that no distinction could be made between them as regards this deed.

**Removal of Solicitor Trustee**—The defendant solicitor being a trustee under the deeds of 1900—

**HELD**—that, all the beneficiaries not being before the Court, the question of substituting a new trustee could not be dealt with.

*Powell v. Powell* ([1900] 1 Ch. 243, 69 L. J. Ch. 164, 82 L. T. 81—Farwell, J., *see* SETTLEMENTS, 209) approved.

*Hatch v. Hatch* ((1804) 9 Ves. 292, 7 R. R. 295) and *Holman v. Loynes* ((1851) 4 D. M. & G. : 23 L. J. Ch. 529) followed

Decision of Kekewich, J. (1902) 86 L. T. 110; 18 T. L. R. 256) reversed.

*WRIGHT v. CARTER*, [1902] 1 Ch. 27; 72 L. J. [Ch. 138; 51 W. R. 106; 87 L. T. 624; 19 T. L. R. 29—C. A.]

**21. Solicitor's Duty—Rectification of Deed—Mistake—Independent Advice—Beneficial Interest in Client's Property given to Solicitor's Son.**—In October, 1889, the plaintiff was married to J. W., the only son of T. W.

In April, 1890, T. W. died, having appointed his widow, A. W., his executrix and sole residuary legatee.

In December, 1890, a deed was executed between A. W., J. W., the plaintiff, and the defendants, with a view to carry out in some measure the wishes of T. W., and also with the object of making provision for J. W., and the plaintiff, and any future wife of J. W., and the lawful issue of J. W., by way of family arrangement.

In October, 1891, owing to unhappy differences between J. W. and his wife, a deed was executed by J. W., the plaintiff, and A. W. for the purpose of varying the trusts of the deed of December, 1890.

In September, 1893, J. W. died intestate and without issue.

In August, 1894, a deed was executed between the plaintiff, A. W., F. N. S., and the defendants for the purpose of further modifying the trusts of the deeds of 1890 and 1891.

All three deeds were prepared by W. M. S., one of the defendants, as solicitor, with the assistance of counsel.

A. W. died in April, 1897.

In November, 1897, the plaintiff married W. B.

The plaintiff in February, 1896, brought an action claiming (*inter alia*) a declaration that the deed of 1891 was not binding on her so far as it purported to deprive her of the general power of appointment given to her by the deed of 1890.

Under the deed of 1890 the ultimate reversion of the beneficial interest was given as to half to N. W., one of the trustees, and as to the other half to W. M. S.'s son, F. H. S. W. M. S. purchased the reversionary interest of his son. W. M. S. was a very intimate friend and the legal adviser of the W. family. When the first supplemental deed was executed, the plaintiff had been consulting W. M. S. about her position with reference to her settled property and about her husband and a possible separation.

**HELD**—that it was W. M. S.'s duty to give the plaintiff advice, showing her that the proposed alteration in the deed of 1890 could not be made without either a lawsuit or her consent, and that the alteration was so adverse to her interests that it would be inadvisable for her to execute the new deed or to concur in it without further consideration. His merely explaining the deed to her was insufficient. He should have pointed out the various modes by which the desire of the parties could be carried out, and the extreme importance to her of one of the methods rather than the other. The deed of 1891 was therefore

**Confidential Relation—Continued.**

not binding on the plaintiff and must be set aside.

Decision of C. A. (*sub nom. Barron v. Willis*) ([1900] 2 Ch. 121; 69 L. J. Ch. 532; 48 W. R. 579, 82 L. T. 729; 16 T. L. R. 371) affirmed.

WILLIS v. BARRON, [1902] A. C. 271; 71 L. J. [Ch. 609; 86 L. T. 805; 18 T. L. R. 602—H. L. (E.)

**V. COSTS.**

And see BANKRUPTCY, Nos. 95, 215.

**(a) General.**

**22. Agreement as to Costs—Necessity for Writing—Attorney and Solicitors Act, 1870** (33 & 34 Vict. c. 28), s. 4.]—An agreement by a solicitor to charge his client nothing for costs if an action be won, and, if it be lost, to charge only so much as, if successful, he would have recovered from the other side, is not required by sect. 4 of the Attorneys and Solicitors Act, 1870, to be in writing, and an oral agreement to this effect may be enforced by the client.

*Jennings v. Johnson* ((1873) L. R. 8 C. P. 425) approved.

Decision of Div. Ct. ([1906] 2 K. B. 592; 75 L. J. K. B. 580, 95 L. T. 197; 22 T. L. R. 617) reversed.

CLARE v. JOSEPH, [1907] 2 K. B. 369; 76 L. J. [K. B. 724; 96 L. T. 770; 23 T. L. R. 898—C. A.

**23. Agreement between Mortgagee and his Solicitor as to Sharing Latter's Costs.**—There is in general no reason why a solicitor acting for a mortgagee (who is also a solicitor) should not agree to share with him the profit costs paid by the mortgagor. Such an agreement does not affect the taxation of the costs at the instance of the mortgagor.

IN RE JEROME, (1907) 51 Sol. Jo. 114—[Kekewich, J.

And see No. 2, *supra*.

**24. Agreement in Writing—Contentious Business—Signature—Attorneys and Solicitors Act, 1870** (33 & 34 Vict. c. 28), s. 4.]—Upon the taking of an account between a solicitor and clients, the former claimed a certain sum as due under a memorandum in which the clients agreed at that sum the balance of costs due for contentious business previously done by the solicitors. The memorandum was signed by the clients, and was referred to in a letter to the clients from the solicitors.

HELD—that the agreement must be referred to the taxing Master for examination, since (1) it must be treated as signed by both parties, and (2) even if it were only signed by the clients, such signature would satisfy sect. 4 of the Attorneys and Solicitors Act, 1870.

*Pontifer v. Farnham* ((1893) 62 L. J. (Q. B.) 344; 41 W. R. 238—Div. Ct.) doubted.

BAKE v. FRENCH (No. 2), [1907] 2 Ch. 215; 76 [L. J. Ch. 605—Warrington, J.

**25. Agreement—Agreement Creating Security for Costs—Ascertainment of Amount.**—The Court will not upon a summons for taxation ascertain the amount which is charged upon property by an agreement creating a security for costs under r. 7 of the Solicitors' Remuneration Order, 1882.

IN RE CARNEGIE, (1907) 52 Sol. Jo. 14—Joyce, J.

**26. Party and Party Costs—Attendance of Country Solicitor as Witness at Trial.**—A country solicitor, being solicitor on the record of one of the parties in an action, was examined at the trial in Dublin; and he claimed in his costs as between party and party his expenses of such attendance.

HELD—that the right of such expenses depends in every case on a question of fact—namely, was the solicitor's attendance at the trial attributable to his character as a solicitor or as witness?

HAMILTON v. COLQUHOUN, [1906] 2 Ir. R. 104—[K. B.

**27. Petition for Divorce by Wife—Compromise—Taxation of Costs of Petitioner—Payment of Costs to Solicitor—Form of Order.**—A petition for divorce was presented by a wife, and an application instituted for the usual order for the taxation of her costs. Before the hearing of the application a settlement was made by the petitioner without the knowledge of her solicitor, and she returned to cohabitation with her husband. The Court, on an application of the solicitor for the petitioner, made an order for the payment of the amount of the taxed costs to the solicitor.

BALLANCE v. BALLANCE, [1899] 2 Ir. R. 128—[Q. B.

**28. "Professional Charges."**—The words "professional charges" in the Irish Ord. 45, r. 64 (40) (which corresponds to the English Ord. 45, r. 27 (38b)) mean professional charges properly so called, and do not include disbursements of any kind. The English usage to the contrary disregarded.

CUNNINGHAM v. M'DONAGH, [1904] 2 Ir. R. [417—Andrews, J.

**29. Recovery of Costs—Partners—One Partner's Certificate by Accident not Renewed—Right to Recover Costs—Solicitors (Ireland) Act, 1898** (61 & 62 Vict. c. 17), s. 48.]—P. and his son P. junior carried on business as solicitors under the firm name of J. E. P. & Son. P. junior was only recently admitted, and had no real share in the business. By accident his annual certificate was not renewed.

HELD—that P. senior could himself recover the whole costs of an action, the Court being satisfied that he had in fact done all the work, and assumed all responsibility therefor.

MARTIN v. SHERRY, [1905] 2 Ir. R. 62—C. A.

**30. Shorthand Notes of Evidence—Patent Action.**—In patent cases where there are com-

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plicated and scientific details in conflict, a shorthand note is really a necessity. Where there is an agreement in open Court between the parties, at the instance and with the sanction of the judge, that the expense of taking shorthand notes for the purposes of the trial should be borne by the parties, and the notes should be used by the parties for the purposes of the trial, it carries an agreement that they should be costs in the cause. A solicitor who, in pursuance of such an agreement, pays half of the cost of taking the shorthand notes out of his own pocket, is entitled to recover the money so paid by him as money paid for his clients at their request.

*In re Blyth and Fanshaw* ((1882) 10 Q. B. D. 207, 52 L. J. Q. B. 186; 31 W. R. 283; 47 L. T. 610—C. A.) distinguished.

**OSMOND v. MUTUAL CYCLE AND MANUFACTURING SUPPLY CO.**, [1899] 2 Q. B. 488; 68 L. J. Q. B. 1027; 48 W. R. 125, 81 L. T. 254—C. A.

**31. Solicitor Employed at a Fixed Salary—Solicitors Act, 1870** (33 & 34 Vict. c. 28), ss. 4, 5.]—A public body employed a solicitor to do their legal and other work at a fixed annual salary, the costs of the public body in legal proceedings to which they were a party having been ordered to be paid to them by the other party to the proceedings.

**HELD**—that they were entitled to charge, as part of such costs, sums in respect of the services of their solicitor, provided that such sums did not exceed an undue proportion of the solicitor's salary, having regard to the work done.

**HENDERSON v. MERTHYR TYDFIL URBAN DISTRICT COUNCIL**, [1900] 1 Q. B. 434; 69 L. J. Q. B. 335; 48 W. R. 332—Div. Ct.

**31a. Solicitor Partner of Trustee—Charges for Services to Estate—Charges other than Professional.**—A solicitor, although partner of a trustee of an estate, is entitled to be paid out of trust moneys for his proper professional costs and charges in respect of business done by him in the ordinary course of his profession, and also in the management of the estate as agent.

**IN RE ASHTON, GARDNER v. ASHTON**, (1900) [108 L. T. Jo. 419—Kekewich, J.

**32 Successful Pauper Client—Appellant in the House of Lords—Solicitor and Client Costs—R. S. C.**, 1883, Ord. 16, rr. 22–31.]—Where a solicitor had been retained by, and acted for, a successful pauper appellant (since deceased) in the House of Lords, as laid down in *Johnson v. Lindsay* ([1892] A. C. 110; 61 L. J. Q. B. 90), the respondent in the House of Lords was not liable for party and party costs.

**HELD**—on an application by the solicitor against the estate of his deceased client for taxation of the costs of the appeal to the House of Lords—that the solicitor was entitled to recover from the client's estate the ordinary costs which a solicitor is entitled to charge, viz., costs to be taxed as between solicitor and client.

*Richardson v. Richardson* ([1895] P. 276; 64 L. J. P. 119; 44 W. R. 102; 73 L. T. 135; 11 R. 663—C. A.) followed as to dicta of Jeune, P.

**IN RE RAPHAEL, EX PARTE SALOMON**, [1899] [1 Ch. 853; 68 L. J. Ch. 309, 47 W. R. 330; 80 L. T. 226—Kekewich, J. (Reversed by C. A. on the evidence, 68 L. J. Ch. 765, 81 L. T. 479)]

**33. Two Defendants Jointly Represented—Judgment for One Defendant and against the Other—To what Costs Successful Defendant Entitled.**—A successful defendant is entitled to recover from the plaintiff the costs in which his defence has involved him, if he, and an unsuccessful co-defendant, have employed one solicitor and counsel, he is *prima facie* entitled to receive from the plaintiff one half of their joint costs. If, however, the unsuccessful defendant has agreed to be liable to their solicitors for both their defences, probably the plaintiff need only pay the extra costs caused by his having wrongly joined the successful one.

**BEAUMONT v. SENIOR**, [1903] 1 K. B. 282; 72 [L. J. K. B. 141, 88 L. T. 234—Div. Ct.

**(b) Bill of Costs.**

*And see* **BANKRUPTCY**, Nos. 177, 241; **LIMITATION OF ACTION**, Nos. 1, 19.

**34. Agreed Sum retained for Costs—Other Costs Paid by a Third Party—Right of Client to have Costs Taxed.**—A valid agreement as to the amount of costs, accompanied by a settlement of account, may disentitle a client to his right to have a bill of costs delivered. Where a third party agrees to pay a solicitor's bill of costs, the reasonableness of the sum claimed and paid does not concern the client.

A solicitor acting for C. recovered for him a large sum of money, and retained by agreement sufficient to meet his charges, in subsequent proceedings by C. against D, the latter agreed to pay the costs of C's solicitor, and the latter demanded and received £105.

**HELD**—that C. was not entitled to have delivered to him a bill of costs either in reference to the earlier action or to the £105.

*In re West, King v. Adams* ([1892] 2 Q. B. 102) followed.

**IN RE CHAPMAN**, (1904) 20 T. L. R. 3—C. A.

**35. Amended Bill of Costs—Action on—Reference to Taxation after Verdict—Solicitors Act, 1843** (6 & 7 Vict. c. 73), s. 37.]—A solicitor delivered a bill of costs to his client and subsequently delivered an amended bill containing additional items which might have been charged in the first bill. In an action to recover the amount of the costs specified in the second bill, the client denied liability, and further submitted that, as the solicitor had delivered a previous bill of costs, he was concluded by that bill and could not sue for amount of the second bill.

At the trial the jury found a verdict for the plaintiff.



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**HELD**—that after verdict there was no power to send the bill sued on (*i.e.*, the second bill) to be taxed by a Master under sect. 37 of the Solicitors Act, 1843; that the proper course was to refer it to a Master, or some other referee, to ascertain the proper amount payable, on which reference the first bill would be some evidence as to the proper charges.

Per Vaughan Williams, L.J.—On such a reference the rule as to taxing-off one-sixth would not apply.

Per Moulton, L.J.—A solicitor may *bonâ fide* amend his bill before taxation is ordered or threatened.

**LUMSDEN v THE SHIPCOTE LAND CO.**, [1906] 2 K. B. 433, 75 L. J. K. B. 665; 54 W. R. 461; 95 L. T. 17; 22 T. L. R. 559—C. A.

**36. Collecting Rents—Lump Sum.**—In the absence of any agreement a solicitor who collects rents for a client ought not to include a lump sum in respect thereof in a bill of costs for professional work.

If the work is to be treated as professional work, items should be brought in.

**IN RE SHILSON, COODE & CO.**, [1904] 1 Ch. [837, 73 L. J. Ch. 541; 52 W. R. 556; 90 L. T. 641; 20 T. L. R. 418—Eady, J.

**37. Common Order to deliver Bill of Costs and Tax—Refusal to Deliver—Disclaimer of Right to Costs and Non-payment—Attachment.**—A client obtained the common order for delivery of a bill of costs and taxation against his solicitor, who had received a loan of money from him. No bill was delivered, and the client moved for leave to issue a writ of attachment. The solicitor, in defence, said he made no claim for costs, and that such a claim, if made, was statute-barred.

**HELD**—that, if the solicitor made a further affidavit that he had not been paid for work done, and refused to claim costs for such work, and abandoned any right to receive costs therefor, no bill of costs could be demanded.

**IN RE LANDOR (A SOLICITOR)**, [1899] 1 Ch. [818; 68 L. J. Ch. 373; 47 W. R. 457; 80 L. T. 643—North, J.

**38. Disbursements—Deposits as Security for Costs of Discovery and in respect of Discovery by Interrogatories—Money Lent—R. S. C.**, 1883, Ord. 31, rr. 25, 26.]—In a bill of costs there were included two items, the first being the amount of a deposit as security for costs of discovery in the action by production of documents under Ord. 31, rr. 25, 26, and the second being the amount of a like deposit in respect of discovery by interrogatories under the same rules.

**HELD**—that these payments ought to have been entered in the solicitors' cash account, and not in their bill of costs as "disbursements", that these payments were not payments which the solicitors were "either by law bound to make or by custom looked upon as the persons

to make"; and that the money was simply lent by them to their client.

Decision of Kekewich, J. ([1902] 50 W. R. 629) reversed.

**IN RE BUCKWELL AND BERKELEY**, [1902] 2 Ch. [596; 71 L. J. Ch. 713, 51 W. R. 21; 87 L. T. 215—C. A.

**39. "Disbursement"—Payment of Estate Duty—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, sub-ss. 1, 2, s. 8, sub-s. 16, s. 22, sub-s. 1 (d)—Application by Third Parties—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 37, 38, 39**—Those payments only which are made in pursuance of the professional duty undertaken by a solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs.

Payments for estate duty and payments for probate duty ought not to be included in bills of costs as "disbursements" within the meaning of sect. 37 of the Solicitors Act, 1843.

**In re Lamb** ((1889) 23 Q. B. D. 5; 58 L. J. Q. B. 455; 37 W. R. 506—Div. Ct.) overruled. **IN RE KINGDOM AND WILSON**, [1902] 2 Ch. 242; [71 L. J. Ch. 604; 50 W. R. 535; 86 L. T. 639; 18 T. L. R. 588—C. A.

**40. "Disbursement"—Stamp Duty on Capital of Company—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 112—Finance Act, 1899 (62 & 63 Vict. c. 9), s. 7—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.**—A payment by a solicitor, who was employed to act in the formation and registration of a company under the Companies Acts, of the *ad valorem* stamp duty payable under sect. 112 of the Stamp Act, 1891, and sect. 7 of the Finance Act, 1899, upon the amount of the nominal share capital of the company, is not a professional "disbursement" within the meaning of sect. 43 of the Solicitors Act, 1843, and ought therefore to be entered in the solicitor's cash account and not in his bill of costs.

**IN RE BLAIR AND GIRLING**, [1906] 2 K. B. 131; [75 L. J. K. B. 624; 54 W. R. 549; 94 L. T. 873; 22 T. L. R. 547—C. A.

**41. No Detailed Bill—Cross Claim by Client—Account stated verbally—Solicitor's Right to Sue on.**—A solicitor sent in a rough summary of his aggregate charges in respect of certain matters, but no detailed bill of costs. He mentioned the probability of a deduction being made, and a satisfactory arrangement arrived at, if the client called upon him.

The client, who had a cross claim for work done, called: their respective accounts were discussed, and a balance agreed verbally at £35 due to the solicitor.

**HELD**—that, under these circumstances, the solicitor might sue for the £35 although he had delivered no signed bill.

**Seadding v. Eyles** ((1846) 9 Q. B. 858) applied.

**TURNER v. WILLIS**, [1905] 1 K. B. 468; 74 L. J. [K. B. 365; 53 W. R. 348; 92 L. T. 412—Div. Ct.

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**42 "Party Interested"**—*Creditor in Administration Action—Solicitors Act, 1843* (6 & 7 Vict. c. 73), s. 39].—A creditor who has obtained a judgment for the administration of a deceased person's estate is entitled as a "party interested" to an order for the delivery and taxation of bills of costs already paid by the deceased.

IN RE JONES AND EVERETT, [1904] 2 Ch. 363, [73 L. J. Ch. 706; 53 W. R. 59; 91 L. T. 286—Buckley, J.

**43 Payment on Account—Bill of Costs not sent in—Delivery and Taxation—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 41].—The plaintiff had paid the amount of an account sent in by his solicitor, which account was not, however, a "bill of costs," inasmuch as it did not set out the particular items charged. More than twelve months after such payment, the plaintiff took out a summons for delivery and taxation of the solicitor's bill of costs. No bill of costs had been delivered at the date of the hearing of the summons.**

HELD—that the payment on account could not in the circumstances be made referable to the bill of costs which would be delivered after the hearing of the application; and that the plaintiff was entitled to the common form order for delivery and taxation, notwithstanding the payment made upwards of twelve months before the issue of the summons.

IN RE CALLIS, (1901) 49 W. R. 316—Joyce, J.

**(c) Charging Orders.**

**44 Costs—"Money recovered or preserved"**—*Bankruptcy—Lien on Estate—Solicitors Act, 1860* (23 & 24 Vict. c. 127), s. 28].—An absconding bankrupt on arriving in Australia was arrested for forgery, and the police at the same time took possession of the money found upon him.

He was brought back to England for trial, and while in custody other charges under the Debtors Act, 1869, were preferred against him in pursuance of an order of the county court judge, sitting in bankruptcy, obtained on the application of the solicitors of the trustee in bankruptcy.

Subsequently the police in Australia, by virtue of a power of attorney prepared by these solicitors on behalf of the trustee in bankruptcy, remitted to them the money found on the bankrupt.

The solicitors then obtained from the county court judge, under sect. 28 of the Solicitors Act, 1860, a charging order upon this sum of money as being "property recovered or preserved" by them within that section.

This order was discharged by the Queen's Bench Division. On appeal:—

HELD—that the money in question had not been recovered or preserved in the bankruptcy or in any other civil legal proceedings, and that therefore no charging order could be made upon it under sect. 28 of the Solicitors Act, 1860.

HELD, also, that the power of the Court under that section is discretionary, and should be

rarely exercised by a court of bankruptcy in favour of the solicitor to the trustee in bankruptcy.

HELD, also, that the solicitors to the trustee in bankruptcy had no lien for their costs on the bankrupt's estate.

Judgment of Q. B. Div. (77 L. T. 501; 4 Manson, 239; 14 T. L. R. 68) affirmed.

IN RE HUMPHREYS, EX PARTE LLOYD-GEORGE, [1898] 1 Q. B. 520; 67 L. J. Q. B. 412; 78 L. T. 182; 5 Manson, 11; 14 T. L. R. 263; 46 W. R. 322—C. A.

**45. Property Recovered or Preserved—Probate Action—Will upheld—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28].—A testator bequeathed and devised the residue of his estate to his wife for life, and after her death to his two daughters, of whom one was legitimate and the other illegitimate. The daughters having opposed probate of the will, an action was commenced by the executor, in which the will was upheld. The bulk of the estate was real property.**

HELD—that the solicitor of the executor was entitled to a charging order for his costs on the property bequeathed and devised, as being property preserved through his instrumentality within the meaning of sect. 28 of the Solicitors Act, 1860.

EX PARTE TWEED, [1899] 2 Q. B. 167; 68 L. J. [Q. B. 794; 48 W. R. 5; 81 L. T. 1—C. A.

**46. Bankruptcy—Costs—Property "Recovered or Preserved"—Application to Discharge—Limit of Time for Application—Jurisdiction—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28].—Where property has been "recovered or preserved" by an order of the Court of Appeal, the Court or judge of first instance which has seisin of that order when it comes down to be enforced, is equally entitled with the Court of Appeal, under sect. 28 of the Solicitors Act, 1860, to make a charging order in favour of a solicitor on the property so recovered or preserved. An application to discharge a charging order must be made with promptitude, even although no steps have been taken to enforce the charging order.**

*Semble*, a judge sitting in bankruptcy is entitled in that capacity to make a charging order under sect. 28 of the Solicitors Act, 1860.

*In re Suffield and Watts* ((1888) 20 Q. B. D. 693; 36 W. R. 584; 58 L. T. 911; 5 M. B. R. 83—C. A.) and *In re Wood, Ex parte Fanshawe* ([1897] 1 Q. B. 314; 66 L. J. Q. B. 69; 75 L. T. 387; 5 Manson, 299—Vaughan Williams, J.) considered.

IN RE DEAKIN, EX PARTE DANIELL, [1900] 2 [Q. B. 489; 69 L. J. Q. B. 725; 48 W. R. 678; 82 L. T. 776; 7 Manson, 302—C. A.

**47. Property Recovered for Company—Lien—Fund in Court—Delay—No Intervening Rights—Discretion—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28].—Solicitors formerly employed by a limited company in prosecuting and recovering a claim against the estate of G. E. B., deceased,**

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applied for an order charging their costs on the company's share of the fund in Court to the credit of a creditor's action for the administration of the estate of G. E. B., deceased. The claim was made and duly admitted in the said action in January, 1897. The company closed their office, and ceased to carry on business in June, 1897, and no intervening rights arose.

**HELD**—that the applicants had no absolute right to a charging order under sect. 28 of the Solicitors Act, 1860, but that the Court had a discretion in the matter, which it must exercise according to the circumstances of the particular case; that the solicitors, notwithstanding the lapse of time, were entitled to the statutory charge—in aid of their already existing common law lien—which was prior to any right of the official receiver or liquidator.

**IN RE BORN, CURNOCK v. BORN**, [1900] 2 Ch. 143; 69 L. J. Ch. 669; 49 W. R. 23, 83 L. T. 51—Farwell, J.

**48. "Property Recovered or Preserved" — Action Compromised**—The plaintiff recovered judgment against the defendants in respect of extras under a building contract and retention moneys. Three months prior to the issue of the writ a portion of the retention money coming to the plaintiff was assigned by him for value to a member of the defendant council. Pending an appeal in the action, a compromise was effected, by which the defendants were to pay a portion of the sum claimed in full satisfaction, the plaintiff paying the defendants their taxed costs of the action. Upon an application by the plaintiff's solicitor in the action for a charging order for his costs under 39 & 40 Vict. c. 44, s. 3:—

**HELD**—first, that the money payable under the consent was money "recovered or preserved in the action" by the instrumentality of the plaintiff's solicitor; and, secondly, that the assignee, having known of and adopted the proceedings, was not entitled as a *bonâ fide* purchaser for value without notice to payment in priority over the costs of the plaintiff's solicitor.

**M'LARNON v. CARRICKFERGUS URBAN COUNCIL**, [1904] 2 Ir. R. 44—K. B. D.

**49. Charge on Property Recovered or Preserved — Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28—Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2.**—A limited company being unable to meet its liabilities, executions were levied on the company's property by creditors, and other creditors threatened actions. An extraordinary meeting of the company was then held, and resolutions were duly passed to wind up the company voluntarily. It was further resolved that the liquidator should submit a proposal for the reconstruction of the company.

A scheme of arrangement, sanctioned by order of the Court, under the Joint Stock Companies Arrangement Act, 1870, provided that a new company should be incorporated; that one of its objects should be the acquisition and under-

taking of the assets and liabilities of the company; that the new company should discharge the unsecured debts of the company by allotting to the unsecured creditors fully paid-up shares in the new company in full discharge of their claims against the company; and that the shareholders of the company should receive partly paid-up shares in the new company. It was also provided that the new company should pay all the costs of the winding up and of the scheme of arrangement.

In pursuance of this order an agreement, subsequently adopted by the new company, was made between the liquidator and the trustee of the future new company, whereby it was provided that part of the consideration payable by the new company to the liquidator should be cash. The new company did not pay cash, and the assets of the company accordingly were not transferred to the new company.

**HELD**—that the company's assets purchased by the new company, and retained by the liquidator, were to be charged with the costs of the company's solicitor which had arisen in connection with the winding-up and reconstruction of the company, the company's property having been "recovered or preserved" through the instrumentality of the solicitor within the meaning of sect. 28 of the Solicitors Act, 1860.

**IN RE JOHN CLAYTON, LD.**, (1905) 92 L. T. 223—[Buckley, J.]

**50. Debenture-holder's Action — Plaintiffs' Costs—Surplus Assets—Receiver's Costs—Property Recovered or Preserved—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.**—A receiver was appointed in a debenture holder's action; and the receiver, with the Court's approval, instituted various proceedings to get in assets. Sufficient was realised to pay the debenture-holders in full, and to hand over a large surplus to the liquidator.

The same solicitor acted for the receiver as for the plaintiff in the debenture holder's action, and was unable to get from the plaintiff the amount of "extra" costs of such action.

**HELD**—(1) that the solicitor was entitled to a charging order for such costs on so much of the funds as belonged to the debenture holders; and (2) that he was entitled to a charging order on so much of the funds as belonged to the liquidator for his costs of recovering and preserving the assets; such costs were really part of the receiver's costs and might have been included in his accounts.

**IN RE HORNE & SONS, LD., HORNE v. THE COMPANY**, [1906] 1 Ch. 271; 75 L. J. Ch. 206; 54 W. R. 278; 13 Manson, 165—Farwell, J.

**51. Property Recovered or Preserved — Purchaser for Value without Notice—Conveyance to Limited Company—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.**—In an action by the master of a ship *in rem* against the ship to recover £625 for wages and disbursements, the owners set up cross claims. The ship was arrested and

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remained under arrest during the proceedings. The plaintiff recovered £320, and the ship was released. The person who had been the registered owner and had acted as manager of the ship throughout the proceedings then sold her to a limited company, the shareholders in which were the vendor and his nominees, and the vendor was appointed manager of the company for life. The company were registered as owners. The solicitor who had acted for the defendants subsequently obtained *ex parte* a charging order on the ship under sect. 28 of the Solicitors Act, 1860, upon the ground that to the extent of £305—namely, the difference between £625 claimed and £320 found due—they had preserved the ship. Upon the application of the company this order was discharged.

**HELD**, on appeal, that the order was rightly discharged, inasmuch as, assuming that the solicitors had preserved the ship within the meaning of sect. 28 of the Act, the company were purchasers for value without notice within the meaning of this section, although the original owner of the ship was the promoter of the company.

**HELD**, further, that a charging order under sect. 28 ought not to be made *ex parte* except under very special circumstances.

**THE BIRNAM WOOD**, [1907] P. 1; 76 L. J. P. [1; 96 L. T. 140, 23 T. L. R. 3; 10 Asp. M. C. 325—C. A.]

**52. "Property Recovered or Preserved."—Trustees' Costs—Priority—Discretion of Court—Form of Order—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.]**—The Court will not, as a rule, make a charging order under sect. 28 of the Solicitors Act, 1860, on property recovered or preserved in an action for the costs of the plaintiff's solicitor, where that order would deprive the trustees of the estate, the subject-matter of the litigation, of their costs properly incurred as parties to the action, the estate being insufficient to pay both.

In the particular case an order was eventually made subject to the rights of the trustees.

Property may be "preserved" even though there is nothing left after payment of the costs.

Decision of Kekewich, J. (85 L. T. 861; 23 T. L. R. 141) affirmed.

**IN RE TURNER, WOOD v. TURNER**, [1907] 2 Ch. [126, 539; 76 L. J. Ch. 492; 96 L. T. 798; 23 T. L. R. 524—C. A.]

**(d) Taxation.**

**53. Actions by Several Plaintiffs against Same Defendant—Same Solicitor for all Plaintiffs—Discretion of Taxing Master to Reduce Allowances—Entries of Appearance—R. S. C. Ord., 65, rr 8, 27 (29); App. N., 59, 60.]**—A number of plaintiffs all acting by the same solicitor brought actions against a defendant; they were not consolidated, nor was one treated as a test action, but upon the first being dismissed with costs the others were discontinued.

**HELD**—that the taxing master had no power to reduce the allowance for entering appearance, and must allow 6s. 8d. in respect of the appearance entered in each action, though such appearances were all entered at the same time.

**PRICE v. CLINTON**, [1906] 2 Ch. 487; 75 L. J. [Ch. 658; 95 L. T. 710—Joyce, J.]

**54. Adding Item to Bill—Items wrongly added up—Deposit by Petitioning Creditor in Bankruptcy—Bankruptcy Rules, 1886, rr. 112 (1), 147.]**—In a solicitor's bill of costs, which was ordered to be taxed, a charge of 3s. 4d. was entered "for attending and drawing up order and copies" which was not properly chargeable, but there was omitted from the bill a charge of 4s. 6d. which the solicitor might properly have charged for "notice of application and copies to file and for service."

**HELD**—that the taxing Master had no power to add the latter item from the bill and to substitute it for the former item.

The taxing Master can correct an error in addition in a bill of costs.

The £5 deposited by the solicitor of the petitioning creditor with the official receiver under sect. 147 of the Bankruptcy Rules, 1886, on the presentation of a bankruptcy petition should be entered by the solicitor as a disbursement in his bill of costs, and not in his cash account.

**IN RE GRANT, BULCRAIG & CO.**, [1906] 1 Ch. [124; 75 L. J. Ch. 106; 54 W. R. 165; 93 L. T. 760; 22 T. L. R. 96—Farwell, J.]

**55. Attendance of Country Solicitor at Trial in London on Affidavit Evidence—Ord. 65, r. 27 (2, 3).]**—The general rule as to the allowance of costs of the attendance of a country solicitor at the trial of an action in London is not an inflexible one; and, in an exceptional case, such additional costs may be allowed, even where the case has proceeded upon affidavit evidence.

Decision of Byrne, J. affirmed.

**IN RE DIXON; TOUSEY v. SHEFFIELD** [1898], [2 Ch. 443; 67 L. J. Ch. 537, 79 L. T. 163; 14 T. L. R. 536; 46 W. R. 677—C. A.]

**56. Common Order to Tax—Bill including Items for Non-Professional Work done under Agreement—Refusal of Common Order—Solicitors Act, 1843 (6 & 7 Vict. c. 73) s. 37.]**—A solicitor obtained from his client a mortgage to secure payment of professional charges, which expressly provided that it should not affect the solicitor's lien or the right to tax. In the same year the client gave him a power of attorney empowering him to charge for non-professional work. On the solicitor sending in a bill for professional work, his charges as mortgagee and charges under a cash account, the client obtained *ex parte* a common order to tax. The last two sets of charges were not mentioned in the petition.

**HELD**—that the order must be set aside as it

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was not consistent with the contractual rights of the parties.

IN RE H. H. FANSHAWE, [1905] W. N. 64; [118 L. T. Jo. 526; 49 Sol Jo 404, 40 L J. N. C. 261—Buckley, J.

**57. Common Order to Tax—Suppression of Matters of Moment and Importance—Proposal to refer to Law Society.**—It is incumbent on a party applying for a common order to tax to state every matter which can be material to enable the officer to judge whether the case is really a proper one for granting an order of course. If he omit to do so, and there are special matters affecting his right to an order of course which are suppressed, the Court will not stay to inquire whether he would be entitled to the same order upon a special application, but will limit the inquiry to whether the matter omitted is of sufficient moment and importance as to require grave consideration or discussion.

A mere proposal to refer the matter to the Law Society is not of such real moment and importance.

*Re Gedge* ((1852) 15 Beav. 254; 21 L. J. Ch. 430; 15 Jur. 851) followed.

IN RE COLLYER-BRISTOW, EX PARTE FLETCHER, [(1899) 81 L. T. 110—North, J.

**58. Common Order for Taxation within a Month—Power of Taxing Master to Extend Time—Expiration of Month before Request made to Extend Time—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37—R. S. C., 1883, Ord. 65, r. 27 (57).**—A client obtained the common order to tax a bill which had been delivered within twelve months. Such order directs the Master to give his certificate within a month (unless he shall extend the time), or the order is to be of no effect.

No application for an extension of time was made, nor was the order served, within the month.

HELD—that, nevertheless, the Master had power after the expiration of the month to extend the time, but, under such circumstances, an extension should not be granted as a matter of course.

Decision of Byrne, J. reversed.

IN RE MACINTOSH, DIXON & Co., (1903) 72 [L. J. Ch. 609; 51 W. R. 659; 88 L. T. 820—C. A.

**59. Ex parte Order for Taxation—Irregularity—Taxation of One of Several Bills—Delivery of Bill—Payment—Agreement for Payment—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8—Solicitor for both Mortgagor and Mortgagee.**—A solicitor accepted a lump sum in discharge of his client's costs of a completed purchase without any agreement in writing, and without delivery of a formal bill of costs.

HELD—that the bill was not outstanding, and did not require to be included in an *ex parte* order for taxation obtained by the solicitor in respect of another bill.

*Semble*, a payment in discharge of past costs by way of accord and satisfaction is not an agreement for remuneration within the Solicitors' Remuneration Act, 1881, and precludes taxation in the absence of special circumstances.

A solicitor acting for both mortgagor and mortgagee is not required to include the mortgage costs, where there is no relation of solicitor and client as to those costs between him and the mortgagor, in his application for an *ex parte* order for taxation of separate bills against the mortgagor.

IN RE DUNCAN, (1907) 51 Sol. Jo. 485—[Kekewich, J.

**60. Examination of Party before Trial—Depositions not used at Trial—Prudent Step—“Necessary and Proper”—R. S. C., 1883, Ord. 65, r. 27 (29).**—Ord. 65, r. 27 (29), makes the standard for consideration, not the event which actually happened, but whether, when the order was applied for, proper prudence was exercised, or whether there was “overcaution, negligence, or mistake”; that is, it makes the standard or governing point for consideration the state of things before the legal adviser at the time he makes up his mind.

The plaintiff, an officer who had volunteered, was liable, with other persons exactly in a similar position, to be sent out to South Africa at a very short notice, and his commanding officer was himself perfectly sure that he would have to go, and so gave him three days' leave to settle his affairs. The plaintiff was examined before the trial, at which he was afterwards present as a witness, but not examined, as the defendant submitted to judgment.

HELD—that it was a prudent step for the solicitor to take his evidence; that the costs of taking his evidence were “necessary and proper” at the time the order for examination was made by the Master; and that the requirements of Ord. 65, r. 27 (29), were abundantly satisfied.

*Delaroque v. SS. Orenholme & Co.* ([1883] W. N. 227) approved.

*Ridley v. Sutton* ((1863) 1 H. & C. 741; 32 L. J. Ex. 122, 9 Jur. (N.S.) 358; 11 W. R. 314; 7 L. T. (N.S.) 693) disapproved.

BARTLETT v. HIGGINS, [1901] 2 K. B. 230; 70 [L. J. K. B. 621; 49 W. R. 449; 84 L. T. 509—C. A.

**61. Examination of Witness before Trial—Attendance in London of Country Solicitor—Allowance—Discretion of Taxing Master—R. S. C., January, 1902, r. 10—R. S. C. Ord. 65, r. 27, reg. 29, Appendix N., No. 147.**—According to the practice as to taxation of costs between party and party prior to the rules of January, 1902, the sale given in Appendix N. was binding on the taxing Master. By rule 10 the R. S. C., January, 1902, regulation 29 of Ord. 65, r. 27, was annulled and the following regulation was substituted for it. “On every taxation the taxing Master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the

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rights of any party" subject to certain exceptions therein named. Upon the taxation of costs as between party and party in an action on a charter-party, the taxing Master allowed 12 guineas for the costs of the attendance of the plaintiff's solicitor from Liverpool, who attended on the examination of a witness before trial in London for the purpose of instructing counsel. This allowance exceeded the maximum specified by Appendix N., to Ord. 65, No. 147, namely, two guineas.

**HELD**—that the taxing Master had a discretion to make the allowance which he had made under rule 10 of the R. S. C., January, 1902; and that his discretion appeared to have been well exercised.

**McIVER & Co., LD. v. TATE STEAMERS, LD.**, [1902] 2 K. B. 184, 71 L. J. K. B. 717, 50 W. R. 642; 87 L. T. 320, 18 T. L. R. 653—C. A.

**62. Fixed Costs—Substituted Service of Writ—R. S. C., Ord. 3, r. 7—Ord. 65, r. 27 (38)—Central Office Practice, r. 18**—On a taxation of costs under Ord. 3, r. 7, the plaintiff claimed £2 10s. for costs of substituted service of the writ. The Master allowed £1 only, on the ground that by the practice adopted at chambers that was the sum invariably allowed.

**HELD**—that the practice could not be justified. **FLATAU v. CULLEN**, (1899) 48 W. R. 36; 81 L. T. 402; 16 T. L. R. 1—C. A.

**63. Higher Scale—Partition Action—"Special Grounds arising out of the Nature and Importance, or the Difficulty or Urgency of the Case"—R. S. C., 1883, Ord. 65, r. 9.**—A partition action resulted in a certificate which found ten shares coming to persons absolutely entitled, and one share amounting to  $\frac{1}{80}$  as settled. It was assumed that the matter had been one of considerable complication, difficulty, and importance, that the amount was large, and that it had been carried through in an extremely able way in chambers, and that all needless detail had been avoided. The question arose whether, under these circumstances, costs on the higher scale, under Ord. 65, r. 9, ought to be allowed.

**HELD**—that the conduct of the solicitors in the matter—the way in which they had done their duty—was neither "the nature of the case," nor "the importance of the case," nor "the difficulty of the case," nor "the urgency of the case." It was the manner in which they had dealt with those things, and therefore there were no "special grounds arising out of" any of the matters mentioned in Ord. 65, r. 9, and costs on the higher scale must be refused.

**Williamson v. North Staffordshire Ry. Co.** (1886) 32 Ch. D. 399; 55 L. J. Ch. 938; 55 L. T. 452—C. A.) followed.

**Davies Bros. & Co. v. Davies** (1887) 56 L. J. Ch. 481; 35 W. R. 697, 56 L. T. 401—Keke-wich, J.), **Re Leeuw** (1892) 93 L. T. Jo. 333),

and **Marriott v. Cobbett** ((1894) 38 Sol. Jo. 620) not followed.

**RIVINGTON v. GARDEN**, [1901] 1 Ch. 561; 70 L. J. Ch. 282, 49 W. R. 279; 84 L. T. 197—Buckley, J.

**64. Higher Scale—Order for Successful Party's Costs on Higher Scale—Costs of Unsuccessful Party—Mayor's Court Rules, 1890, r. 13**—In an action in the Mayor's Court for £40 the plaintiff recovered judgment for that amount with costs, and the judge made an order under rule 13 that such costs should be taxed on the higher scale applicable to actions in which £50 or more has been recovered. The defendants had their own solicitor's bill taxed by a Master of the High Court; and the Master taxed that portion of it which related to the action according to the higher scale.

**HELD**—that the effect of the judge's order was not confined to the taxation between the parties; but that it raised the action for all purposes into the higher scale; and that the Master was right.

**IN RE JAMES BRIGGS & SONS**, [1903] 2 K. B. [156; 72 L. J. K. B. 644, 51 W. R. 577; 88 L. T. 7; 19 T. L. R. 501—C. A.

**65. Infant—Guardian ad litem—Order for Costs to come out of Estate—Infant Coming of Age before Taxation—Discretion of Taxing Master to Order Attendance of Guardian—Ord. 65, r. 27 (27).**—An order was made in an administration action that the costs of the plaintiff and of the defendants should be taxed as between solicitor and client and be paid out of the testator's estate. One of the defendants was an infant, who appeared by her guardian *ad litem*. After the order of taxation the infant came of age and changed her solicitors. The taxing Master thereupon directed that the guardian *ad litem* should attend before him by his solicitors upon the taxation.

**HELD**—that the Master had a discretion under Ord. 65, r. 27, sub-r. 27, to make the order and the Court would not interfere.

**IN RE SALMOND, RYDON v. WILLIAMS**, (1906) [22 T. L. R. 161—Farwell, J.

**66. Lessor and Lessee—Third-party Order to Tax—Negotiations—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38.**—Where a lessee elects to tax under the third-party clause, it is well settled that the bill to be taxed is the bill between the solicitor and his own client; and that the third party can only tax it on the condition of paying what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party, and it follows, therefore, with respect at least to any piece of business properly inserted in the bill which the third party is liable to pay, it is not open to the third party to object that payments sanctioned by the client are excessive. The third-party order does not alter the nature or enlarge the scope of the liability, upon the existence of which the order is based. On a

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third-party taxation the Court is bound to look at the nature of the items, and to consider whether, apart from the order, the applicant is under any liability to pay them. Although the solicitor may put in one bill, as against his own client, a series of items, some of which may go beyond the liability of the third party, the third party does not, by obtaining an order to tax, render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax.

*In re Negus* ([1895] 1 Ch. 73; 64 L. J. Ch. 79; 43 W. R. 68; 71 L. T. 716; 13 R. 85—Chitty, J.) applied.

*IN RE GRAY*, [1901] 1 Ch. 239; 70 L. J. Ch. 133, [49 W. R. 298; 84 L. T. 24—Cozens-Hardy, J.

**67. Lessor and Lessee—Lease of Several Lessors—Separate Solicitors—Costs of all Solicitors Included in One Bill by Chief Lessor's Solicitor—Taxing off more than one-sixth—Costs of Taxation—Fees to Lessor's Surveyor—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38**—Where several lessors grant a lease, and they are represented by separate solicitors, in the absence of an agreement the lessee has to pay one set of costs only.

Where, upon the grant of a mineral lease by the vicar of a parish with the concurrence of the Ecclesiastical Commissioners and the bishop of the diocese, the lessor's solicitors included in the bill of costs, payable by the lessee, the costs of the solicitors for the Ecclesiastical Commissioners and the bishop, and upon taxation at the instance of the lessee more than one-sixth was taxed off the entire bill, though less than one-sixth off the lessor's solicitor's own charges.

**HELD**—that the lessor's solicitor must pay the costs of the taxation.

*IN RE FLETCHER AND DYSON*, [1903] 2 Ch. 688; [72 L. J. Ch. 791; 52 W. R. 27; 19 T. L. R. 682; 89 L. T. 473—Eady, J.

**68. Notice of Application—Allowance for Notice of Application after an Order for Directions—R. S. C., 1883, App. N, item 51.**—As a general rule 5s. is a fair and reasonable sum to allow on taxation for a notice of application after there has been a summons for directions in the action; if the notice be a special one, the master can, under item 52, make a special allowance.

*MACGUARE v. MILLIGAN*, [1903] 1 Ch. 145, [72 L. J. Ch. 87; 87 L. T. 676; 19 T. L. R. 44—Eady, J.

**69. Translations of Foreign Documents made in Solicitor's Office**—An order was made that the costs of the defendant be taxed as between solicitor and client, "and to include charges and expenses properly incurred by him as executor and trustee of the testator's will and codicil

beyond his costs of this action not already taxed and allowed."

**HELD**—that it was within the scope of the solicitor's duties, if he had a staff competent for the purpose, to assist the Court by translating the documents in a foreign language which had to be brought to the notice of the Court, and that the taxing master must make allowance, as he might think reasonable in respect of such translations.

*IN RE BOWES, EARL OF STRATHMORE v. VANE*, [1900] 2 Ch. 251; 69 L. J. Ch. 544; 48 W. R. 604; 82 L. T. 673—Cozens-Hardy, J.

**70. Parliamentary Agent and Solicitor—Work Done Solely as Agent—Power to Tax under the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37—House of Commons Costs Taxation Act, 1847 (10 & 11 Vict. c. 69)—House of Lords Costs Taxation Act, 1849 (12 & 13 Vict. c. 78).**—The fact that a parliamentary agent happens to be a solicitor does not make his bill of costs for work done solely in the capacity of a parliamentary agent taxable under the Solicitors Act, 1843.

*Allen v. Aldridge* ((1844) 5 Beav. 401) followed.

*IN RE BAKER, LEES & CO.*, [1903] 1 K. B. 189; [72 L. J. K. B. 136; 51 W. R. 246; 87 L. T. 662; 19 T. L. R. 113—C. A.

**71. Third Party Taxation—Mortgagee's Solicitor's Bill of Costs—Taxation at Mortgagee's Instance—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38**—Since the decision in *Re Gray* ([1901] 1 Ch. 239; 70 L. J. Ch. 133; 49 W. R. 298; 84 L. T. 24—Cozens-Hardy, J.) the practice in taxing a mortgagee's solicitor's bill of costs upon a third party taxation has been to tax it as between the solicitor and the party liable to pay, *i.e.*, the mortgagor.

Decision of Kekewich, J. ((1904) 52 W. R. 660; 90 L. T. 538) affirmed.

*IN RE LONGBOTHAM & SONS*, [1904] 2 Ch. 152; [73 L. J. Ch. 681; 90 L. T. 801—C. A.

**72. Third Party Taxation—Solicitor and Client Costs—Agreement to Pay—What included—Principle of Taxation—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38**—Where a third party obtains an order under sect. 38 of the Solicitors Act, 1843, for the taxation of a bill of costs the bill must be taxed on the footing of a taxation between the solicitor and his client, but as against the third party items outside the scope of his liability must be disallowed.

E. agreed to pay C's costs of an action to be taxed as between solicitor and client.

**HELD**—that this was not an agreement to indemnify C. against all charges made by her solicitors, but only to pay her reasonable costs which the solicitors could recover from her without any special agreement.

*In re Gray* ([1901] 1 Ch. 239; 70 L. J. Ch. 133; 49 W. R. 298; 84 L. T. 24—Cozens-Hardy, J., No. 66, *supra*) and *In re Longbotham & Sons* ([1904] 2 Ch. 152; 73 L. J. Ch. 681; 90 L. T. 801—C. A., No. 71, *supra*) followed.

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Decision of Eady, J. ([1905] 1 Ch. 345; 74 L. J. Ch. 192; 53 W. R. 315, 91 L. T. 836) affirmed.

IN RE COHEN & COHEN, [1905] 2 Ch. 137; 74 [L. J. Ch. 517; 53 W. R. 529; 92 L. T. 782—C. A.

**73. Trustee's Costs—Application by Cestui que Trust—Twelve Months after Payment—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 37–41.]—**The discretion of the Court to make an order for taxation of a trustee's bill of costs under sect. 39 of the Solicitors Act, 1843, is controlled by sect. 41. Such a bill cannot be ordered to be taxed if paid more than twelve calendar months before the application of the *cestui que trust*.

IN re Downes (1844) 5 Beav. 425; 13 L. J. Ch. 159) followed.

Decision of Kekewich, J. ([1900] 1 Ch. 857, 69 L. J. Ch. 462, 48 W. R. 375; 82 L. T. 375) reversed.

IN RE WELLBORNE, [1901] 1 Ch. 312; 70 [L. J. Ch. 172; 49 W. R. 113, 83 L. T. 611—C. A.

**74. Winding-up of a Company—"Professional Charges"—"Disbursements"—Including Disbursements in Bill—Party and Party Costs already Taxed and Paid—Ord. 65, r. 19 (b); rr. 27, 38 (b).]**—Under an order to tax, as between solicitor and client, a solicitor's bill of costs, charges, and expenses properly incurred in the voluntary winding-up of a company—

HELD—that certain party and party costs, which had already been taxed and paid by a third person, ought to be included in the bill, credit for the amount received being given on the other side of the bill.

HELD, also, for the purpose of seeing whether the bill had been reduced by a sixth part on taxation, the amount of the professional charges should be taken by themselves without regard to the disbursements.

IN RE MERCANTILE LIGHTERAGE CO. LD., [1906] 1 Ch. 491; 75 L. J. Ch. 171; 54 W. R. 389; 94 L. T. 405; 22 T. L. R. 250—Warrington, J.

**75. Winding-up Estate—Special Costs Incurred at Request of Particular Beneficiaries—Inclusion of Anticipatory Costs—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 39.]—**In taxing a solicitor's bill of costs against a trustee or executor in respect of the winding-up of an estate, the taxing officer ought not to disallow an item properly incurred in carrying out the wish of some particular beneficiary, *e.g.*, in converting or re-investing his share. All costs properly and reasonably incurred should be allowed, and special items attributable to the action of individual beneficiaries can ultimately be debited to their particular shares.

When a final division is about to be made (but not an interim division), reasonable costs of such division may be included in the bill by anticipation, and may be allowed upon taxation

under sect. 39 of the Solicitors Act, 1843. In the case of an interim division the bill should only include costs actually incurred to its date.

IN RE MILES, [1903] 2 Ch. 518; 72 L. J. Ch. [704, 52 W. R. 47; 88 L. T. 863—Eady, J.

**76. Winding-up Estate—Series of Bills in the same Administration—Application by Beneficiaries to Tax Bill paid by Trustees—Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 39, 41.]—**A solicitor acted for many years in connection with winding-up an estate. He delivered three bills of costs to the trustees under the will in three successive years. He agreed to accept and was paid by the trustees £80 in respect of the first bill, and was willing to accept £27 12s. 0d. in discharge of the second and third. The beneficiaries under the will applied to have all the bills taxed notwithstanding payment of the first bill.

HELD—that the first bill could not be reopened, that a solicitor employed on a trust was entitled to draw a line from time to time and deliver a bill up to a particular date; and that a bill was not the less final because it was one of a series.

IN re Hall and Barker (1877) 9 Ch. D. 538) followed.

IN RE HUDSON, [1904] W. N. 32; 39 L. J. N. C. [97—Kekewich, J.

**(e) Solicitors Remuneration Act, 1881.**

**77. Election—Public Body—Persons in Fiduciary Position—Right of Election—Rule 6 of General Order under the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44).]**—There is no reason why a school board or other local authority or persons in a fiduciary position employing a solicitor in respect of a sale, purchase, or mortgage of land may not assent to the solicitor's election to charge according to the old system as altered by Sched. 2, instead of by scale, in accordance with Rule 6 of the General Order made under the Solicitors Remuneration Act, 1881.

IN RE EVANS, [1905] 1 Ch. 290; 74 L. J. Ch. 204; [69 J. P. 104, 92 L. T. 151; 3 L. G. R. 169—Fairwell, J.

**78. Lease—Scale of Charges—Building Lease—General Order, 1884, Sched. I, Part 2.]—**A municipal corporation took a lease of a house in a town for the purpose of a technical school at the rent of £35 per annum for thirty-five years. The lessees covenanted to expend £250 in improvements and alterations according to a specification within two years. The specification comprised repairs and a good deal of new work and structural alterations which did not, however, necessitate rebuilding.

HELD—that the lease was a "building lease" within the meaning of the General Order, and that the costs of preparing it must be taxed accordingly.

IN RE KILKENNY CORPORATION, EX PARTE [SHORTAL, [1901] 2 Ir. R. 570—M.R.

**79. Lease "not at a Rack Rent"—Fine—Solicitors Remuneration Act, 1881 (44 & 45 Vict.**



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c. 44)—*General Order*, 1884, *Sched. I., Part 2, r. 5*—A firm of solicitors, acting for the lessor, prepared, settled and completed a lease of premises for a term of one hundred years, in consideration of a fine of £500 and a rent of £30 per annum, no abstract of title was made out.

HELD, by C. A. (FitzGibbon, L.J., dissenting)—that the solicitors were entitled to charge £10, being the scale fee on the rent reserved, and also £7 10s., being the scale fee on the fine, the fine being treated as if it were the purchase-money paid on a sale.

HELD, by FitzGibbon, L.J.—that the lease was not “a long lease, not at a rack-rent,” and that the solicitor was therefore entitled to 30s. per £100 on the fine, i.e., £7 10s. and to £7 10s. per cent. on the rent of £30, i.e., £2 5s.

*In re Robson* ((1890) 45 Ch. D. 71, 59 L. J. Ch. 627; 38 W. R. 556; 63 L. T. 372—North, J.) followed.

*Ex parte Ferguson* ((1888) 21 L. R. Ir. 392) dissented from.

EX PARTE CONNOLLY TO SHERIDAN AND RUSSELL, [1900] 1 Ir. R. 1—C. A.

**80. Lease Renewed in Pursuance of a Covenant—Costs of Investigating Lessee's Title—Scale Fee—Applicability of—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order, r. 2 (b), (c), Sched. I., Part 2.**—A lease contained a covenant by the lessor to grant renewals “at the request, cost and charges of” the lessee.

HELD—(1) that the lessor was to be indemnified against costs reasonably incurred in investigating the title of a lessee applying for a renewal, and (2) that such costs were not covered by the scale fee for “preparing, settling and completing lease and counterpart” under the General Order of 1881.

IN RE BAYLIS, [1907] 2 Ch. 54, 76 L. J. Ch. 358; 96 L. T. 812—Kekewich, J.

**81. Mortgagee—Scale Negotiation Fee—Mortgages Legal Costs Act, 1895 (58 & 59 Vict. c. 25), s. 2—General Order under Solicitors Remuneration Act, 1881, Sched. I., Part 1, r. 11.**—Property was already in mortgage, and a solicitor, not in partnership, alone, arranged that the mortgagee should be paid off, and that the property should be re-conveyed to his client, the mortgagor, and that he, the solicitor, should lend the money to the mortgagor of the property.

HELD—that the solicitor did arrange and obtain the loan and was entitled to charge the scale registration fee by virtue of sect. 2 of the Mortgages Legal Costs Act, 1895.

IN RE NORRIS, [1902] 1 Ch. 741, 71 L. J. Ch. 187; 50 W. R. 316; 86 L. T. 46, 616—Eady, J.

**82. Negotiation of Purchase and Resale—Payment of Commission to an Agent—Investigating Title on Purchase—Deducting Title on Resale—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order, Sched. I., Part 1, r. 2.**—A client purchased property, and almost

immediately resold it at a profit. His vendor and the sub-purchaser were both introduced to him by an agent, who was paid a commission on each transaction. The same agent also introduced a solicitor, who actually concluded both contracts. The client admitted the solicitor's right to charge a reasonable sum for the work, but disputed the applicability of the scale fees.

HELD—that the scale fee for negotiating did not apply to the purchase or to the resale, for (1) the solicitor had not done substantially the whole of the negotiation, and (2) a commission had been paid to another agent on each occasion.

The two transactions were carried out by one conveyance from the vendor to the sub-purchaser, the client joining in order to introduce the latter; consequently his solicitor acted merely as a conduit pipe for passing the abstract, requisitions and answers from one to the other.

HELD—that the scale fee did not apply.

*In re Read* ([1894] 3 Ch. 238; 63 L. J. Ch. 831; 42 W. R. 601, 71 L. T. 189—Kekewich, J.) distinguished.

IN RE ROMAIN, [1903] 1 Ch. 702; 72 L. J. Ch. 309; 58 W. R. 346; 88 L. T. 125—Buckley, J.

**83. Purchase of Land in Register County—“Preparing and completing Conveyance”—Costs of registering Memorial—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44); General Order, rr. 2, 4, Sched. I., Part 1.**—The scale fee allowed to a purchaser's solicitor on a purchase of land, under Sched. I., Part 1, of the General Order to the Solicitors Remuneration Act, 1881, for “preparing and completing the conveyance,” covers the expense, in the case of a register county, of registering a memorial of the conveyance.

GREY v. CURTICE, [1899] 1 Ch. 121, 68 L. J. Ch. 60; 47 W. R. 294; 79 L. T. 713—Kekewich, J.

**84. Sale by Auction in Lots—One Title—Different Purchasers—Deducting Title—“Transaction”—Minimum Fee—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order, Sched. I., Part 1, rr. 1, 7, 8.**—Where real estate is ordered to be sold and is sold by auction in separate lots to different purchasers for prices under £100, with one title common to all the lots, the solicitor engaged to carry out the sale is, under r. 8 of Sched. I., Part 1, of the General Order under the Solicitors Remuneration Act, 1881, entitled to the remuneration of a minimum fee of £3 for deducting title and perusing and completing the conveyance in respect of each sale of a lot, each sale being a “transaction” within the meaning of the rule.

IN RE THOMAS, EVANS v. GRIFFITHS, [1900] 1 Ch. 454; 69 L. J. Ch. 219, 48 W. R. 299; 82 L. T. 105; 16 T. L. R. 196—Stirling, J.

**85. Scale Fee “for Negotiating Loan”—Solicitors Remuneration Act, 1881, General Order, Sched. I., Part 1.**—A mortgagee's solicitor is entitled to charge the scale fee “for negotiating loan” set out in Part 1 (c) of Sched. I. of the General Order made under the

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Solicitors' Remuneration Act, 1881, for negotiating a loan on a mortgage, notwithstanding that the mortgage is not one of exclusively freehold, copyhold, or leasehold property.

IN RE FURBER, EX PARTE FURBER, [1898] 2 [Ch. 538; 67 L. J. Ch. 593; 79 L. T. 266; 47 W. R. 184—Kekewich, J.

**86 Transfer of Mortgage—Costs of Transferor's Solicitor—Solicitors Remuneration Act.**—The solicitor for the transferor of a mortgage is to be remunerated for showing any title required and for approving of the transfer under the old system as altered by Sched. II. of the General Order, 1884

IN RE BRISCOE AND SMITH, [1903] 1 Ir. R. 29—  
[M.R.]

**VI. COVENANT IN RESTRAINT OF TRADE.**

**87. Construction—“Any Work or Act” —Letter from outside Prohibited Area to Person within.**—A solicitor covenanted not to do any work or act, usually done by a solicitor, for any person within a certain radius. From his office outside the radius he sent letters on instructions of persons residing within the radius to other persons also within it.

**HELD**—that he had broken the covenant. To post a letter to a person within the radius was equivalent to paying him a professional visit. And, *semble*, it did not matter where the person instructing him resided as the words “within a radius, &c.,” applied to the doing of the work, and not to the person instructing him.

EDMUNDSON v. RENDER (No. 2), [1905] 2 Ch. [320, 74 L. J. Ch. 583, 53 W. R. 632; 93 L. T. 124—Buckley, J.]

**88. “Work usually done by Solicitors” —Covenant not to do such Work within certain Radius—Construction.**—A covenant not to do within a certain area any work “usually done by solicitors” is broken by a person who *bonâ fide* practises at a place outside the area, but (a) signs a *præcipe* for the issue of a county court plaint at a Court within the area, and conducts the proceedings up to receipt of amount paid into Court; or (b) prepares the will of a person residing within the area, and himself attests its execution within the area. It is not broken by his advertising as to let a farm situated within the area; and

*Quære*, whether it is broken by his writing to a witness within the area to obtain his proof with a view to proving the will of a person who has died within the area.

EDMUNDSON v. RENDER (No. 1) (1904) 90 L. T. [814—Kekewich, J.]

**VII. LIABILITY**

**89 Costs—Liability of Solicitor who is really the Litigant.**—Where the Court is satisfied that a plaintiff is a mere puppet, and that the real party to the action is the solicitor, it will hold

the solicitor personally liable for any expenses to which he has put the other party by his conduct.

There is no distinction for this purpose between a solicitor propounding a will and a solicitor opposing probate.

*In re Jones* ((1871) L. R. Ch. 497; 40 L. J. Ch. 113; 19 W. R. 361; 23 L. T. 655—per Ld. Hatherley) followed.

The Court, upon the facts of the particular case, refused an application by a successful executor plaintiff that the defendant's solicitor should be held liable for costs on the ground that he had unreasonably placed on the record (the pleading not being signed by counsel) charges of undue influence and fraud.

SCOTT v. HITCHCOCK, (1904) 20 T. L. R. 759—  
[Barnes, J.]

**90. Fraud of Partner—Liability for—One Partner Secretary to a Company—Purchase of Land by Company in Secretary's Name—Secretary Mortgaging Land—Liability of Innocent Partner—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 11 (b).**—A water company, for their own purposes, and not upon the advice of J & G, their solicitors, took a conveyance of some property in the name of G., who was their secretary. They left the deeds in G.'s custody and he fraudulently mortgaged the property.

**HELD**—that J. was not liable in respect of his partner's fraud; for (1) it was no part of G.'s duty as secretary to accept a conveyance of the company's property, or to take charge of their deeds, or to advise them, and (2) the firm was employed merely to prepare the conveyance and hand it over to G., as directed by the company, and were never consulted as to the advisability of taking a conveyance in his name, or as to the custody of the deed.

TENDRING HUNDRED WATERWORKS Co. v. [JONES, [1903] 2 Ch. 615; 52 W. R. 61. 19 T. L. R. 720; 73 L. J. Ch. 41—Farwell, J.]

**91. Fraud of Partner—Liability of Firm—Solicitor-Trustee—Receipt of Trust Funds for Investment—Money paid by Solicitor into his own Account—Misappropriation.**—A solicitor, whose firm acted as solicitors to the trustees of a settlement, was appointed a trustee of the trust, and after his appointment a sum of money came into his hands to invest. £600, part of this sum, it was agreed he should retain himself as a loan on the mortgage of his own house. The mortgage in fact was never executed, although he paid interest to the *cestui que trust* as if it had been. After some years the solicitor got into difficulties. His house was sold, and the co-trustee brought an action against the solicitor's solvent partner, alleging that he was liable.

**HELD**—that the defendant was not liable for the default of his partner which caused the loss, as the loss was due to wrongful acts *quâ* trustee and not *quâ* solicitor.

PALMER v. S., (1907) 51 Sol. Jo. 653—Ld. [Alverstone, C.J.]

**Liability—Continued.**

**92. Shorthand Notes—Personal Liability of Solicitor.**—Where a solicitor employs a shorthand writer to take shorthand notes of a case in which the solicitor is acting for a client, in the absence of a special arrangement the solicitor is personally liable to the shorthand writer for the costs of the notes.

COCKS v. BRUCE, SEARL AND GOOD, (1905) 21 [T. L. R. 62—Channell, J.]

**93. Special Jury—Solicitor obtaining for Plaintiff without Means—Verdict for Defendant—Personal Liability of Solicitor for Jury Fees.**—The plaintiff in this action served notice for and obtained a special jury. The jury found a verdict in favour of the defendant. It appeared in the course of the trial that the plaintiff was almost without means, and that she had given a mortgage to her solicitor upon whatever property she had, to secure her solicitor's costs.

HELD by the judge at the trial (Gibson, J.)—that he had jurisdiction to order the plaintiff's solicitor personally to pay the jury fees.

MONSERRATT v. SCOTT, [1899] 2 Ir. R. 551—[Gibson, J.]

**94. Speculative Action—Costs—Motion that Plaintiff's Solicitor should be Ordered Personally to Pay Defendants' Taxed Costs.**—In a speculative action brought to recover damages for personal injury the evidence at the trial showed that the action was wholly unwarrantable. As the plaintiff was a man of straw, the defendants, judgment with costs having been entered for them, moved that the solicitor for the plaintiff should be ordered personally to pay their taxed costs.

HELD—that although the solicitor's clerk who had taken instructions and prepared the brief had been guilty of reprehensible conduct, there was no absolute proof that the solicitor had not acted *bona fide* in the matter. There was nothing wrong or illegal in taking up a speculative action so long as the solicitor took reasonable care to assure himself that the plaintiff had a case fit to be brought into Court. In the present case the solicitor deposed that he had given the matter his consideration, and had decided on the documents that the plaintiff had a fair chance of succeeding. He was therefore entitled to the benefit of the doubt, and it would not be fair to order him to personally pay the defendants' costs. At the same time the defendants ought not to pay more than their own costs of the motion, which for the reason above stated was dismissed.

WARREN v. LONDON ROAD CAR CO., (1907) 52 [Sol. Jo. 13—Darling, J.]

**VIII. LIEN.**

And see **BILLS OF EXCHANGE**, 11.

**95. Costs—Lien on Documents—Charge on Property—Delivery up of Documents.**—In May, 1897, a lady of full age who was entitled, subject to the life interests of her parents, to a share of property settled by their marriage settlement,

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being desirous of obtaining an advance on the security of her interest, signed a retainer and charge which was witnessed by her father, in favour of a firm of solicitors in the following words; "Will you please negotiate for me a loan of £1,000, or such other sum as you can arrange, and I am willing to accept, upon security of the interests and property after mentioned, and I request you to make inquiries and obtain all information, valuations, and papers necessary for the above purpose, and I charge the aforesaid interests and property with the payment of your proper costs, charges, valuer's fees, and expenses thereof, and of any moneys I may now or hereafter owe you on any account." Then followed particulars of the property. With a view of carrying out the transaction the firm obtained a valuation of and made inquiries respecting the property, and offered to advance £300 upon its security, which the lady was willing to accept. An abstract of title was then delivered, requisitions were made and answered, searches were instituted, a deed of appointment was prepared and executed, and an appointment of new trustees was prepared for execution. After this, in July, 1897, the lady consulted other solicitors and instructed them to obtain the required advance. The firm first retained then delivered to the lady their bill of costs for the work done under their retainer, which she took no steps either to tax or pay, but in October, 1897, applied to them for the documents and papers in their possession relating to her interest in the settled property, which they declined to deliver up, claiming a lien upon such documents and papers for their unpaid costs. On a motion, on behalf of the lady, for an order for the delivery up of such documents and papers—

HELD—that the case was governed by the decision of the Court of Appeal in *Re Taylor, Stileman and Underwood, Ex parte Payne Collier* ((1891) 1 Ch. 590), and that the documents and papers must be delivered up.

IN RE DOUGLAS NORMAN & CO., [1898] 1 Ch [199; 67 L. J. Ch. 85; 77 L. T. 552; 16 W. R. 421—North, J.]

**96. Lien on Documents—Administration Action—Lien acquired in Lifetime of Deceased—Inspection by Creditors.**—A solicitor's lien is a right to retain his client's documents as against the client and persons representing him; and as between the solicitor and third parties, the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if the documents were in his own possession.

H. died, leaving in his solicitor's possession documents on which the solicitor had a lien for costs. The solicitor was employed by the executors of H. to institute an action for the administration of his estate, and the usual administration order was made. Afterwards the conduct of the action was given to a creditor, the executors remaining parties and the solicitor continuing to act for them.

A question arose whether steps should be taken to get in a debt said to be due to the estate of H.; and to determine this question it was

**Lien—Continued.**

necessary to see some of the above-mentioned documents on which the solicitor had a lien.

**HELD**—that the solicitor was bound to produce the documents in question for the perusal of the solicitor of the creditor having the conduct of the action, notwithstanding his lien.

Decision of Kekewich, J. affirmed.

*Warburton v. Edge* ((9 Sim 508), *Re Capital Fire Insurance Association* (24 Ch. Div. 408), and *Boden v. Hensby* ((1892) 1 Ch. 101) distinguished.

**IN RE HAWKES, ACKERMAN v. LOCKHART**, [1898] 2 Ch. 1; 67 L. J. Ch. 281; 78 L. T. 336; 46 W. R. 445—C. A.

**97. Infant Clients—Action against Defaulting Trustee—Compromise—Judgment—Costs—Solicitor's Lien on Fund Recovered—Form of Judgment**—It is not customary to make any reference in a judgment or order to the ordinary lien of a solicitor.

A judgment was one sanctioning a compromise in actions brought by infant plaintiffs whereby certain moneys brought into Court by a defaulting trustee under an order were to be placed under the control of new trustees, and in consideration of that further proceedings against the defaulting trustee were stayed. The defaulting trustee was to pay the party and party costs, and the new trustees of the settlements were to raise sufficient money for the purpose of paying the difference between the party and party costs and the solicitor and client costs. The judgment in no way referred to the solicitor's right of lien.

**HELD**—that the result of the infants appearing by their next friend, and of the compromise being assented to by the Court, put the infants in the same position, for the purpose of the solicitor's lien, as if the compromise had been entered into by persons who were *sui juris*; in other words, the solicitor was entitled to his lien on the interest of his infant clients.

**IN RE WRIGHT'S TRUST, WRIGHT v. SANDERSON**, [1901] 1 Ch. 317; 70 L. J. Ch. 119; 83 L. T. 515—C. A.

**98. Action for Dissolution of Partnership—Assets in Hands of Receiver—Judgment Creditors—"Property Recovered or Preserved"—Costs—Priority—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.**—In an action for dissolution of partnership in a business carried on by the plaintiff and the defendant, under the style of "R. B. & Sons," a receiver was appointed of the assets and business of the partnership. The receiver had collected and realised all the available assets of the partnership with the exception of some doubtful or disputed book debts; and it appeared that the assets were insufficient to meet the liabilities of the firm. Certain judgment creditors of the partnership obtained orders following the case of *Kewney v. Attrel* ((1886) 34 Ch. D. 345; 56 L. J. Ch. 448; 35 W. R. 191; 55 L. T. 805—Kay, J.), and by these orders the applicants undertook to deal with the charges thereinafter mentioned according to the order of

the Court, and it was ordered that the assets of the firm of R. B. & Sons to come into the hands of the receiver should stand charged with the payment of the judgment debts. The solicitor employed by the plaintiff in the action claimed a charge upon the assets of R. B. & Sons in the hands of the receiver and any further moneys coming to his hands as receiver for his costs.

**HELD**—that the effect of these orders, so far as the assets were concerned, was only to give a charge, or rather was not to give a charge otherwise than, subject to any existing lien or existing prior charge: that the persons who obtained those orders were not purchasers for value without notice within the meaning of sect. 28 of the Solicitors Act, 1860; and that the solicitor's right to a lien on the "property recovered or preserved" took priority over them all, and he was entitled to the common order.

**RIDD v. THORNE** [1902] 2 Ch. 314; 71 L. J. Ch. 624; 50 W. R. 542; 86 L. T. 635—Joyce, J.

**99. Solicitor's Lien for Costs—Action for Recovery of Bill of Exchange—Bill Overdue when received by Solicitor—Bill coming back to Acceptor—Right of Action by Solicitor on Bill—Bills of Exchange Act, 1882 (15 & 46 Vict. c. 61), s. 27, sub-s. 3**—The defendants, R. & Co., accepted a bill of exchange, and sent it to their agent B, requesting him to fill in his name as drawer, and to get the bill discounted for them. B. filled in his name as drawer, endorsed the bill, and handed it to L, in order that he might discount it. L. claimed to return the bill, on the ground of an alleged indebtedness of B to him. The bill being a fully negotiable instrument, steps were taken to stop its negotiation, and accordingly an action was brought by B. against L. to recover the bill, and an interlocutory injunction was obtained restraining L. from negotiating it. At the time the action came on for trial the bill was overdue. The plaintiffs, who were the solicitors acting for B., obtained a verdict for the recovery of the bill. The question arose whether the plaintiffs could sue R. & Co. on the bill.

**HELD**—that they could not; that when the bill came back from L. the transaction, of discounting it, was wiped out as if it had never occurred; that the bill came back to B. when it was overdue and was then a dead instrument and had ceased to be negotiable, and the plaintiffs when their rights to it accrued knew the facts; that the plaintiffs got a lien, but they could not in the circumstances get any higher rights than their client B. had, and B. could not give them, in the circumstances, any rights upon the bill *qua* bill; and that when the plaintiffs received a dead instrument they could not treat it as a living one.

Decision of Div. Ct. ((1901) 85 L. T. 813; 17 T. L. R. 638) reversed.

**REDFERN & SON v. ROSENTHAL BROS. AND [ANOTHER]**, (1902) 86 L. T. 855; 18 T. L. R. 718—C. A.

**100. London Agent of Country Solicitor—Order to Tax Country Solicitor's Bill—General**

**Lien—Continued.**

*Lien—Waiver*—The London agent of a firm of country solicitors received in the course of his employment certain documents belonging to the lay client. The country solicitors having become bankrupt, the client obtained the common order to tax their bill of costs. Upon the application for that order, the London agent acted as solicitor for the client. The order directed the trustee in bankruptcy and the client to produce before the taxing Master all documents relating to the matter in question. The client subsequently changed his solicitor, and the London agent refused to deliver up the documents in his possession on the ground that he had a lien upon them, not only for the proportion of the bill due to him as such agent, but also for all costs due to him from the country solicitors. The London agent refused to produce them.

**HELD**—that the London agent was not bound to produce the documents, his lien extended to all costs due to him from the country solicitor, and was not waived by his obtaining for the client the order to tax.

**IN RE JONES AND ROBERTS**, [1905] 2 Ch. 219; [53 W. R. 444, 92 L. T. 562; 21 T. L. R. 352]—Joyce, J.

On appeal the matter was settled: the agents giving up the documents and the trustee undertaking to pay them the amount received from the client, less costs of taxation.

[1905] 2 Ch. 224; 74 L. J. Ch. 458; 54 W. R. 22—C. A.

**101** *Lien on Papers—Security given by Client for Counsel's Fees and Expenses—Effect of giving Security on Lien*—*Prima facie* where a solicitor has a lien for costs on a client's papers the lien may be waived or released just as any other lien may be.

The main difference between the case of a solicitor's lien and that, for example, of an innkeeper, is that where a solicitor takes any security which is in any degree inconsistent with the retention of the lien, it is the solicitor's duty to give express notice to his client if he intends to retain the lien, otherwise the lien will be taken to be abandoned.

**IN RE MORRIS AND OTHERS**, (1907) 52 Sol. Jo. 78—C. A.

**102** *Set-off for Damages in different Actions—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28—Ord. 65, r. 14.*—By R. S. C., Ord. 65, r. 14, "a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

The rule above applies to damages in different actions. There is no substantial difference for the purpose of the set-off between a lien on the damages recovered by a judgment and a charging order on such damages.

**GOODFELLOW v. GRAY**, [1899] 2 Q. B. 498; 68 [L. J. Q. B. 1032; 81 L. T. 314—C. A.]

**IX. MISCONDUCT.**

**103.** *Acquittal by Law Society—Suspension by Court notwithstanding*—The Court may suspend a solicitor from practising on the ground of misconduct, although the statutory committee of the Law Society had found that he had not been guilty of professional misconduct.

Decision of Div. Ct. ((1897) 14 T. L. R. 161) affirmed.

**IN RE DAVIES**, (1898) 14 T. L. R. 332—C. A.

**104** *Carrying on Business of Bookmaker—Striking off Rolls—Solicitors Act, 1888 (51 & 52 Vict. c. 65), ss. 12, 13*—The Court struck the name of a solicitor off the rolls upon the ground that he had carried on the business of a bookmaker since 1902, and that he distributed circulars in connection therewith, which, in the opinion of the Court, might get into the hands of minors and married women, although he had ceased to practise as a solicitor since 1898, and had not since that time taken out a certificate.

**IN RE A SOLICITOR, EX PARTE INCORPORATED [LAW SOCIETY]**, (1905) 22 T. L. R. 127, 93 L. T. 838—Div. Ct.

**105** *Costs of Inquiry before Incorporated Law Society—Application to Divisional Court, not to Judge at Chambers.*—An application was made by a solicitor for the costs of an inquiry before the committee of the Incorporated Law Society. He had been entirely exonerated from the charges made against him by the report of the committee.

**HELD**—that the application must be made to the Court, and not to a judge at chambers

**IN RE DAVIDSON, EX PARTE DAVIDSON**, [1899] 2 Q. B. 103; 68 L. J. Q. B. 837; 81 L. T. 182—Div. Ct.

**106.** *Permitting Unqualified Person to Use Name—Discretion as to Striking off Roll—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 32*—Where a solicitor permits an unqualified person to use his name, contrary to sect. 33 of the Solicitors Act, 1843, the Court has no discretion to inflict a less punishment on the solicitor than that of striking him off the roll.

*In re Kelly* ([1895] 1 Q. B. 180; 64 L. J. K. B. 129, 43 W. R. 191; 71 L. T. 843—Div. Ct.) followed.

**IN RE BURTON AND BLINKHORN, EX PARTE [INCORPORATED LAW SOCIETY]**, [1903] 2 K. B. 300; 72 L. J. K. B. 752; 51 W. R. 668; 19 T. L. R. 581; 89 L. T. 549—Div. Ct.

**107.** *Report of Incorporated Law Society—Right of Complainant to be heard in Court—Not heard in Person—Counsel—Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13.*—Sect. 13 of the Solicitors Act, 1888, provides that "any person who but for this Act would have been entitled to apply to the Court . . . shall be entitled so to apply, although the committee is of opinion that there is no *prima facie* case of misconduct against the solicitor; and shall be entitled to be heard, if the society brings the report of the committee before the Court."

**Misconduct—Continued.**

Such an applicant must be represented by counsel—unless, indeed, an application is being made for an order for costs against him in connection with the matter.

*Ex parte Pitt* ((1833) 2 Dowl. 489; 39 R. R. 731) followed.

IN RE A SOLICITOR, EX PARTE INCORPORATED [LAW SOCIETY, [1903] 1 K. B. 857; 72 L. J. K. B. 424; 89 L. T. 118; 19 T. L. R. 368—Div. Ct. (Affirmed (the Court declining, however, to express any opinion as to whether any appeal really lay to them from Div. Ct. without leave), [1903] 2 K. B. 205; 72 L. J. K. B. 643; 51 W. R. 561; 89 L. T. 113; 19 T. L. R. 553—C. A.)

**108. Report by Law Society—Charge Pending before Justices—Application to Postpone Dealing with Report pending Decision of Justices—Prejudice—Undertaking by Solicitor.**—A solicitor was charged before justices and remanded, and he applied to the Divisional Court that the report of the statutory committee on a charge of professional misconduct connected with the charge might stand out of the list, on the ground that a decision might prejudice his fair trial.

HELD—that the application should be granted on the solicitor giving an undertaking in writing not to practise until the report had been dealt with by the Court.

IN RE A SOLICITOR, (1907) 51 Sol. Jo. 212—Div. Ct.

**109. Solicitors representing Conflicting Interests in Litigious Proceedings—Sharing Profits—Non-disclosure of Agreement—Disciplinary Powers of the Court.**—Where solicitors represent conflicting interests in litigious proceedings of any kind, any arrangement or understanding or practice, whereby a share of profits, whether called “agency” or by any other name, is paid by one of the solicitors to another, is wrong in principle and fraught with risks to the welfare of clients and to the administration of justice. The matter assumes a much more serious aspect, both practically and morally, if the agreement or practice is not disclosed. The carrying on of this practice of undisclosed profit-sharing with solicitors who represent conflicting interests is professional misconduct, and will be dealt with by the Court in the exercise of its disciplinary powers.

IN RE FOUR SOLICITORS, EX PARTE INCORPORATED LAW SOCIETY, [1901] 1 Q. B. 187; 70 L. J. Q. B. 5; 49 W. R. 219; 83 L. T. 484; 17 T. L. R. 73—Div. Ct.

**110. Striking off the Rolls—Offence not of Pecuniary Nature.**—The Court will order the name of the solicitor to be struck off the rolls, who has been convicted of feloniously shooting with intent to murder. It is not necessary that the offence charged should be of a pecuniary nature. It is sufficient if it is of such a character as to make it expedient for the protection of the public and the profession that he should be struck off.

IN RE COOPER, (1898) 67 L. J. Q. B. 276—Div. Ct.

**111. Striking off Rolls—Struck off by Court at the Cape of Good Hope—Production of Order—Not sufficient.**—A solicitor was admitted in England in 1880. In 1884 he was suspended for two years from practice for misconduct. He then went to the Cape and was admitted a solicitor there, but, in consequence of misappropriating certain funds recovered in an action, which facts came out in an action brought against him to recover the money, he was struck off the rolls of the colony. It was now sought to strike him off the rolls in England, and the only evidence produced was the order of the colonial Court. It was contended that it was sufficient on the analogy of the practice that when the three Courts of Queen’s Bench, Common Pleas, and Exchequer existed, each Court acted merely on the production of the order of the other striking a solicitor off the rolls.

HELD—that the Court could not allow this application, as it went far beyond the former practices, and there was no precedent for it.

IN RE M. (A SOLICITOR), EX PARTE INCORPORATED LAW SOCIETY, [1898] 1 Q. B. 331; 67 L. J. Q. B. 245; 77 L. T. 661; 14 T. L. R. 159; 46 W. R. 303—Div. Ct.

**X. PRACTICE.**

**112. Appeal—Documents for the Court—Neglect to Supply—Costs thrown away.**—Solicitors who had neglected to supply copies of the various documents required for the decision of an appeal explained the omission by saying that they had not expected the case to be so early in the list.

HELD—that the putting off of this duty to the last minute was not a practice to be encouraged; that solicitors who so acted did so at their own risk, and that on the appellant’s solicitors undertaking not to put the costs of the day thrown away into their bill, no further order would be made.

ABDY v. ABDY, (1904) 118 L. T. Jo. 63—C. A.

**113. Official Solicitor—Guardian ad litem for Infant Defendant—R. S. C., Ord 45, r. 13.**—A trustee in bankruptcy brought an action to set aside a post-nuptial settlement made by the bankrupt and his wife. On the application of the trustee, the official solicitor was appointed guardian ad litem of the infant children. The settlement having been declared void in so far as it related to the bankrupt’s property, and valid in so far as affected the wife’s property, the official solicitor asked that the trustee should pay his costs as between solicitor and client. The trustee said that he did not object to the order being made in the terms of Ord. 45, r. 13, viz., that the guardian ad litem be paid the “costs incurred in the performance of the duties of such office.”

HELD—that the order might be so made.  
GOATLEY v. JONES, [1907] W. N. 161—  
[Neville, J.]

**114. Order to Lodge Will—Solicitor’s Privilege.**—A solicitor cannot claim privilege when

**Practice—Continued.**

ordered to bring into the registry a testamentary paper.

IN RE HARVEY, (1907) 51 Sol. Jo. 357—Barnes, [P.]

**XI. SOLICITOR-TRUSTEE.**

**115. Power under Will to make Professional Charges—Insolvent Estate—Creditor's Action—Profit Costs.**—A testator appointed three persons executors and trustees of his will, one of whom was a solicitor. The solicitor proved the will, the other two renouncing probate and disclaiming the trusts of the will. The will empowered the solicitor, notwithstanding his executorship, to make professional charges. A creditor's action was brought, which was defended by the solicitor in person, the estate being insolvent.

**HELD**—that the solicitor was not entitled to any profit costs in competition with the creditors of the testator.

Decision of Kekewich, J. ([1898] 1 Ch. 297, 67 L. J. Ch. 139; 77 L. T. 793; 46 W. R. 247) affirmed.

IN RE WHITE, PENNELL v. FRANKLIN, [1898] 2 [Ch. 217; 67 L. J. Ch. 502; 78 L. T. 770; 14 T. L. R. 503; 46 W. R. 676—C. A.]

**116. Power to Charge—Professional Services—Time and Trouble.**—A testator by his will appointed a solicitor one of the executors and trustees thereof, and gave him a legacy if he acted as such. The will contained the following clause:—"I direct that my executor and trustee" (the solicitor) "shall be the solicitor to my trust property, and shall be allowed all professional and other charges for his time and trouble, notwithstanding his being such executor and trustee."

**HELD**—that the solicitor was not entitled under the above clause to charge against the trust estate in respect of business or work done by him which did not require the employment of a solicitor, although he might have charged for it in the case of an ordinary client without any special bargain.

IN RE CHALINDER AND HERINGTON, [1907] 1 [Ch. 58; 76 L. J. Ch. 71; 96 L. T. 196; 23 T. L. R. 71—Warrington, J.]

**XII. UNDERTAKINGS.**

**117. Undertaking to Stamp Documents—Practice—Liability—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14.**—Where a solicitor undertakes at the hearing to have a document stamped, such an undertaking is properly given by the solicitor and not by the client, and is a personal undertaking of the solicitor, and will be enforced against him by attachment.

IN RE COOLGARDIE GOLD FIELDS, [1900] 1 [Ch. 475; 69 L. J. Ch. 215; 48 W. R. 461; 82 L. T. 23; 16 T. L. R. 161—Cozens-Hardy, J.]

**118. Undertaking to Appear—Delay exceeding Twelve Months—Attachment R. S. C., 1883, Ord. 8, r. 1; Ord. 9, r. 1; Ord. 12, r. 18.**—A writ

in an action was brought to the defendants' solicitors, and they then, under R. S. C., 1883, Ord. 9, r. 1, indorsed the writ with an undertaking to the effect that they "accepted service" for the defendants and would "enter an appearance in due course." That undertaking was given with the authority of the clients. Having accepted service, they then offered to compromise, and that offer was to last for two months. No appearance was entered, and no step was taken in the action for eighteen months. An application was made under Ord. 12, r. 18, to attach the solicitors for not having performed their undertaking.

**HELD**—that the acceptance by the solicitors with the authority of the clients was equivalent to service upon the clients, and the undertaking to enter an appearance at once became an unconditional undertaking; that it was not necessary on their part to intimate at the end of the two months that the offer to compromise was no longer a continuing offer; that at the expiration of the two months they ought, in pursuance of their undertaking, to have entered an appearance; and that they ought to enter an appearance forthwith.

Judgment of Farwell, J. ([1900] 49 W. R. 199; 83 L. T. 524; 17 T. L. R. 123) affirmed.

IN RE KERLY, SON AND VERDEN, [1901] 1 Ch. [467; 70 L. J. Ch. 189; 49 W. R. 211; 83 L. T. 699; 17 T. L. R. 189—C. A.]

**119. Undertaking to pay Money—Order to enforce Undertaking.**—A solicitor proved for £1,000 in the bankruptcy of a lunatic client, and, like all other creditors, was paid in full. Subsequently the official solicitor was appointed committee of the estate in lunacy, and upon a motion by him for an order the solicitor undertook to refund the £1,000. The bankrupt had since died, and the solicitor claimed that, as his executrix had approved his claim, he ought not to be called upon to refund.

**HELD**—that he must pay the money into Court, but that it should not be paid out to the executrix without notice to him.

IN RE AYTOUN, (1904) 20 T. L. R. 252—[Bucknill, J.]

**120. Undertaking to pay Money—Receipt of Money from Client—Undertaking to Third Person—Enforcement—Summary Order.**—The applicant, who was a solicitor, was owed certain costs by a client, and the client retained the respondent, who was also a solicitor, to apply for an order for the taxation of the bill of costs. An order for taxation was made, and the client, who was an undischarged bankrupt, placed in the respondent's hands £150 to meet the amount of the bill. The respondent wrote to the applicant stating that the client had placed in his hands the full amount of the bill, "so that on completion of the taxation we shall be in a position to pay the amount certified by the Master due to you." The applicant, relying on the letter, did not press on the taxation, and when upon the taxation being completed he applied to the respondent for payment of the amount due, the

**Undertakings—Continued.**

latter declined to pay upon the ground that the client, who had died, was indebted to him for costs. The applicant applied for an order on the respondent to pay the sum due

HELD—that the letter written by the respondent to the plaintiff amounted to a personal guarantee to pay the sum when found due out of the money placed in his hands, and constituted a declaration of trust on the faith of which the applicant altered his position, and the Court would by a summary order enforce payment of the amount by an officer of the Court.

IN RE A SOLICITOR, EX PARTE HALES, [1907]  
[2 K. B. 539; 76 L. J. K. B. 931, 97 L. T. 212;  
23 T. L. R. 573—Div. Ct.]

**XIII. UNQUALIFIED PERSONS**

**121. Lodging Caveat—Ministerial Act—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 26.]**—A law stationer went to the registry to lodge a caveat. He was led into inserting his own name and address owing to the opinion of one of the Probate officials. The Incorporated Law Society moved for an attachment against the law stationer for acting as a solicitor, he being an unqualified person within sect. 26 of the Solicitors Act, 1860.

HELD—that all the law stationer did was a ministerial act as the messenger of the country solicitors, and that the motion must be dismissed and no order as to costs.

IN RE PANTON, [1901] P. 239; 70 L. J. P. 95;  
[84 L. T. 725—Jeune, P.]

**122. "Acting as Solicitor"—Giving Notice of Appearance in Action—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 2.]**—A, an unqualified person, sent to the plaintiffs in an action the notice of appearance required by R. S. C., Ord. 12, s. 9, stating (in the words of the official form) that he did so as agent for the defendant, for whom he had entered an appearance and who required a statement of claim.

HELD—that A had contravened sect. 2 of the Solicitors Act, 1861, by "acting as solicitor" or "carrying on a proceeding" in a Superior Court.

IN RE AINSWORTH; EX PARTE INCORPORATED  
[LAW SOCIETY, [1905] 2 K. B. 103, 74  
L. J. K. B. 462, 53 W. R. 533; 92 L. T. 652  
—Div. Ct.]

**SOUTH AUSTRALIA.**

See DEPENDENCIES AND COLONIES.

**SPECIFIC PERFORMANCE.**

See also AUCTIONS, 4; BURIAL AND CREMATION; COUNTY COURTS, 12; LANDLORD AND TENANT, 9, 15; PATENTS, 163; SALE OF LAND.

**1. Acts entitling Vendor to Enforce—Request for Repairs—Delivery of Keys.]**—In an action

for specific performance of a parol agreement to purchase a house, the plaintiff relied on the facts that the defendant had requested him to do repairs and had had the keys delivered to her.

HELD—that the specific performance of a contract concerning land, on the ground of part performance, can be sustained only by evidence that the defendant has done something unequivocally inconsistent with anything except the contract sued on, and that upon the facts such a situation was not disclosed.

BROWN v. STRONG, (1907) 122 L. T. Jo. 367—  
[Kekewich, J.]

**2. Agreement for Sale of Reversionary Interest—Deposit Paid—Equitable Interest—Rescission and Return of Deposit—Delay.]**—In 1886 an agreement was entered into between S. and K., by which S. agreed to sell to K. an equitable interest in £20,000. S. had a life interest in the fund, then his wife had a life interest, and then there was a contingent interest in the younger children of the marriage. There were clauses in the agreement which plainly showed that it was contemplated that there should be a formal deed of assignment, and that covenants should be entered into by the purchaser to pay succession duty, and to indemnify the vendor and his estate from it.

Ten years afterwards, S. being dead, his widow also being dead, and there being no children, the purchaser, who had done nothing except pay a deposit of £100, claimed the fund.

HELD—that the purchaser had no right whatever to the reversion except upon the terms of the contract of 1886, and though there had been bankruptcies and assignments to complicate the case, it all came back to this—that for ten years the purchaser and his successors in title had done nothing. He therefore could have brought an action for specific performance, asking in the alternative for rescission of the contract and return of his deposit. But all right to specific performance of the agreement of 1886 had been lost by delay.

Decision of Stirling, J. ([1898] 1 Ch. 478; 67 L. J. Ch. 313; 78 L. T. 185) affirmed.

LEVY v. STODDON, [1899] 1 Ch. 5; 68 L. J. Ch. 19; 79 L. T. 364—C. A.

**3. Agreement to enter into Contract for Sale of Land.]**—The Court will not specifically enforce an agreement to enter into a contract for the sale of land. In such a case it will leave the plaintiff to recover damages.

JOHNSTON v. BOYES, (1898) 14 T. L. R. 475—  
[Stirling, J.]

**4. Agreement to Lend Money—Agreement to take Debentures—Damages.]** An agreement to take debentures to be issued by a company is an agreement to lend money of which specific performance will not be granted.

The breach of an agreement to pay instalments on debentures as they become due does not constitute a debt to the company, and they are only entitled to such damages for the breach as they can prove that they have actually sustained.



Judgment of C. A. ([1897] 1 Q. B. 692) affirmed.  
 SOUTH AFRICAN TERRITORIES CO. v. WAL-  
 LINGTON, [1898] A. C. 309; 67 L. J. Q. B.  
 470; 78 L. T. 426; 14 T. L. R. 298; 46 W. R.  
 545.—H. L. (E.).

5. *Agreement to sell Land—Authority of Agents—Complete Contract.*—Under a will land passed to the defendants, who before probate instructed estate agents to find a purchaser on behalf of the intended administrators. The agents negotiated with the plaintiff for the purchase.

In one of their letters to the plaintiff the agents wrote, "Although we can agree price now, we cannot make a formal contract until the executors are appointed and will proved." Later they wired "Close for £21,000, subject to more formal contract," which would be prepared, and asking for a cheque for the deposit. The plaintiff in answer to this telegram replied, enclosing a cheque for the deposit. "Willing to close at £21,000." A formal agreement was then prepared, but this the defendants refused to execute, and thereupon the plaintiff brought an action for specific performance.

HELD—that the agents had never in fact had, nor had they represented themselves as having, authority to make a complete contract. The only term of the contract that had been fixed was the price to be paid, and that the plaintiff could not claim specific performance.

COOK v. WILLIAMS, (1898) 14 T. L. R. 31.—  
 C. A.

6. *Building Contract—Exception to Rule of Non-enforcement of Specific Performance—Building Work defined by Contract—Substantial Interest in Performance of Contract—Inadequacy of any Damages for Breach—Possession of Land obtained under Contract—Specific Performance Granted.*—As a general rule the Court will not enforce specific performance of a building contract; but an exception is recognised if the plaintiff can establish (1) that the building work, of which he seeks performance, is defined by the contract; (2) that he has a substantial interest in having the contract performed, which is of such a nature that he cannot be compensated for breach of the contract by damages; (3) that the defendant has by the contract obtained possession of the land on which the work is constructed to be done.

The plaintiffs were possessed of a piece of land abutting on a street in their borough, upon which they were desirous of having new buildings erected for the improvement of the town, and also for the purpose of increasing the rateable value of the property. The defendant purchased the piece of land, and in the conveyance to him he covenanted that he would commence to erect a building or buildings thereon of a certain height within twelve calendar months, and would complete the same within two years from May 25th. Afterwards, in consideration of his being allowed further time, he agreed to erect eight houses on the land purchased in accordance with plans showing full particulars of houses to be erected. He failed to perform this agreement, and thereupon the plaintiffs brought their action for specific performance,

HELD—that the Court was justified in making a decree for specific performance, and that damages would not be an adequate compensation to the plaintiffs for the breach of contract.

WOLVERHAMPTON CORPORATION v. EMMONS,  
 [1901] 1 K. B. 515; 70 L. J. K. B. 429; 19  
 W. R. 553; 84 L. T. 407; 17 T. L. R. 234—  
 C. A.

7. *Building Lease—Contract to Build Houses—Specific Description of Houses—Right of Mortgagee to Sue.*—A lease of land contained a covenant by the lessee to build seven houses thereon similar to those erected on an adjoining street, and to keep and deliver them up in repair at the end of the term. Some of the houses referred to had four rooms, and others five. The lease contained a reservation out of the demise to the persons entitled to the minerals under the land to work them, and for that purpose to occupy and use the surface, paying compensation for the damage done. The lessee had in fact himself acquired a lease of the minerals with a right to work them. The lessor mortgaged his reversion. The lessee not having built the houses on the land, the mortgagees sued for specific performance of the covenant.

HELD—(1) that the fact that the lessee had the right, which he had not yet exercised, to occupy the surface for mining operations did not extinguish the covenant to build, (2) that the particulars of the houses which were to be similar to certain others, were sufficiently specified; (3) that the building of the houses was of importance to the mortgagees, and that therefore an order for specific performance should be made.

EBBETTS v. CONQUEST ([1895] 2 Ch. 377; 64 L. J. Ch. 702; 44 W. R. 56, 73 L. T. 69—C. A.) applied.

MOLYNEUX v. RICHARD, [1906] 1 Ch. 31; 75 [L. J. Ch. 39; 54 W. R. 177, 93 L. T. 698; 22 T. L. R. 76—Kekewich, J.

8. *Contract entered into with Agent—False Representation as to Principal—Specific Performance.*—If, in negotiations for a contract, an agent make a false representation as to the name of his principal, knowing that if he disclosed the true name the other party would not enter into the contract, the Court will not order specific performance of the contract. A. signed a contract for the sale of a house to B. Before signing, he asked, "Are you buying for C. or his nominees?" B. answered, "No." B. was, in fact, buying for nominees of A., to whom he afterwards assigned his contract. He and they brought an action for specific performance.

HELD—that the contract could not be specifically performed.

ARCHER v. STONE (1898), 78 L. T. 34—North, J.

9. *Eligible Property for Investment—House used as a Brothel—Ignorance of both Vendor and Purchaser of such User—Rescission.*—A house, described in particulars of sale by auction as an eligible property for investment, was, after

the sale, discovered by the purchaser to have been used by the tenant as a disorderly house at and some time before the date of the contract, but neither the vendors nor the purchaser knew of such user at the time of the sale.

**HELD**—(1) that the Court would not decree specific performance and thus compel a man to buy a property which, if he take no steps to prevent it, will expose him, as owner, to criminal proceedings by reason of its state at the time of the sale, viz., under the Criminal Law Amendment Act, 1885; (2) That that was no ground for setting aside the contract.

*Lucas v. James* ((1849) 7 Hare, 410; 18 L. J. Ch. 329; 13 Jur. 912; 14 L. T. (O.S.) 308) distinguished.

Decisions of Cozens-Hardy, J. ([1899] 1 Ch. 879; 68 L. J. Ch. 359; 47 W. R. 479; 80 L. T. 355) reversed on point (1) and affirmed on point (2).

*HOPE v. WALTER*, [1900] 1 Ch. 257; 69 L. J. [Ch. 166; 82 L. T. 30; 16 T. L. R. 160—C. A.]

**10 Specific Performance—Land Improvement Act—Provisional Order for Creation of Rent charge—Agreement to advance Money for Improvements—Action for Breach of Contract to pay Instalments of Loan.**—A land improvement society (duly incorporated for making advances) agreed to advance to the owner of an estate £4,000 for improvements on his lands, on condition of having assigned to them a Provisional Order from the Board of Works, under the Act of 1864, sanctioning the proposed expenditure for improvements, and, subject to the requirements of the Act, creating a rent charge on the estate. The Board of Works sanctioned the loan, and the owner assigned the Provisional Order to the society, who advanced to the owner £1,500 on account of the loan by the specified instalments, but refused to make any further advances.

**HELD**—that the owner was entitled to specific performance of his contract with the society, the transaction being in substance a purchase by the society of a rent charge to be created in part by means of the purchase money to be paid for it.

*GORRINGE v. LAND IMPROVEMENT SOCIETY*, [1899] 1 Ir. R. 142—M.R.

**11. Lease of Minerals—Tenants in Common—Undivided Moiety—Inconvenience**—An agreement by one of two tenants in common of land to make a lease of the minerals contained in his share can be enforced by specific performance.

Inconvenience caused by the other tenant in common having granted a lease of the minerals contained in his share to another person is not sufficient ground for the Court to refuse specific performance in such a case.

*Price v. Griffith* ((1851) 1 D. M. & G. 80; 21 L. J. Ch. 78; 18 L. T. (O.S.) 190) explained.

*HEXTER v. PEARCE*, [1900] 1 Ch. 80; 69 L. J. [Ch. 146; 48 W. R. 330; 82 L. T. 109, 16 T. L. R. 94—Farwell, J.]

## SPIRITS.

*See* FOOD AND DRUGS; INTOXICATING LIQUORS, REVENUE.

## SPORT AND SPORTING.

*See* GAME.

## STAMPS AND STAMP DUTIES.

*See* REVENUE.

## STATUTES.

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### I. CONSTRUCTION

*And see* FISHERIES, No. 21.

**1. Amending Act—Implication from Previous Practice.**—In construing an amending Act the Courts will impute to the Legislature, when it is reasonable so to do, a knowledge of the practice prevailing under an earlier Act *in pari materia*.

*Semble*, it is not reasonable to impute knowledge of a neglect of a duty by persons on whom such duty was cast by the earlier Act.

*Yewens v. Noakes* ((1880) 6 Q. B. D. 530; 50 L. J. Q. B. 132; 45 J. P. 468; 28 W. R. 562; 44 L. T. 128—C. A.) considered.

*LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO.*, [1904] 1 Ch. 76; 68 J. P. 5; 2 L. G. R. 161—C. A.

**2 Colonial Statutes—Repugnancy to the Law of England—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63)**—The obvious purpose and meaning of the Colonial Laws Validity Act, 1865, is to preserve the right of the Imperial Legislature to legislate for a colony, although a local legislature has been given to it, and to make it impossible, when an Imperial statute has been passed expressly for the purposes of a colony, for a colonial legislature in that sense to enact anything repugnant to what was an express law applied to the colony by the Imperial Legislature itself.

*REX v. MARAIS*, (1901) 85 L. T. 363; 17 [T. L. R. 704, [1902] A. C. 51; 71 L. J. P. C. 32—P. C.]

**Construction—Continued.**

**3. Effect of Continuous User.**—Where the words of a statute are capable of only one interpretation, it is immaterial that a wrong meaning has for many years been ascribed to it and acted upon. But, where the words are not absolutely unambiguous, their true meaning at the date of their enactment may well be exhibited by long continuous practice.

Decision of Irish C. A. (2 New Ir. Jur. 291) affirmed

CORPORATION OF DUBLIN *v.* TRINITY COLLEGE, [DUBLIN, (1903) 88 L. T. 305—H. L. (Ir.)]

**4. Expressio Unius, Exclusio Alterius**—It is not to be assumed that all persons not specifically included in a protecting clause in a statute are therefore to be treated as excluded.

MCLAUGHLIN *v.* WESTGARTH AND OTHERS, [(1906) 75 L. J. P. C. 117; 94 L. T. 831; 22 T. L. R. 594—P. C.]

**5. Incorporation of Former Statute with Omission of Certain Words.**—Where a statute incorporates a section of an earlier one, directing it to apply as if certain words were omitted therefrom, the incorporated section is not to be construed as if such words had never existed therein.

ATTORNEY-GENERAL *v.* SMYTH, [1905] 2 Ir. R. [553—K. B. Div.]

**6 Orders made under Statute—To be read with Statutes.**—When an Act of Parliament declares that orders made under it are to have effect "as if enacted by this Act," orders so made and the Act itself are to be read as one statute and so construed.

*The Chartered Institute of Patent Agents v. Lockwood* ((1894) A. C. 347) applied.

BAKER *v.* WILLIAMS, [1898] 1 Q. B. 23; 62 [J. P. 21; 66 L. J. Q. B. 880; 77 L. T. 495; 14 T. L. R. 12; 46 W. R. 64—Div. Ct.]

**7. Permissive Powers—Use of Land—Prejudicing Common Law Rights—Injunction—Compensation.**—Wherever, according to the sound construction of a statute, the legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

By the legislation of British Columbia the proprietor of land held under title from the Crown, with the consent of the commissioner, and upon making payment of compensation, may compulsorily divert water from any stream, lake or river adjacent, and may convey it to his own land for the purpose of irrigation; and may convey it through or over land which does not belong to him, upon paying due compensation for waste or damage; and after the water has been used for irrigation, he may run the surplus or waste water

through the adjacent lands by means of flumes, ditches or drains, subject to the same provisions as to compensation.

HELD—that the provisions were permissive merely, and subject to the obligation implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands.

*Metropolitan Asylums District v. Hill* ((1881) 6 App. Cas 193; 50 L. J. Q. B. 333; 45 J. P. 664; 29 W. R. 617; 44 L. T. 653) approved.

CANADIAN PACIFIC RAILWAY *v.* PARKE, [1899] [A. C. 535, 68 L. J. P. C. 89; 48 W. R. 118; 81 L. T. 127; 15 T. L. R. 427—P. C.]

**8 Repealing Statute—Saving Clause—Effect of.**—Where an Act conferring a certain jurisdiction is repealed, and the later Act contains a proviso saving established jurisdictions, the old jurisdiction is to be regarded as preserved in the absence of any inconsistency arising from such a ruling.

Effect of repeals by Statute Law Revision Acts considered.

IN RE R., [1906] 1 Ch. 730—C. A.

**9. Interpretation—Ambiguous Words—Object—Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 34.**—By sect. 34 of the Elementary Education Act, 1870, "No member of a school board . . . shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board."

To interpret words of this kind, which have no very definite meaning, and which were purposely employed for that very reason, the object to be attained must be looked at. The defendant was the chairman of a school board, and supplied gravel and sand to the contractor to the board.

HELD—that he was clearly concerned in work done under the authority of the school board within the meaning of sect. 34.

BARNACLE *v.* CLARK, [1900] 1 Q. B. 279; 69 [L. J. Q. B. 15; 64 J. P. 86; 81 L. T. 484—Div. Ct.]

**10. Special Act Imposing Obligations and Conferring Rights—Subsequent General Act—Effect on Earlier Act.**—Private Acts conferring rights and imposing obligations for special purposes are not overruled by general Acts, where the effect would be to interfere with the exercise of such rights and the performance of such obligations.

ESQUIMALT WATERWORKS CO. *v.* VICTORIA [CORPORATION, [1907] A. C. 499; 76 L. J. P. C. 75; 28 T. L. R. 762—P. C.]

**11. Statutes Receiving Royal Assent on the same day—Precedence—"Upon the day"—"From and after the day."**—By a Provisional Order under the Electric Lighting Acts, confirmed by the Electric Lighting Orders Confirma-

**Construction—Continued.**

tion Act, 1892, which received the Royal assent on June 27th, 1892, the defendant company were authorised to carry on an electric undertaking in Sheffield. The Order contained an option for the corporation within forty-two years to purchase the undertaking "upon the terms of issuing or transferring to the undertakers such an amount of Sheffield Corporation stock as will produce by the interest or dividends thereon an annuity of 5 per cent. per annum upon the sum properly expended by the undertakers upon the undertaking and chargeable to capital account."

Under the Sheffield Corporation Acts, 1883 and 1888, the corporation had power to issue redeemable or redeemable stock.

By a Provisional Order under the Public Health Act, confirmed by an Act which received the Royal assent on the same June 27th, the power to issue redeemable stock was repealed.

The two Provisional Orders contained provisions that they should come into operation on the first-mentioned "on the day" the last-mentioned "from and after the day," upon which they received the Royal assent.

The corporation gave notice to purchase. The company refused to sell on the ground that the corporation were bound to issue redeemable stock and had no power to do it.

The corporation brought an action for specific performance.

**Held**—that the Provisional Order under the Electric Lighting Act came into operation on the day of, and the Order under the Public Health Act the day after, the Royal assent, but that, even if they came into operation on the same day, they could not be construed together so as to give or reserve to the corporation a power to issue redeemable stock for the purpose of this purchase.

**SHEFFIELD CORPORATION v. SHEFFIELD ELECTRIC LIGHT CO.** [1898] 1 Ch. 203; 62 J. P. 87; 67 L. J. Ch. 113; 77 L. T. 616; 16 W. R. 185—North, J.

**12 Title—Operation of.**—Now and for some years past the title of an Act of Parliament has been part of the Act. In old days it used not to be so and in the old law books we were told not so to regard it, but now the title is an important part of the Act and is so treated in both Houses of Parliament.

Decision of C. A. [1899] 1 Ch. 1; 67 L. J. Ch. 611; 47 W. R. 295; 79 L. T. 231) affirmed.

**FILDEN v. MORLEY CORPORATION.** [1900] 3 A. C. 133; 69 L. J. Ch. 314; 64 J. P. 484; 18 W. R. 515; 82 L. T. 29; 16 T. L. R. 219—H. L. (E.).

**III RETROSPECTIVE OPERATION.**

*And see* AGRICULTURE, No. 14.

**13. Declaratory Act.**—An enactment declaratory in form is not necessarily retrospective in operation.

*Midland Ry. Co. v. Pye* (10 C. B. (N. S.) 179 approved.

**YOUNG v. ADAMS.** [1898] A. C. 469; 67 L. J. [P. C. 75; 78 L. T. 506; 14 T. L. R. 373—P. C.

**14. Declaratory Act.**—A declaratory enactment is in general retrospective in its operation.

**IN RE LOVELL AND COLLARD'S CONTRACT.** [1907] 1 Ch. 249; 76 L. J. Ch. 246; 96 L. T. 382—Eady, J.

**15. Procedure Act—Rights of Action—Limitation of Action.**—When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed the enactment applies to all actions, whether commenced before or after the passing of the Act.

The Public Authorities Protection Act 1893, is an Act dealing with procedure only, and is retrospective.

Decision of Jemne, P. affirmed.

**THE YDUN.** [1899] P. 236; 68 J. P. 101; 81 [L. T. 10; 15 T. L. R. 361; 8 Asp. M. C. 551—C. A.

**16 Procedure Act.**—In the absence of provision to the contrary a statute dealing only with matters of procedure has a retrospective operation.

**R. v. CHANDRA DHARMA R. v. HUGHINSON v. R. v. SLATLER, R. v. COURT** [1905] 2 K. B. 335; 74 J. K. B. 159; 69 J. P. 198; 53 W. R. 131; 92 L. T. 790; 21 T. L. R. 353—C. C. R.

**17. Matter of Procedure—Abolition of Right of Appeal.**—The abolition or transfer to another tribunal of an existing right of appeal cannot be regarded as a mere "matter of procedure" apart, therefore, from express enactment, a statutory provision of this nature will not operate retrospectively so as to take away the right of appeal in an action already commenced.

**COLONIAL SUGAR REFINING CO. LD. v. LEVING.** [1906] A. C. 360; 75 L. J. P. C. 51; 92 L. T. 738; 91 L. T. 387; 21 T. L. R. 513; 22 T. L. R. 105—P. C.

**STATUTE OF FRAUDS.**

*See* CONTRACT, EVIDENCE: FRAUDULENT AND VOLUNTARY CONVEYANCES; SALE OF GOODS, SALE OF LAND.

**STATUTES OF LIMITATIONS.**

*See* LIMITATION OF ACTIONS: REAL PROPERTY AND CHATTELS REAL.

**STATUTE OF USES.**

See REAL PROPERTY AND CHATTELS  
REAL; SETTLEMENTS; TRUSTS AND  
TRUSTEES; WILLS.

**STOCK EXCHANGE.**

I. RULES AND CUSTOMS . . .	COL. . 789
II. BROKERS AND CLIENTS.	
(a) In general . . .	. 794
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(c) Closing accounts . . .	. 797
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See also AGENCY, BANKRUPTCY; CON-  
TRACTS; GAMING AND WAGERING;  
MORTGAGE, 98.

**I. RULES AND CUSTOMS.**

1. *Alleged Custom—Failure of Purchasing Jobber—Suggested Liability of Vendor's Broker to Vendor—Form of Contract Note—Custom not Proved* ]—A broker, on instructions from a client, sold shares at £6 each, and sent him a sold note not stating the name of the purchasing jobber, the latter failed, and the "hammering" price was fixed at £2 per share. The client sued the broker, alleging a custom that, by not disclosing the jobber's name, the broker became personally liable. The evidence completely failed to support the declaration.

HELD—the custom was not proved.

GILL v. SHEPHERD & Co., [1903] 19 T. L. R. 17;  
[8 Com. Cas. 48—Kennedy, J.]

2. *Goodwill—Stock Exchange Firm—Saleable Goodwill in a Stockbroker's Business upon the London Stock Exchange* ]—Upon the death of a partner in a stockbroker's business carried on upon the London Stock Exchange, under articles which did not mention "goodwill," the executrix of the deceased partner brought an action to wind up the partnership and realise the assets. The surviving partner, who continued to carry on the business in the firm's name, having been authorised by the committee of the Stock Exchange to do so, contended that there was no saleable goodwill of such a business, and that, therefore, the goodwill could not be included as an asset of the partnership.

HELD—that it was not shown that there was any practice of the Stock Exchange with reference to the use of the firm's name by the surviving partner which would entitle the Court to say that there was no saleable goodwill of a business of this kind.

Wilson v. Williams ((1892) 29 L. R. Ir. 176) distinguished.

HILL v. TRAVIS, [1905] 1 Ch. 466; 74 L. J. Ch. [237; 53 W. R. 457; 21 T. L. R. 187—Warrington, J.]

3. *Power of Committee—Suspension of "Buying in"—Suspension of Rules as to Intermediaries*

—*Alteration of Contract between Parties—Ultra vires.* ]—On June 4th, the plaintiffs through B., a broker and member of the Stock Exchange, sold to the defendants, jobbers and also members of the Stock Exchange, a parcel of shares; and in due course the defendants passed to B. the name of W., also a member, as the ultimate purchaser.

On the 12th, the plaintiffs, for certain reasons, could not tender certificates, and W. applied to have the shares "bought in" against them. On the 17th the committee passed a resolution suspending the "buying-in" of the particular securities.

HELD—that this resolution, which left the original contract operative, was *intra vires* and good.

By rule 103, when the seller fails to deliver intermediate parties are released from liability, and only the issuer of the ticket remains responsible for the price to the vendor. By this rule W. would have been alone liable to the plaintiffs when (on September 26th) they became able to tender certificates; but in the meantime the committee by another resolution had purported to suspend rule 103; and the plaintiffs (W. having been declared a defaulter) claimed to be entitled to sue the defendants for the price of the shares on the ground that rule 103 no longer protected them.

HELD—that the second resolution, as it purported to alter the whole nature of the contract, was *ultra vires*; and that the defendants were still protected by rule 103 and were not liable.

The sale of shares implies a prompt delivery, the tender of certificates three months after the sale is not a good delivery and the purchaser is entitled to refuse to accept them.

UNION CORPORATION, LD v. CHARRINGTON AND [BRODRICK, (1903) 19 T. L. R. 129; 8 Com. Cas. 99—Bigham J.]

4. *Power of Committee—Custom—Delivery of Some only of Shares Purchased—Delay of Vendors—Delay of Broker—Broker's Right to Indemnity from his Client* ]—A person instructing a broker to deal for him on the Stock Exchange is bound by its printed rules and regulations, but not by a mere custom apart from a special contract, or evidence that he is acquainted with it.

It is a well-known practice of the Stock Exchange (despite the ordinary law of vendor and purchaser) that a tender of some of the shares bought for a client under one order is a good tender.

A purchasing broker who receives transfers with proper certificates from the vendor within the ten days allowed by the rules for delivery, and pays for them, is entitled to be indemnified by his client: he does not lose his right to such indemnity, because he himself does not tender them to his client until after the time limit has expired, but he ought not to delay unreasonably, and, if he does, such delay might afford good ground for a counterclaim.

Where, however, the vendor does not deliver to the broker within the ten days, the client may

**Rules and Customs—Continued.**

then give the broker notice that he will not accept the shares, if the latter, notwithstanding such notice, accepts and pays for the shares, he cannot call upon his client to indemnify him. A resolution of the committee rescinding the ten days rule cannot bind the client and alter the terms of his contract.

A. instructed a broker to buy him seventy shares for the special settlement; twenty of these were received by the broker from the selling jobber within the ten days allowed for delivery by the rules of the Stock Exchange, and were paid for by the broker; but the other fifty shares were not forthcoming owing to the refusal of the company to certify the transfers. The broker tendered the twenty shares to A., who insisted on having seventy or none; eventually the committee of the Stock Exchange held a meeting, and (as the broker understood) passed a resolution that he should accept and pay for the remaining fifty shares as soon as the jobber could deliver them. Accordingly, some three or four weeks after the bargain the broker accepted and paid for these shares, and as A. refused to accept them, he now claimed to be indemnified by him.

**HELD**—that A. must pay for the twenty shares delivered within the ten days, though they were not actually tendered to him within such period, but that he was entitled to reject the remaining fifty. A resolution of the committee could not make valid a broken contract, so far as he was concerned; and apparently no such resolution had in fact been passed.

*Union Corporation, Ltd. v. Charrington* (No. 3, *supra*) followed.

**BENJAMIN v. BARNETT**, (1903) 19 T. L. R. 564; [8 Com. Cas. 244—Kennedy, J.

**5 Rules—Defaulter—Account with Jobber—Official Assignee—Dividend—Completion of Transactions by Jobber—Further Dividend.**—The defendant, a broker and member of the Stock Exchange, was declared a defaulter. At the previous settlement his account with the plaintiffs, who were jobbers, showed a balance due to them of £986 in respect of contracts which were then carried over. On the closing at the hammer price a further sum of £281 became due to the plaintiffs in respect of these contracts. The plaintiffs proved in the Stock Exchange liquidation of the defendant's estate, and were paid a dividend of 2s. 6d. in the £. At the next settlement after the default, the plaintiff completed the transactions with the defendant's customers, and received from them the amounts due on their contracts, but by the rules and usage of the Stock Exchange the plaintiffs had to account to the official assignee for £281 of the sums so received. The plaintiffs brought an action against the defendant claiming to recover £986 and £281. At the date of the hearing the Stock Exchange liquidation of the defendant's estate had not been completed, and the official assignee had in hand or would receive funds sufficient to pay a further dividend.

**HELD**—that the plaintiffs were entitled to sue

and to recover the amount claimed less the amount received as a dividend on the defendant's estate.

The judgment of Mathew, J. ([1901] 2 K. B. 844; 70 L. J. K. B. 969, 50 W. R. 106; 85 L. T. 426; 17 T. L. R. 759, 6 Com. Cas. 285) and decision of C. A. [1902] 2 K. B. 653; 71 L. J. K. B. 984; 51 W. R. 3, 87 L. T. 422; 18 T. L. R. 788; 7 Com. Cas. 247) affirmed.

**MENDELSSOHN v. RATOLIFFE** (No. 1), (1902) 73 [L. J. K. B. 1027; 91 L. T. 204, 20 T. L. R. 669—H. L. (E.).

**6. Rules—Defaulter—Official Assignee—“Estate”—“Assets”—Stock Exchange Rules** (1897) 174 & 176.—Rule 174 of the Stock Exchange is in these terms: “Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him . . . and to manage the estate in conformity with the rules, regulations, and usages of the Stock Exchange.”

Rule 176 is in these terms: “The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible.”

**HELD**—that rules 174 and 176 operate as an equitable assignment of the estate and assets of a defaulter. The words “estate” in rule 174 and “assets” in rule 176 mean the whole estate, and all the assets of the defaulter.

R. became a defaulter on the Stock Exchange there being then a debt due to him. This debt was paid, with the assent of the official assignee, partly in cash and partly by an issue of shares to R. The shares were subsequently, with the assent of the official assignee, sold to the defendants, who claimed to set off against the purchase price a debt due to them from R.

**HELD**—that they were not entitled to set off the debt.

**RICHARDSON v. STORMONT, TODD & Co.**, [1900] 1 Q. B. 701; 69 L. J. Q. B. 369, 48 W. R. 451; 82 L. T. 316; 16 T. L. R. 224; 5 Com. Cas. 134—C. A.

**7 Rules—Defaulter—Official Assignee—Assignment of Assets—Judgment Creditor—Charging Order—Rules and Regulations of Stock Exchange, r. 178.**—A broker, who was a member of the Stock Exchange, was declared a defaulter, and by rule 178 of the rules and regulations of the Stock Exchange the official assignee had to collect and distribute the assets of the defaulting broker. The official assignee brought an action in the name of the defaulting broker against a third person to recover a sum of money due in respect of Stock Exchange transactions, and a sum of money was paid into Court in satisfaction of that claim. The plaintiff, who had recovered judgment against the defaulting broker for money lent, not connected with Stock Exchange transactions, applied for an order charging the sum of money in Court with the payment of his judgment debt.

**Rules and Customs—Continued.**

**HELD**—that as the effect of the Stock Exchange rules was to make an assignment of the defaulting broker's assets to the official assignee, which was prior in point of time to the plaintiff's application for a charging order, the plaintiff was not entitled to a charging order.

LOMAS v. GRAVES & Co., [1904] 2 K. B. 557; 73 [L. J. K. B. 803; 20 T. L. R. 657; 91 L. T. 616—C. A.]

**8 Rules—Position of Non-members—Mortgage of Shares—Realising Security—Taking Shares at Price Fixed by Official Assignee—Rules 152, 160.]**—By rule 152 of the London Stock Exchange rules, in every case of failure the official assignees shall fix the prices current in the market, at which prices all members having accounts open with the defaulter shall close their transactions. By rule 160, in the case of a loan upon securities valued at less than the market price, the lender shall realise his securities within three days, or take them at a price to be fixed by the official assignees; and if the security be insufficient, the difference may be proved against the defaulter's estate.

The plaintiff, who was not a member of the Stock Exchange, through a broker, procured from the defendant, a jobber, a loan upon the security of certain shares, upon condition that the shares were sold for the next settling day. The broker thereupon, on behalf of the plaintiff, agreed with another broker for the sale to him of the shares. The latter broker, in fact, buying for the plaintiff. The defendant, when he made the advance, knew that the broker was acting for an undisclosed principal. The plaintiff did not put the two brokers in funds to pay off the loan or to purchase the shares, and upon default being made the defendant was compelled to take over the shares at the price fixed by the official assignees. The shares subsequently rose in price, and the defendant sold them and realised a profit.

**HELD**—that rules 152 and 160 only bound members of the Stock Exchange, even though the outside principal made default in carrying out his contract, and that therefore the defendant was liable to account to the plaintiff after deducting principal, interest, and costs.

PONSOLLE v. WEBBER, (1907) 24 T. L. R. 190—[Neville, J.]

**9. Sale of Shares for Settlement "Coming out"—Reasonable Time.]**—Partly paid shares in a company were sold, subject to the rules of the London Stock Exchange, for the settlement "coming out." The rules of the Stock Exchange provided for the transaction being completed by the handing over of a transfer and a certificate. The articles of association of the company provided for certificates being issued to members and contemplated certificates being issued for partly paid shares. The company refused to issue certificates for partly paid shares, and in consequence no settlement in those shares took place. The purchaser called upon the seller to complete within a reasonable time.

**HELD**—that it was a term of the contract that the "coming out"—that was, the coming out of the certificate—was to be within a reasonable time, and in considering what was a reasonable time regard must be had to the regulations of the company; but that delay occasioned by the arbitrary conduct of the directors in refusing to issue certificates until the shares were fully paid could not be counted.

GOLDMANN v. E. G. KANN, (1907) 23 T. L. R. [287—Channell, J.]

**II. BROKERS AND CLIENTS.**

And see AGENCY, No. 13; BANKRUPTCY, Nos 216, 217.

**(a) In General.**

**10 Client selling Shares deposited with his Bank—Broker not bound to pay Purchase Money to Bank and obtain delivery of Shares.]**—Where a person, who has deposited shares with his bank, sells such shares through a broker on the London Stock Exchange, he cannot require the broker to pay the purchase money to the bank and so release the shares. Nor is the broker under any obligation to ask the purchasing jobber to pay the bank, and so obtain the shares.

HAWKINS v. PEARSE, (1904) 9 Com. Cas. 87—[Walton, J.]

**11. Cover—Deposit of Money as—Right of Depositor to Recover—Gaming Transaction.]**—Money was deposited with a stockbroker as "cover" in respect of gaming transactions in stocks and shares. The transactions resulted in money becoming due from the stockbroker to the depositor, who claimed repayment of the amount which he had deposited.

**HELD**—that the depositor could recover the amount which he had deposited as "cover" and that he was entitled to prove for it in the bankruptcy proceedings of the stockbroker.

IN RE CRONMIRE, EX PARTE WAUD, (1898) [2 Q. B. 383; 67 L. J. Q. B. 620, 78 L. T. 483; 5 Mans. 30; 14 T. L. R. 376, 46 W. R. 679—C. A.]

**12 General Lien of Broker—Security for Specific Loan—Loan Paid off—General Lien on Customer's deposited Securities—Official Receiver—Official Assignee of Stock Exchange.]**—Securities were deposited by a company with their stockbrokers to secure an advance of £15,000. Most, if not all, of these securities had been purchased by the brokers for the company. The company paid off the £15,000 a few days after the loan had been made, but did not call for a return of the securities, which remained in the possession of the brokers until they were declared defaulters on the Stock Exchange. The subsequent transactions resulted in a sum owing by the company to the brokers. The company was compulsorily wound up.

**HELD**—that there was nothing to exclude the general lien of the brokers, and that they (or the official assignee of the Stock Exchange) were entitled to hold, under their general lien as brokers, the securities for the amount which the

**Brokers and Clients—Continued.**

company owed them as against the company—that is to say, the official receiver.

IN RE LONDON AND GLOBE FINANCE CORPORATION, [1902] 2 Ch. 416; 71 L. J. Ch. 893, 87 L. T. 49; 18 T. L. R. 679—Buckley, J.

**13. Option Contract—Call Option—Whether a Gaming and Wagering Contract.]**—The plaintiffs, at the defendant's request, purchased for him the right to call for certain shares at a particular price on a specified day. They paid to a member of the Stock Exchange £637 10s. for the option, and added £25 for their own commission, giving the defendant a note headed: "Bought for your account . . ."

**HELD**—that the bargain, as expressed in the contract, was not a gaming and wagering contract, but a bargain for good consideration giving the right to call for certain shares, and that the plaintiffs could recover the £662 10s. The case would have been different if there had been evidence to justify a finding that, in spite of the form of the contract, the parties never intended it to be enforced, but tacitly understood that only "differences" were to be paid.

BUTTENLANDSCHE BANKVEREENIGING v. [HILDESHEIM, (1903) 19 T. L. R. 641—C. A.]

**14. Outside Broker—Defence of Gaming and Wagering.]**—Where a transaction for the purchase or sale of stocks and shares is merely intended to end in the payment of differences, a defence of gaming and wagering is good.

WOOD v. FERREZ, (1898) 14 T. L. R. 492—Day, J.

**15. Outside Broker—Secret Commission—Repudiation of Contract.]**—The defendant discovered that the plaintiffs, who were stockbrokers, but not members of the Stock Exchange, besides charging commission had in their contract notes sent to him added something to the price at which they had really bought.

**HELD**—that he was entitled to repudiate such contracts.

STANGE & CO. v. LOWITZ, (1898) 14 T. L. R. [468—C. A.]

**16. Outside Broker—Secret Commission—Repudiation of Contract.]**—The plaintiff employed the defendants, who were outside stockbrokers, to buy and sell and carry over stocks and shares on the London Stock Exchange. The defendants, in the contract notes which they sent to the plaintiff, besides charging commission, added something to the price at which the stocks were really bought or sold.

**HELD**—that the plaintiff was entitled to repudiate the contracts.

Stange & Co. v. Lowitz ((1898) 14 T. L. R. 468, *supra*) followed.

NICHOLSON v. MANSFIELD & CO., (1901) 17 T. L. R. 259—Bigham J.

**17 Pooling Transaction.]**—When the real transaction between a stockbroker and his client was not the ordinary one of purchase of shares in a company, but to purchase a participation in a "pool" to the extent of 5,000 shares, and the stockbroker acquired an interest in the "pool" of 15,000 shares, intending a portion of this, viz., an interest of 5,000 shares for the client, and the remainder for himself and other customers, it was held, that the customer was liable to pay for the 5,000 shares.

Decision of C. A. ((1897) 13 T. L. R. 568) reversed.

MAY. v. ANGELI, (1898) 14 T. L. R. 551—[H. L. (E.).]

**(b) Carrying Over.**

**18 Agreement to Carry Over—Sale in Breach of Agreement—Indemnity.]**—In accordance with the instructions of a client, a stockbroker purchased some railway stock for him upon the London Stock Exchange. By arrangement between them, the broker paid for the stock, and after having procured delivery of it to himself, held it as security for the money he had advanced. It was agreed between them that the broker should not sell the stock before the next settling day. Subsequently in breach of this agreement, and without the authority of his client, the broker sold the stock before the next settling day at a loss. In an action by the broker against the client for indemnity against this loss.—

**HELD**—that the broker was entitled to recover, subject to a counter-claim by the client for damages caused in consequence of a breach of the agreement not to sell before the next settling day.

Where a stockbroker bought stock on his client's instructions for the next account, and agreed that it should not be sold before that date, but in breach of such agreement sold at a loss before the next account:—

**HELD**, by Smith and Collins, L.J.J. (Rigby, L.J. dissenting)—that the broker could not claim to be indemnified by his client.

ELLIS v. POND, [1898] 1 Q. B. 426; 67 L. J. [Q. B. 345; 78 L. T. 125, 14 T. L. R. 152—C. A.]

**19. Death of Customer—Determination of Broker's Authority—Sale and Repurchase after Death—Liability of Broker for Loss.]**—J. H. acted as broker for C. O., who died on March 24th, 1898. On that day he was under contract, as the result of a continuation transaction, to take up and pay for on March 30th (amongst other securities) £10,000 New Ecuador bonds. The next settling day after the death was March 28th. On the following settling day J. H. effected a fresh continuation, by re-entering into a contract for sale at 21½ and a contract for repurchase on the next settlement at 21½ plus 6 per cent. contango.

**HELD**—that J. H. could have closed the account on March 28th by selling in the market, relying on his right to indemnity against the



**Brokers and Clients—Continued.**

estate of his principal in respect of any loss, and that J. H. could not be heard to say that the sale ought not as between himself and his principal to be treated as a sale, because he without authority at the same time entered into a contract to purchase again at the next settlement, and that he was liable for the loss so incurred.

*Phillips v. Jones* (1888) 4 T. L. R. 401 followed.

*IN RE OVERWEG, HAAS v. DURANT*, [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776; 16 T. L. R. 70—Byrne, J.

**20. Failure of Broker — Privity of Contract.**—A contract was made by the defendant through his broker to buy shares. The defendant, being unable to take them up, applied to his broker to get the shares carried over. This could not be done on the Stock Exchange, and the broker then told the defendant that he (the broker) had a client—the plaintiff—who would find the necessary money. By arrangement between the broker and his client the broker retained 1 per cent as his commission out of 10 per cent. *contango* which was charged for the carry over.

**HELD**—that it was never intended that the broker should, as regards the defendant, occupy the position of principal, and that there was a clear case of a contract between the plaintiff and the defendant, and the plaintiff was therefore entitled to damages for the defendant's failure to accept and pay for the shares.

*BELL v. PLUMBLY*, (1900) 16 T. L. R. 393—[Mathew, J.]

**(c) Closing Accounts.**

**21. Broker closing Clients' Account—Sale and Repurchase by Broker—Fiduciary Capacity.**—The defendants were clients of the plaintiffs, who were stockbrokers. The defendants engaged through the plaintiffs in a series of speculative transactions on the Stock Exchange, the result of which was that the defendant's became liable to pay a considerable sum of money. The defendants made default when called upon to pay this money. The plaintiffs thereupon became entitled to close the account in the manner usual on the Stock Exchange, and thus they did by going to jobbers and asking them to name a price for certain shares. The plaintiffs sold to the jobbers and repurchased from them the shares, and in their account with the defendants charged them commission on the sale of the shares to the jobbers. The plaintiffs contended that the account was not closed at all, because the plaintiffs bought back from the jobbers the shares which they had sold to them for the purpose of closing the account.

**HELD**—that the case was covered by the decision in *Walter v. King* ((1897) 13 T. L. R. 270); that the plaintiffs having acted in a fiduciary capacity, they must account for the amount of the profit they made out of the

transaction, though the transaction of sale and repurchase was a single one.

*ERSKINE, OXENFORD & CO. v. SACHS*, [1901] 2 K. B. 505; 70 L. J. K. B. 978; 85 L. T. 385; 17 T. L. R. 636—C. A.

**22. Broker closing Client's Account — Sale and Repurchase by Broker — Fiduciary Capacity.**—The plaintiff instructed the defendants, who were stockbrokers, to buy for him a large number of shares, and the defendants bought and paid for them. On the plaintiff failing at the proper time to find the purchase-money, the defendants went to a jobber on the Stock Exchange, and had a fair price fixed for the shares, and went through the form of selling and buying back the shares at that price. The plaintiff sued the defendants for wrongfully selling the shares. The defendants counter-claimed for a balance of account alleged to be due from the plaintiff to the defendants in respect of Stock Exchange transactions into which they had entered on behalf of the plaintiff as his brokers. The jury found that the defendants agreed to keep the account open only on condition that the plaintiff would provide money for payment of the balance, and that the plaintiff did not take reasonable means to provide for the discharge of his liabilities to the defendants. The judge gave judgment for the plaintiff on the first head of claims and for the defendants on the counter-claim. On appeal on the ground that the transaction with the jobber was no sale at all:—

**HELD** (by A. L. Smith, M R., and Romer, L.J.)—that the best price that was obtainable in the market was obtained for the shares that were sold on behalf of the plaintiff, and that the case was covered by the decision in *Walter v. King* ((1897) 13 T. L. R. 270).

**HELD** (by Vaughan Williams, L.J., and Romer, L.J.)—that having regard to the mode in which the case was conducted in the Court below, the point taken by the plaintiff's counsel was not open to him in the C. A.

*MACGON v. ERSKINE, OXENFORD & CO.*, [1901] 2 K. B. 493; 70 L. J. K. B. 973; 85 L. T. 372—C. A.

**23. Broker Closing Customer's Account — Anticipatory Breach by Customer—Right to carry over Part and to sell Part of Account.**—The plaintiff, who was a stockbroker, had certain shares open for the end of December account, viz., some Golden Link shares and some Louisville shares, which had been carried over from previous accounts. The plaintiff wrote to the defendant saying that owing to the stringency of the money market it would be impossible for him to carry over the defendant's shares at the coming settlement, and he asked the defendant either to take up the shares or to give him instructions to sell them. The defendant's representative said that the defendant could not take up the shares, and asked the plaintiff to carry them over again. The plaintiff carried over the Louisville shares, but he did not succeed in

**Brokers and Clients—Continued.**

carrying over the Golden Link shares, but sold them

**Held**—that the plaintiff's right to sell the shares was let in, as the defendant having said that he could not possibly find the money to take them up amounted to an anticipatory breach which justified the plaintiff in selling.

It appeared that the lots of shares had been bought separately and had been sold separately, so that the question of lumping did not come into consideration.

Decision of Darling, J. ([1901] 17 T. L. R. 21) reversed.

CULLUM v. HODGES, (1902) 18 T. L. R. 6—C. A.

**24. Broker Anticipatory Breach of Contract—Wrongfully closing Customer's Account—Continuance of Broker's Obligation—Measure of Damages.**—Where there has been what has been called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded and hold the party repudiating the contract to his obligation, when the time fixed for performance arrives.

The defendants, brokers on the London Stock Exchange, entered into an agreement with the plaintiff for the carrying over of certain contracts for the purchase of stock, which had been made by them on his account, from the mid-May account to the account at the end of that month, and, having made arrangements for carrying the stocks over accordingly, they nevertheless proceeded a day or two afterwards, and before the account day at the end of May, without instructions from the plaintiff, to close his account. The action brought by the plaintiff for non-performance of contract was not brought till after the time at which the contract ought to have been performed by the defendants, and the plaintiff, upon notice of the closing of his account, distinctly insisted on performance of the contract.

**Held**, by C. A.—that the defendant's obligation continued up to the date of the settlement; that the damages ought not to be calculated with reference to the prices of the stocks at the time of the closing of the plaintiff's account; and that the damages were to be as ascertained in accordance with the arrangement arrived at by the parties.

The decision of Wills, J. ([1901] 2 K. B. 867; 70 L. J. K. B. 1000; 50 W. R. 154; 85 L. T. 548; 17 T. L. R. 761) not therefore considered.

Decision of C. A. ([1902] 1 K. B. 482; 71 L. J. K. B. 265; 50 W. R. 308; 86 L. T. 474; 18 T. L. R. 254) affirmed on a question of fact, no point of law being considered.

HART & Co. v. MICHAEL, (1904) 89 L. T. 422 [—H. L. (E.).

**(d) Defaulting Brokers.**

**25. Liability of Broker's Client to Jobber—Privity of Contract—Breach—Measure of Damages.**—The defendant employed a broker on the Stock Exchange to purchase certain shares for the mid-December account. The broker bought the shares from the plaintiffs, who were jobbers on the Stock Exchange. At the mid-December account the broker, by the defendant's instructions, carried over the shares with the plaintiffs. Before the next account the broker was declared a defaulter. The plaintiffs, having ascertained that the shares were for the defendant, applied to him to take up the shares at the end of December account, but the defendant declined to recognise the plaintiffs in the transaction. The plaintiffs thereupon sold the shares, and sued the defendant for damages for breach of contract.

**Held**—that the plaintiffs were entitled to recover as damages the difference between the carrying-over price and the price realised on the sale.

Dictum of Kennedy J., in *Beckhousen v. Hamblet* ([1900] 2 Q. B. 18; 69 L. J. Q. B. 431, 82 L. T. 459; 16 T. L. R. 278; 5 Com. Cas. 217, No. 28, *infra*) approved.

ANDERSON & Co v. BEARD, [1900] 2 Q. B. 260; [69 L. J. Q. B. 610, 82 L. T. 714; 16 T. L. R. 367; 5 Com. Cas. 261—Mathew, J.

**26. Liability of Broker's Client to Jobber—Principal and Agent—Privity of Contract—Measure of Damages—Application of Stock Exchange Rules and Usages.**—The defendant, an outside person, employed a firm of brokers on the Stock Exchange to purchase shares. The brokers contracted with the plaintiffs, a firm of jobbers on the Stock Exchange, and at the request of the defendant the shares were carried over, and if nothing had intervened the brokers would have had to take up and pay for the shares at the price of 57 on the settling day, December 29th, 1899, and the defendant would have had to pay the brokers. Before that time, and while the shares were being carried over, the brokers became defaulters, and were hammered. When the settling day arrived the plaintiffs, who had found out that the defendant was the principal in the transaction, required him to take up the shares at 57. The defendant refused, and the plaintiffs sold the shares, which realised a less price, and they sued the defendant for the difference between the price at which the shares were carried over and that at which they were sold. The defendant claimed that the transaction was closed under rule 177 of the Stock Exchange.

**Held**—(1) that apart from any consideration of the rules and usages of the Stock Exchange, and assuming that a proper appropriation had been made of the shares by the brokers, the jobbers could sue the defendant on the ground that he was the undisclosed principal of the brokers, and that when the brokers became defaulters and the jobbers discovered who was

**Brokers and Clients—Continued.**

the principal, they had a right to call upon the principal to fulfil the contract made through the brokers; (2) that rules of the Stock Exchange framed exclusively to meet particular emergencies, and ascertain rights between the members of the Stock Exchange themselves, do not govern the rights of persons outside, and rule 177 did not, therefore, apply to the defendant; (3) that no usage of the Stock Exchange had been proved entitling the defendant to close the transaction at the hammer price.

Decision of Mathew, J. ((1900) 16 T. L. R. 436; 5 Com. Cas. 326) affirmed.

LEVITT v HAMBLET, [1901] 2 K. B. 53; 70 [L. J. K. R. 520; 84 L. T. 638; 17 T. L. R. 307, 6 Com. Cas. 79—C. A.

**27. Liability of Broker's Client to Jobber—Principal and Agent—Privity of Contract between Jobber and Customer—Difference between Contract Price and Hammer Price—Failure of Customer to Complete—Damages against Customer.**—Where a broker on the Stock Exchange has entered into a contract with a jobber on behalf of a customer in such circumstances as to create privity of contract between the jobber and the customer, and the broker is before completion declared a defaulter, and the jobber claims in the liquidation of the estate of the broker for the difference between the contract price and the hammer price, and is paid such difference in full, the jobber is, nevertheless, entitled, in the event of the customer failing to complete with him, to recover damages from the customer, but in the event of the damages exceeding the sum received by the jobber from the broker's estate, the jobber is bound to account to the broker's estate for that sum.

STONEHAM v. WYMAN, (1901) 17 T. L. R. 562, [6 Com. Cas. 174—Mathew, J.

**28. Liability of Broker's Client to Jobber—Principal and Agent—Privity of Contract—Broker Lumping several Orders under one Contract—Usage of Stock Exchange.**—The defendant employed a firm of brokers on the Stock Exchange to purchase 210 Louisville shares. The brokers bought from the plaintiffs, who were jobbers on the Stock Exchange, 360 Louisvilles, of which 210 were intended by the brokers for the defendant, and 150 for another client. The plaintiffs were not told who the brokers' principal was, or that the shares were for two clients. Before the selling day the brokers were declared defaulters. The plaintiffs, having ascertained that 210 of the shares were for the defendant, applied to him for instructions as to what he wished done in the matter, but the defendant declined to recognise the plaintiffs in the transaction. On the selling day the plaintiffs tendered the 210 shares to the defendants, who refused to accept them, and the plaintiffs then sold them, and, the price having fallen, claimed the difference from the defendant as damages for breach of the contract to buy the shares.

HELD—that as the evidence in the action did not establish the existence of a special usage of

the Stock Exchange, by which in such a transaction privity of contract was created between the plaintiffs and the defendant as regards the 210 shares, a new trial would not be ordered, but without prejudice to the plaintiffs' right to raise the question as to the existence and validity of such a usage in any subsequent action in respect of a similar transaction.

Decision of Kennedy, J. ([1900] 2 Q. B. 18, 69 L. J. Q. B. 431, 82 L. T. 459; 16 T. L. R. 278, 5 Com. Cas. 217), affirmed.

BECKHUSON AND GIBBS v. HAMBLET, [1901] 2 [K. B. 73; 70 L. J. K. B. 600; 49 W. R. 481; 84 L. T. 617; 17 T. L. R. 429; 6 Com. Cas. 141—C. A.

**29. Liability of Broker's Client to Jobber—Principal and Agent—Privity of Contract—Broker Lumping several Orders under one Transaction—Usage of Stock Exchange.**—The defendant employed a broker on the Stock Exchange to purchase 225 Randfontein shares for the next account. The broker entered into a contract with the plaintiffs who were jobbers on the Stock Exchange, for the purchase of 925 Randfontein shares, of which 225 were included by the broker for the defendant, 150 for the broker himself and another on a joint account, and the remainder for other customers of the broker. The shares were so appropriated by the broker in his books. Before the settling day the broker was declared a defaulter. The plaintiffs were then informed by the broker that 225 of the shares had been bought for the defendant, who, on being applied to by the plaintiffs, repudiated the transaction as regards the plaintiffs. The plaintiffs sold the shares, and, the price having fallen, claimed the difference from the defendant in an action for damages for breach of the contract to buy the shares. The jury found that there was a custom or practice of the Stock Exchange by which a broker lumps together the orders of different customers, and executes them by means of one transaction with a jobber, and that the defendant gave his order on the terms that it might be so executed.

HELD—that privity of contract had been established between the plaintiffs and the defendant, and there must be judgment for the plaintiffs.

SCOTT AND HORTON v. GODFREY, [1901] 2 [K. B. 727; 70 L. J. K. B. 954; 50 W. R. 61; 85 L. T. 415; 17 T. L. R. 633; 6 Com. Cas. 226—Bigham, J.

**30. Broker's Client and Jobber—Completion—Application by Selling Jobber to Buying Jobber to "make down" the Shares—Refusal by Buying Jobber—Obligation of Broker's Client to Tender the Shares—Waiver.**—The plaintiff through Y., a broker on the Stock Exchange, bought from W., a jobber, certain shares for the next account. The plaintiff through Y. sold the shares to the defendants, who were jobbers on the Stock Exchange, for the same account. Before the account Y. was declared a defaulter. W., having been informed that the shares had been sold to the defendants, applied to them to "make

**Brokers and Clients—Continued.**

down" the shares with him. The defendants declined to do this on the ground that by doing so they would have discharged the plaintiff. "Making down" meant that there would be a new contract between W. and the defendants, and that the plaintiff would drop out, *i.e.*, that W. would be substituted for plaintiff.

**HELD**—that the defendants were simply standing on their rights in refusing to accept a transfer from W. as principal, that there was no evidence that the defendants waived their rights or did anything to absolve the plaintiff from his obligation to tender the shares, or that W. was constituted the agent of the plaintiff.

Decision of Phillimore, J. ((1901) 6 Com. Cas. 74) reversed.

CURRIE v. BOOTH BROTHERS (1902), 74 Com. [Cas. 77—C. A.

**STOPPAGE IN TRANSITU.**

See CARRIERS: SALE OF GOODS; SHIPPING AND NAVIGATION.

**STREETS.**

See HIGHWAYS, STREETS AND BRIDGES; METROPOLIS.

**STREET BETTING.**

See GAMING AND WAGERING.

**STREET RAILWAYS.**

See TRAMWAYS AND LIGHT RAILWAYS.

**STREET TRAFFIC.****I. HACKNEY CARRIAGES . . . 803****II. MOTOR CARS.****(a) Offences.**

(i.) *Driving and Speed* . . . 805

(ii.) *Emission of Smoke* . . . 810

(b) Appeals . . . 811

(c) Royal Parks . . . 812

**III. MISCELLANEOUS . . . 812**

And see HIGHWAYS, 49, 50, 52, 53, 104-111.

**I. HACKNEY CARRIAGES.**

1. *Granting Licences—Towns Police Clauses Act, 1847 (10 & 11 Vict. c 89), ss. 37, 46*—Mandamus directed to issue to the district council to hear

and determine the applications for licences for hackney carriages, the Court coming to the conclusion that the district council had in refusing certain licences exercised no discretion in the matter, but had acted in accordance with the terms of an agreement, then cancelled, only to grant licences to two hackney carriage proprietors and their drivers.

REG. v. BARRY DISTRICT COUNCIL, EX PARTE [JONES, (1900) 16 T. L. R. 565—Div. Ct.

2. "*Plying for Hire*"—*Town Police Clauses Act, 1847 (10 & 11 Vict. c 89), s. 45*—The appellant touted for customers for his licensed carriage. A party of nine wanted to go for a drive together, and said that if the appellant had a carriage to take the lot they would take it. The appellant had an unlicensed waggonette at his stable. The whole party went to the stables, and the appellant drove them out in it.

**HELD**—that there was no evidence upon which the justices could find a plying for hire, as the appellant touted for customers for his licensed carriage and not for the waggonette in the first instance.

CAVILL v. AMOS, (1900) 64 J. P. 309; 16 T. L. R. [156—Div. Ct.

3. "*Standing or Plying for Hire*"—*Period of Licence—Licensed Carriage sent out on Booked Order only—Town Police Clauses Act, 1847 (10 & 11 Vict. c 89), s. 38*.—Sect. 38 of the Town Police Clauses Act, 1847, enacts that "Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, having thereon any numbered plate, required by this or the special Act to be fixed upon a hackney carriage . . . shall be deemed to be a hackney carriage within the meaning of this Act." A bye-law under this Act provided that "every proprietor of a hackney carriage shall cause the number of the licence granted to him in respect of such carriage to be painted or marked on a plate in figures" on the carriage while "such carriage may stand, ply, or be driven for hire"

**HELD**—that the general purview of the bye-law was to protect the public, and a man electing to have the privilege of keeping a carriage which is licensed, elects to devote that carriage to the services indicated by the bye-law. Such carriage is licensed for a period, and if used during that period in standing or plying for hire, the number must be shown for the *whole period*; that sect. 38 of the Town Police Clauses Act, 1847, does not limit the period to the time during which the carriage is in fact used for standing or plying for hire in a street; and it applies to such a carriage if sent out to execute a booked order.

HAWKINS v. EDWARDS, [1901] 2 K. B. 169; [70 L. J. K. B. 597; 65 J. P. 423; 49 W. R. 487; 84 L. T. 532; 17 T. L. R. 430; 19 Cox C. C. 692—Div. Ct.

4. *Standing or Plying for Hire—Street—Town Police Clauses Act, 1847 (10 & 11 Vict.*

**Hackney Carriages—Continued.**

*c* 89), ss. 3, 38, 45.]—The respondent stood for hire with an unlicensed carriage upon a cab-rank situated in a road adjoining a railway station. The road was the property of the railway company, subject to a public right of foot-way over and along it. An information against the respondent for standing for hire with an unlicensed carriage having been dismissed by the justices—

**HELD** (affirming the decision of the justices)—that the road was not a street within sect. 3 of the Town Police Clauses Act, 1847.

**HELD ALSO**—that, in order to constitute an offence under sect. 45 of the same Act against the driver of a carriage, it must be proved that such carriage was a hackney carriage within the definition of hackney carriage in sect. 38.

*Curtis v. Embury* ([1872] L. R. 7 Ex. 369; 21 W. R. 143) followed.

*JONES v. SHORT*, (1900) 69 L. J. Q. B. 473; 64 [J. P. 247; 48 W. R. 251, 82 L. T. 197—Div. Ct.

**II. MOTOR CARS.****(a) Offences.****(1.) Driving and Speed.**

**5. Dangerous Speed—Conviction—Duplicity—No Evidence of Actual Traffic—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1.]**—The appellant was convicted for driving a motor cycle "on the public highway at a speed dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway and the amount of traffic which actually was at the time, or which might reasonably be expected to be, on the said highway."

**HELD**—that the conviction was not bad for not showing whether the circumstances taken into account by the magistrate were the actual traffic at the time, or the traffic which might reasonably be expected.

*Semble*, the conviction would have been good if it had ended at the word "case," the other words being mere surplusage.

*REX v. DUBLIN JJ.*, [1904] 2 Ir. R. 698—K. B. D.

**6 Dangerous Speed—Driving at a Speed Dangerous to the Public having regard to all the Circumstances of the Case—Admissibility of Evidence as to the Traffic which might Reasonably be Expected to be on the Highway—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (1).]**—The appellant was convicted before justices, and the conviction as drawn up stated that the appellant drove on a certain highway "at a speed which was dangerous to the public having regard to all the circumstances of the case." On appeal to quarter sessions, evidence as to the amount of traffic which might reasonably be expected to be on the highway, was objected to.

**HELD**—that such evidence was admissible.

*ELWES v. HOPKINS*, [1906] 2 K. B. 1; 75 L. J. [K. B. 450; 70 J. P. 262; 94 L. T. 547; 4 L. G. R. 615; 21 Cox, C. C. 133—Div. Ct.

**7. Dangerous Speed—Aiding and Abetting—Conviction as Principal—Liability of Owner of Car—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5—Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 8—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1.]**—Upon an appeal to quarter sessions by the owner of a motor car against a summary conviction on a charge of having driven the car along a highway at a speed dangerous to the public, there was a conflict of evidence as to whether at the crucial moment the owner of the car was himself actually driving or was sitting on the front seat next to a lady who was driving with his consent and approval. Quarter sessions found that the owner must have known that the speed was dangerous to the public, that he was in control of the car, and that he could and ought to have prevented the driver from driving at such dangerous speed, but that he did not interfere in any way. They affirmed the conviction, being of opinion that the owner (if not driving himself) was aiding and abetting the commission of the offence.

**HELD**—that, as the offence was a misdemeanour, the owner of the car, even if not actually driving the car, but merely aiding and abetting the commission of the offence, was liable to be convicted summarily as a principal, and had been properly so convicted.

*Benford v. Sims* ([1898] 2 Q. B. 641; 67 L. J. Q. B. 655; 47 W. R. 46; 78 L. T. 718—Div. Ct., see ANIMALS, 2) approved.

*DU CROS v. LAMBOURNE*, [1907] 1 K. B. 40; [76 L. J. K. B. 50, 70 J. P. 525; 95 L. T. 782; 23 T. L. R. 3; 5 L. G. R. 120—Div. Ct.

**8. Driving in a Manner Dangerous to the Public—Admissibility of Evidence as to Speed—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (1).]**—On an information under sect. 1 (1) of the Motor Car Act, 1903, for driving a motor car on a public highway in a manner which was dangerous to the public, having regard to all the circumstances of the case, the justices found as a fact that, apart from the question of speed, the defendant drove his car in a manner dangerous to the public.

On appeal the Court **HELD**—that there was evidence to support the finding of the justices. The Court was also of opinion that evidence as to excessive or dangerous speed was admissible on such a charge, although by the same subsection to drive a motor car on a public highway at a speed which is dangerous to the public, having regard to all the circumstances of the case, was constituted a separate offence.

*HARGREAVES v. BALDWIN*, (1905) 69 J. P. 397; [93 L. T. 811; 21 T. L. R. 715; 3 L. G. R. 973; 21 Cox C. C. 33—Div. Ct.

**9 Excessive Speed—"Having Regard to the Traffic on the Highway"—Motor Tricycle—Light Locomotives on Highways Order, 1896, art 4 (1).]**—Article 4 (1) of the Light Locomotives on Highways Order, 1896, provides that a person driving or in charge of a light locomotive when used on a highway shall "not drive the light

**Motor Cars—Continued.**

locomotive at any speed greater than is reasonable and proper, having regard to the traffic on the highway." The appellant drove a motor tricycle at the rate of 18 to 20 miles an hour through a village. The magistrates decided that that speed was excessive, having regard to the traffic on the highway. There was no evidence that any vehicle or person using the highway was interrupted, interfered with, incommoded, or affected by reason of the speed of the tricycle.

**HELD**—that the magistrates were justified, as the words "having regard to the traffic on the highway" meant the traffic on the road and not the traffic within a few yards of the locomotive.

**SMITH v. BOON**, (1901) 65 J. P. 486, 49 W. R. 480; 84 L. T. 593, 17 T. L. R. 472; 19 Cox, C. C. 693—Div. Ct.

1. *Excessive Speed—Driven "to the Common Danger of Passengers"*—*Locomotives on Highways Act, 1896* (59 & 60 Vict. c. 36), s. 4—*Light Locomotives on Highways Order, 1896*, art. 4, s. 1.—Art. 4, s. 1, of the Light Locomotives on Highways Order, 1896, provides that a person shall not drive a locomotive on a highway at any greater speed than is reasonable and proper, having regard to the traffic on the highway, or so as to endanger the life or limb of any person, or "to the common danger of passengers."

The appellant drove a motor car at a high rate of speed through a village. The justices convicted the appellant under the above section of the order, on the ground that the speed was "to the common danger of passengers" using the road, although there was no evidence that anybody was on the road at the time in question.

**HELD**—that the justices were right in convicting the appellant

**MAYHEW v. SUTTON**, (1902) 71 L. J. K. B. 46, [50 W. R. 216; 86 L. T. 18; 18 T. L. R. 52; 20 Cox C. C. 146—Div. Ct.

11 *Exceeding Speed Limit—Evidence of Identity—Notice of Intended Prosecution—Sufficiency of—Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 9.—The defendant was convicted under sect. 9, sub-sect. 1, of the Motor Car Act, 1903, for having driven a motor car at a speed exceeding the legal limit of twenty miles an hour. The evidence was to the effect that two constables were stationed at the seventh milestone from St. Albans, and two others at the third milestone, at which latter milestone the car was stopped; the defendant was then driving, and the chauffeur sitting beside him. The defendant held a licence for driving. The car traversed the distance between the two milestones at the rate of twenty eight miles an hour. The defendant did not give evidence.

**HELD**—that there was no evidence that the defendant had himself driven the car over the whole distance, as alleged, upon which the justices could convict him in the absence of rebutting evidence from him. The notice under sect. 9, sub-sect. 2, of the Act, of the intended prosecution alleged the offence to have been committed between Markyate and St. Albans,

two places which were between ten and twenty miles apart.

**HELD**—that, as the defendant was not misled by it, the notice was valid.

**BERESFORD v. ST. ALBANS JJ.**, (1905) 22 T. L. R. [1—Div. Ct.

12. *Exceeding Speed Limit—Evidence of Police Constable—Timing Speed by Untested Watch—Admissibility—Locomotives on Highways Act, 1896* (59 & 60 Vict. c. 36), s. 4—*Light Locomotives on Highways Order, 1896*, art. 4 (2).—The appellant was convicted on an information preferred by the respondent, charging him with driving a motor car at a greater speed than twelve miles an hour, contrary to the regulations made by the Local Government Board, under the Locomotives on Highways Act, 1896. A police constable gave evidence to the effect that he timed the motor car over a distance of 176 yards, with the result that his watch registered fifteen seconds as the period occupied in covering that distance, giving a speed of twenty-four miles an hour. The watch was an ordinary one with a second hand. No evidence was adduced before the magistrates that the watch used by the constable had been in any way tested for accuracy or was in fact accurate. On appeal.—

**HELD**—that it was impossible for the Court to say that there was no evidence before the magistrates upon which they could convict, and it was also impossible for them to hold that observations as to time ought not to be admitted in evidence unless it was proved that the time in question was Greenwich time.

**GOREHAM v. BRICE**, (1902) 18 T. L. R. 424—[Div. Ct.

13 *Exceeding Speed Limit—"Opinion of one witness"—Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 9.—The appellant was convicted under sect. 9 of the Motor Car Act, 1903, of exceeding the speed limit under the following circumstances. A police sergeant stationed a constable at a point upon a highway a quarter of a mile distant from him, and directly the appellant passed the point at which such constable was standing, the constable gave a signal to the police sergeant, who started a stop-watch, which he stopped as the car passed him. The stop-watch showed that the appellant's car had travelled over the quarter of a mile in 31½ seconds, or at the rate of twenty-eight miles an hour. Upon the hearing of the summons the police-sergeant gave evidence to the above effect, and the stop watch was produced in Court and not objected to.

**HELD**—that this evidence was not merely the "opinion" of one witness as to the car's rate of speed within sect. 9 of the Motor Car Act, 1903, but was evidence of fact on which the justices were entitled to convict.

**PLANO v. MARKS**, (1906) 70 J. P. 216; 94 L. T. [577; 22 T. L. R. 432; 4 L. G. R. 503, 21 Cox C. C. 157—Div. Ct.

14. *Reckless Driving—Motor Car Act, 1903*, (3 Edw. 7, c. 36), s. 1 (1).—The appellant drove his motor car on to a bridge, and just as

**Motor Cars—Continued.**

he was approaching a toll-gate on the further side was informed by the toll-keeper, the respondent, that a toll was payable for the passage of the bridge. The appellant declined to pay the toll—told the respondent to take his number and backed his car off the bridge and turned it round with a view to returning. The respondent thereupon proceeded to the rear of the car with a view to seizing and detaining it or some part thereof. The appellant proceeded along the road at a pace not more than twelve miles an hour with the respondent hanging on to the car. Eventually the respondent let go and was picked up in an insensible condition. The justices found the speed of the car was reasonable and no danger was caused to any other person than the respondent.

**HELD**—that the appellant could not be convicted of reckless driving under sect 1 (1) of the Motor Car Act, 1903, the section applying to recklessness with regard to persons on the highway and not passengers in the car.

**TROUGHTON v. MANNING**, (1905) 69 J. P. 207, [53 W. R. 493, 92 L. T. 855, 21 T. L. R. 408, 3 L. G. R. 548, 20 Cox C. C. 861—Div. Ct.]

**15 Refusal of Name and Address of Driver by Owner of Car—Conviction—Omission of Averment that Driver was Guilty of an Offence—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (3)—Motor Cars (Use and Construction) Order, 1904, art. IV, r. 6.**—The owner of a motor car was convicted for that he did "unlawfully after due notice had been given him refuse to give the name and address of the person who was driving the car 'on a certain date' such name and address being required in order that proceedings might be taken against such driver under sect. 1 of the Motor Car Act, 1903, and art. IV, r. 6, of the Motor Cars (Use and Construction) Order, 1904."

**HELD**—that it is not a condition precedent to the obligation of an owner of a motor car to give the name and address of the driver, that the driver should first have refused to give his name and address. But held, that the conviction was bad, because there was no averment that an offence had been committed by the driver.

**REX v. HANKEY AND OTHERS**, [1905] 2 K. B. 687, [74 L. J. K. B. 922; 69 J. P. 219; 54 W. R. 80; 93 L. T. 107; 21 T. L. R. 409, 3 L. G. R. 554, 21 Cox C. C. 1—Div. Ct.]

**16. Refusal of Name and Address of Driver by Owner of Car—No Allegation in Information or Conviction that Driver had Committed an Offence under s. 1 of the Motor Car Act, 1903—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (3).**—The conviction of an owner of a motor car "for that he . . . then being the owner of a registered motor car, H746, on being duly required so to do, failed to give information to lead to the identification of the person or persons driving such car at . . . on . . . contrary to the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1 (3)," is bad, if it does not aver that the driver of such

car had committed an offence under s. 1 of the Act.

*Reg. v. Hankey and Others*, JJ (*supra*), followed.

**REX v. CHANCELLOR AND OTHERS**, (1905) 69 [J. P. 383, 3 L. G. R. 1012—Div. Ct.]

**17. Warning as to "Traps"—Obstruction of in Execution of Duty—Persons Warning Motorists in Presence of Police—Prevention of Crime Act, 1871 (34 and 35 Vict. c. 112), s. 12, and Prevention of Crimes (Amendment) Act, 1885 (48 & 49 Vict. c. 75), s. 2**—Two police constables were employed in the execution of their duty in tuning the speed of motor cars passing along a road on which certain measured distances had been marked off in order to detect persons driving motor cars at an illegal speed. While the constables were so employed, the respondent on several occasions, by means of signals and, in one instance, by calling out "Police trap," warned the drivers of motor cars approaching the measured distances. In each case the drivers slackened speed on being warned; but there was no finding in the case that the cars were being driven at a speed in excess of the legal limit. The respondent was not acting in concert with the drivers of the cars, nor was he in any way connected with any person or body of persons interested in the driving of motor cars.

**HELD**—that the respondent was not guilty of obstructing the constables in the execution of their duty; but, *semble* per Alverstone, L.C.J., and Darling, J., obstruction of a constable in the discharge of his duty need not necessarily be physical obstruction.

**BASTABLE v. LITTLE**, [1907] 1 K. B. 59; 76 [L. J. K. B. 77; 71 J. P. 52, 96 L. T. 115; 23 T. L. R. 38; 5 L. G. R. 279—Div. Ct.]

(ii.) *Emission of Smoke.*

**18. Excess of Lubrication—Carelessness—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 30—Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1**—On a summons against the owner of a motor car charging an offence under sect 30 of the Highways and Locomotives (Amendment) Act, 1878, it was proved that the locomotive was a petrol-driven motor car less than three tons in weight, and that the emission of smoke was due to carelessness in admitting into the engine an excess of lubricating oil which thereby got burnt and caused the smoke.

**HELD**—that as the cause of the emission of smoke was not improper construction but a temporary one, namely, carelessness, the motor car was, by sect 1 of the Locomotives on Highways Act, 1896, exempted from the operation of sect. 30 of the Highways and Locomotives (Amendment) Act, 1878, and that therefore no offence had been committed against the latter section.

**REX v. WILBRAHAM**, (1907) 71 J. P. 336; 96 [L. T. 712; 5 L. G. R. 764—Div. Ct.]

**19 Smokeless Engine—Constructed so as to Consume its own Smoke—Locomotives on High-**

**Motor Cars—Continued.**

*ways Act, 1896 (59 & 60 Vict. c. 36), s. 1—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 30*—The appellants were summoned under sect. 30 of the Highways and Locomotives (Amendment) Act, 1878, for using on a highway a locomotive which did not consume so far as practicable its own smoke. The locomotive belonged to the appellants, and was a petrol motor-omnibus weighing less than five tons. It had a smokeless engine, but it was seen by the respondent to emit considerable quantities of smoke which smelt of burnt oil. This was caused by the negligence of the appellants' driver in supplying an excessive quantity of lubricating oil to the working parts. The magistrate found as a fact that the omnibus was so constructed that no smoke or visible vapour could be emitted therefrom except by reason of the driver's negligence.

**HELD**—that as the motor-omnibus weighed less than five tons, and was so constructed that no smoke or vapour was emitted therefrom except from any temporary cause, it was exempted by sect. 1 of the Locomotives on Highways Act, 1896, as varied by art. 3 of the Heavy Motor Car Order, 1904, from the operation of sect. 30 of the Highways and Locomotives Act, 1878, and that, therefore, the appellants had committed no offence against the section under which they were summoned.

*STAR OMNIBUS CO. v. TAGG, (1907) 71 J. P. [352; 97 L. T. 481, 23 T. L. R. 488, 5 L. G. R. 808—Div. Ct.]*

**(b) Appeals.**

**20. Appeal—Offence against Order—Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 6—Motor Car Act, 1903 (3 Edw. 7, c. 36)—Motor Cars (Use and Construction) Order, 1904.**—No appeal lies to quarter sessions from conviction under the Motor Car (Use and Construction) Order, 1904, made under sect. 6 of the Locomotives on Highways Act, 1896.

*DAVEY v. BENNETT, (1905) 69 J. P. 200—Qr. Sess.*

**21. Appeal where Fine exceeds 20s.—Inclusion of Costs in Fine—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 49—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 11 (2).**—By sect. 11 (2) of the Motor Car Act, 1903, "any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction. . . ."

**HELD**—that the word "fine" within the meaning of this sub-section does not mean fine and costs added together.

*EX PARTE NOVIS, [1905] 2 K. B. 456, 74 L. J. [K. B. 633; 69 J. P. 288; 93 L. T. 534; 21 T. L. R. 517; 3 L. G. R. 753—Div. Ct.]*

**22 Local Government Board Regulations—Right of Appeal against Conviction—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77)—Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36).**—The Devonshire quarter sessions held that no appeal lies to sessions against a conviction under the Board of Trade

Motor Car Regulations issued pursuant to the Locomotives on Highways Act, 1896.

*STEER v. BENNETT, (1903) 67 J. P. 112—Lord [Coleridge, K.C., Qr. Sess.]*

**(c) Royal Parks.**

**23. Jurisdiction of Commissioners of Works—Statutory Rules and Orders, 1904—Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), ss. 4, 9**—By rule 4 of the Statutory Rules and Orders, 1904, made under the Parks Regulation Act, 1872, it was provided that "cycles, whether mechanically propelled or otherwise, and carriages and cars propelled or drawn by mechanical means shall only be admitted to the parks subject to regulations as may from time to time be framed by the Commissioners of H. M. Works and Public Works and Public Buildings and published by notice exhibited in the parks." A notice was exhibited restricting the pace at which motors were to be driven in the park to ten miles an hour.

**HELD**—that the Commissioners were entitled to publish such notice under rule 4 of the Statutory Rules and Orders, 1904, and that the same was not *ultra vires*, and did not require to be laid before Parliament.

*MUSGRAVE v. KERRISON, (1905) 69 J. P. 341; [92 L. T. 865; 21 T. L. R. 600; 3 L. G. R. 932; 20 Cox C. C. 874—Div. Ct.]*

**24. Endorsement of Licence—Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 4—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4.**—The offence of driving a motor car in a Royal park at a speed greater than that fixed by regulations made under the Parks Regulation Act, 1872, so far as indorsement upon licenses is concerned, is in the same position as the offence of exceeding a speed limit fixed by the Motor Act, 1903. The exception in sect. 4 of that Act as to first and second convictions not justifying indorsement applies to such an offence.

*REX v. MARSHAM, EX PARTE CHAMBERLAIN, [1907] 2 K. B. 638; 76 L. J. K. B. 1036; 71 J. P. 448; 97 L. T. 396; 23 T. L. R. 629, 5 L. G. R. 998—Div. Ct.]*

**III. Miscellaneous.**

**25. Locomotive—Excessive Speed—Crown—Application of Statute to Crown—Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 4**—Sect. 4, of the Locomotives Act, 1865, which enacts that it shall not be lawful to drive any locomotive through any town at a greater speed than two miles an hour, is not binding on the Crown, the Crown not being named therein, and the enactment not being of such a nature as would otherwise bind the Crown.

*COOPER v. HAWKINS, (1903) 19 T. L. R. 620; [1904] 2 K. B. 164; 73 L. J. K. B. 113; 68 J. P. 25; 52 W. R. 233; 89 L. T. 476—Div. Ct.]*

**26. Obstruction—Procession—Liability of Persons Taking Part**—In considering whether a person taking part in a procession is guilty of "wilfully preventing or interrupting the free



**Miscellaneous—Continued.**

passage of persons or carriages in the public street," it is not enough to show that the natural and probable result of such a procession was to cause such obstruction.

It is necessary to go further and prove that the user of the street was unreasonable.

*Original Hartlepool Collieries v. Gibb* ((1887) 5 C. D. 713; 46 L. J. Ch. 311; 36 L. T. 433—Jessel, M. R.) followed

*LOWDENS v. KEAVENEY*, [1903] 21 R. 82; 67 J. P. 378—K. B. D.

**SUBROGATION.**

*See* EQUITY.

**SUCCESSION DUTY.**

*See* DEATH DUTIES.

**SUICIDE.**

*See* CRIMINAL LAW AND PROCEDURE.

**SUMMARY JURISDICTION.**

*See* MAGISTRATES.

**SUNDAY TRADING.**

*See* TIME.

**SUPPORT.**

*See* EASEMENTS; MINES.

**SURETY.**

*See* GUARANTEE AND INDEMNITY.

**SURGEONS.**

*See* MEDICINE AND PHARMACY.

**SWINE FEVER.**

*See* ANIMALS, No. 14.

**TAIL, TENANTS IN TAIL.**

*See* REAL PROPERTY AND CHATTELS  
REAL; SETTLEMENTS.

**TAXATION.**

*See* DEATH DUTIES; INCOME TAX; INHABITED HOUSE DUTY, LAND TAX; REVENUE.

**TAXATION OF COSTS.**

*See* ARBITRATION; COUNTY COURTS; PRACTICE AND PROCEDURE; SOLICITORS, ETC.

**TELEGRAPHS AND TELEPHONES.**

- I. TELEPHONES . . . . . 814
- II. SUBMARINE CABLE . . . . . 818

**I. TELEPHONES.**

**1. Agreement—Yearly Rent Payable in Advance—Rent not Paid When Due—Disconnection of Telephone—Right to Full Rent**—An agreement between G. and a telephone company provided that G. should pay the rent for his instrument in advance. The company was to have the right to disconnect G., without prejudice to the other conditions of the contract, if he failed to observe the company's rules, or if any sum of money payable by him under the contract was in arrear, and the company might also terminate the contract in the event of any sum payable under it being in arrear. G. paid the first year's rent in advance, but upon the second falling due he declined to pay in advance for the future. Thereupon the company disconnected G., and claimed the full rent payable on the first day of the second year, although G. had in fact enjoyed the use of the telephone for only forty days of the second year.

**HELD**—that the company were entitled to recover the second year's rent in full.

*NATIONAL TELEPHONE CO. v. GRIFFEN*, [1906] 2 I. R. 115—K. B. D.

**2. Company with System—New Licence granted to Local Authority—"Restricted inter-communication"—Proper Facilities—Telegraph Act, 1899 (62 & 63 Vict. c. 38) s. 3 (1), (4), (5)**—A company had, before the passing of the Telegraph Act, 1899, established a system of public telephonic communication in an area. Under the Telegraph Act, 1899, the Postmaster-General granted a licence to the local authority over the same area, and extended the then existing licence of the company for a period such as to call sect. 3 (5) of that Act into

**Telephones—Continued.**

operation. The local authority established and opened their system, and made a request for intercommunication within sect. 3 (5), having at that time the number of subscribers required to satisfy Article 1 of the Telegraph (Intercommunication) Order, 1899. The company refused to allow the local authority to connect with their system unless they provided junction circuits to directly connect the corporation exchange both with their central exchange and also with each of their subsidiary exchanges within the area.

Buckley, J., held that proper facilities within the meaning of sect. 3 (5) of the Telegraph Act, 1899, were facilities for using all the several component parts of the system, and that the object of the Act was that the customer of each company should use the trunk line of the other company; and also that the defendants had improperly refused to give such proper facilities.

The Court of Appeal, being of opinion that Buckley, J., had taken a view which was unduly favourable to the plaintiffs, submitted certain questions to a scientific referee for inquiry and report. Having read to the replies contained in that report, the Court, while holding that, under sect. 3 (5) of the Telegraph Act, 1899, and the Telegraph (Intercommunication) Order, 1899, made pursuant to that Act, and in the events which had happened, the plaintiffs were entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of that Order between persons using the telephone system of the defendants and the telephone system of the plaintiffs, made declarations as to specific junction circuits to be provided in order to afford such proper facilities.

Decision of Buckley, J. (74 L. J. Ch. 449; 69 J. P. 239; 53 W. R. 505; 92 L. T. 799; 21 T. L. R. 495; 3 L. G. R. 791) varied.

SWANSEA CORPORATION *v.* NATIONAL TELEPHONE CO., (1906) 75 L. J. Ch. 407; 70 J. P. 366; 94 L. T. 565; 22 T. L. R. 471; 4 L. G. R. 809—C. A.

**3. Interfering with Tramway—Road Authority—Consent of Tramway Company—“Person liable to repair”**—*Telegraph Act, 1863* (26 & 27 Vict. c. 112), ss. 9, 10, 12, 13—*Tramway Act, 1870* (33 & 34 Vict. c. 78), ss. 28, 32.]—A telephone company, under licence from the Postmaster-General, was proceeding to lay wires under a tramway, and in so doing interfered with the tramway company. The telephone company had the consent of the road authority, but the tramway company asked for an injunction restraining the telephone company from doing any work without its previous consent, as the “person liable for the repair” of the street, under sect. 13 of the Telegraph Act, 1863.

HELD—that the tramway company was only brought within sect. 13 of the Telegraph Act, 1863 (if at all), by sect. 28 of the Tramway Act, 1870, and that sect. 32 of that Act prevented the powers of the road authority from being abridged, so that the consent of the tramway company was not required.

BRISTOL TRAMWAYS AND CARRIAGE CO. *v.* [NATIONAL TELEPHONE CO., [1899] 2 Ch. 282; 68 L. J. Ch. 566; 63 J. P. 583; 80 L. T. 836; 15 T. L. R. 430—North, J.

**4. Licence to Provide Telephonic Communication in Exchange Area—New Licence to Local Authority in respect of same Area—Continuance of Powers to Lay down Underground Wires acquired by Company by Agreement with Local Authority—“For the Duration thereof”**—*Telegraph Act, 1899* (62 & 63 Vict. c. 38), s. 3 (1).]—Sect. 3 (1) of the Telegraph Act, 1899—which provides, under certain circumstances, for the continuance of powers acquired by an existing company by agreement with the local authority before the passing of the Act to lay down underground wires in an exchange area, in the event of a new licence being granted to the local authority or to another company in respect of the same exchange area—applies only to the case where the powers of the company are in existence at the date of the grant of the new licence. Accordingly, where the local authority, by virtue of a clause contained in the agreement conferring the powers, has duly determined those powers before the date of the grant of the new licence, the section does not operate to continue them.

The words in the section, “these powers shall continue for the period specified in the new licence for the duration thereof,” refer to the duration of the powers, and not to the duration of the new licence.

Assuming, therefore, that the powers of the company are in existence at the date of the grant of the new licence, they will be continued, not during the duration of the new licence, but during the period (if any) which the new licence specifies for their continuance.

NATIONAL TELEPHONE CO., LD. *v.* CORPORATION OF KINGSTON-UPON-HULL, (1903) 51 W. R. 617; 89 L. T. 291; 19 T. L. R. 577; 68 J. P. 62; 1 C. G. R. 777—Buckley, J.

**5. Removal of Wires stretched across Public Street—Liability—Damages.**]—The appellants alleged a statutory right to place their wires across a public street, and complained of the interference by the respondents—the local authority—with their statutory right, averring that the respondents cut and removed their wires, but not alleging any unnecessary damage to the wires in removing them. They claimed damages against the respondents. The appellants had no authority so to place their wires.

HELD—that an action would not lie against the respondents for the mere removal of the appellants' goods from a public place in which they had no right to place them.

NATIONAL TELEPHONE CO. *v.* CONSTABLES OF [ST. PETER PORT, [1900] A. C. 317; 69 L. J. P. C. 74; 82 L. T. 398—P. C.

**6. Telephone—Telegraph Act, 1869** (32 & 33 Vict. c. 73), s. 5.]—The exemption contained in sect. 5 of the Telegraph Act, 1869 (32 & 33 Vict. c. 73), only extends to communications relating

**Telephones—Continued.**

to the business or private affairs of one person, and not to the external communications between two or more separate establishments.

It does not therefore apply to, *e.g.*, fire alarms between street stations or theatres and a fire brigade station, or wires between two merchants' offices, or between a prison and a police station.

*Attorney-General v. Edison Telephone Co. of London, Ltd.* ((1880) 6 Q. B. D. 244; 50 L. J. Q. B. 145; 43 L. T. 697; 29 W. R. 428) applied.

POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE Co., LD., (1907) 76 L. J. Ch 350; 71 J. P. 221; 96 L. T. 632; 23 T. L. R. 401—  
Eady, J.

**7. Underground Wires—Road Authority—Power of, to impose conditions on Postmaster-General—What conditions may be imposed—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 5, sub-s. 3, s. 9.]—Sect. 9 of the Telegraph Act, 1863, provides that the company—which by a later Act includes the Postmaster-General—shall not place any telegraph under any street except with the consent of the bodies having the control of the streets; and sect. 5, sub-sect. 3, provides that any consent may be given 'on such pecuniary or other terms or conditions as the person or body giving consent thinks fit.'**

**HELD**—that the objections which the road authority are entitled to raise under sect. 5, sub-sect. 3, are objections as to matters only which concern them as a road authority, and that they cannot raise objections as to the modes or conditions of carrying on the service or the reasonableness of the charges for such service; and that they cannot, therefore, when giving consent to the Postmaster-General to lay an underground telephone wire, impose the condition that the wire should not be laid for the use of a particular telephone company unless such company were prepared to provide an improved service at a reduced cost, as such condition would be not only outside the scope of their duties as a road authority, but also unreasonable.

POSTMASTER-GENERAL *v.* LONDON CORPORATION, (1898) 62 J. P. 390; 78 L. T. 120; 14 T. L. R. 222—

Railway and Canal Commission.

**8. Underground Wires—Laying Wires—Opening up Streets—Appeal to County Court Judge—Agreement—Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 4.—Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 5.]—An agreement entered into between a telephone company and a local authority, held not to confer upon the company the right of appealing to the County Court Judge under sect. 4 of the Telegraph Act, 1878, from the refusal of the local authority to allow the company to open up streets for the purpose of laying wires.**

Decision of Divisional Court ((1900) 64 J. P. 756; 48 W. R. 686; 83 L. T. 525, 16 T. L. R. 446) affirmed.

NATIONAL TELEPHONE Co. *v.* TUNBRIDGE [WELLS CORPORATION, (1901) 85 L. T. 368, 17 T. L. R. 459—C. A.

*National Telephone Co. v. Huddersfield Corporation* (17 T. L. R. 460—C. A.) held covered by preceding case.

**II. SUBMARINE CABLE.**

**9. Cable Fouled by Ship's Anchor—Loss of Anchor—Agreement to Compensate Ship—Measure of Damages—Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), Sch., Art. 7.]—The defendants, a submarine telegraph company, having cables laid across the bed of Yang-tze-kiang River, with a view to the preservation of the cables from injury, issued a notice in which they stated that cables, when caught by ship's anchors, chains, &c., were often damaged or broken in the endeavour to free the gear, the latter at the same time being often lost or destroyed, and that they had therefore decided to compensate owners of vessels for loss of material from the above causes by adhering to the Submarine Telegraph Act, 1885, Sched., Art. 7, according to which owners of vessels who could prove that they had sacrificed an anchor, &c., in order to avoid injuring a submarine cable, should receive compensation from the owner of the cable. The plaintiffs' vessel anchored in the Yang-tze-kiang, and her anchor fouled the defendants' cable, and the captain, in order to avoid injuring the cable, slipped the anchor and chain. In consequence of the loss of the anchor the vessel was detained eight days at Shanghai, and damages were claimed in respect of this.**

**HELD**—that the defendants were liable to compensate the plaintiffs for the sacrifice of the anchor and chain, but not under the circumstances of the case to pay further damages resulting from such sacrifice

Decision of Bray, J. (97 L. T. 410, 23 T. L. R. 330; 12 Com. Cas. 166) varied.

AGINCOURT STEAMSHIP Co. *v.* EASTERN EX- [TENSION, AUSTRALASIA, AND CHINA TELEGRAPH Co., AND GREAT NORTHERN TELEGRAPH Co., (1907) 2 K. B. 305; 76 L. J. K. B. 884; 23 T. L. R. 490; 12 Com. Cas. 302—C. A.

**TENANT FOR LIFE AND REMAINDERMAN.**

*See* SETTLEMENTS; TRUSTS AND TRUSTEES.

**TENDER.**

*See* CONTRACT; MONEY; MORTGAGE.

**TESTAMENTARY CAPACITY.**

*See* WILLS.

**THAMES, River.**

See METROPOLIS; SHIPPING AND NAVIGATION, Nos 419, 427; WATER AND WATERCOURSES.

**THEATRES, MUSIC HALLS, AND SHOWS.**

And see AGENCY, 37; COMPULSORY PURCHASE, 14, INTOXICATING LIQUORS, 98.

1. *Actor—Music Hall Artist*—"Re-engagement"—*Question for Jury*.—The defendant, a music hall artist, agreed with the plaintiffs, who were theatrical agents, to pay them a commission on all engagements obtained by him, through them, and also on all his re-engagements with the same halls. During the subsistence of certain engagements obtained through the plaintiffs, the defendant, himself, entered into re-engagements at the same halls.

HELD—that the word "re-engagement" had no definite legal meaning and that the question of what was a "re-engagement" as distinguished from a "fresh engagement" was one for the jury.

ARNOLD v. STRALDON, (1898) 14 T. L. R. 537—  
[C. A.]

2. *Actor—Opera Singer*—"Servant"—*Wages or Salary*—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (b).—An artist engaged to sing during an opera season at a certain sum for each performance.

HELD—that, upon the terms of the contract as a whole, he was a "servant," and his remuneration "wages or salary in respect of services rendered," within the meaning of sect. 1, sub-sect. 1 (b) of the Preferential Payments in Bankruptcy Act, 1888, so as to entitle him to priority of payment up to £50 upon the winding-up of the company by whom he was engaged.

IN RE THE WINTER GERMAN OPERA, LD.,  
[(1907) 23 T. L. R. 662—Warrington, J.]

3. *Actor*—"Understudy"—*Absence of Principal—Right to Play Principal Part—Custom of Profession*.—By a written contract the defendants, who were the managers of a theatre, engaged the plaintiff, who was an actress, for the run of a certain play at the theatre "to understudy" the principal actress at a certain salary, and the plaintiff agreed not to appear at any place of public entertainment elsewhere during her engagement without the defendants' consent. During the run of the piece the principal actress left the theatre, and the plaintiff claimed the right to play the part, which the defendants refused. In an action to recover damages for breach of the contract, evidence was given on behalf of the defendants, that an understudy was not entitled as of right

to play the principal's part if the latter was absent.

HELD—that no right was conferred on the plaintiff to play the part, the contract merely imposing on the plaintiff the obligation of playing the part if called upon by the managers to do so.

NEWMAN v. A. AND S. GATTI, [1907] 24 T. L. R.  
[18—C. A.]

4. *Music Hall—Stage Play—Illegality—Agreement to Produce—Liability to Damages—Theatres Act*, 1843 (6 & 7 Vict. c. 68), s. 11.—The plaintiff agreed with the defendants to produce at their music hall a sketch called "The Fighting Parson" for a period of six weeks, and the agreement contained a clause that "if it should be found that the artist's performance is contrary to law, or is objected to by any licensing or any other public authority, this engagement may be cancelled by the company" (the defendants). After the plaintiff had produced the sketch at the music hall for four weeks the defendants, in consequence of a decision of a magistrate that a somewhat similar sketch was a stage play, and that it was contrary to sect. 11 of the Theatres Act, 1843, to present it at a place not licensed as a theatre, gave notice to the plaintiff cancelling the engagement.

HELD—that the sketch was a stage play, which could not legally be performed at a music hall, and that therefore the defendants were entitled under the agreement to cancel the engagement.

Decision of Phillimore, J. (21 T. L. R. 664), affirmed.

GRAY v. THE OXFORD LD., [1906] 22 T. L. R.  
[684]—C. A.]

5. *Music and Dancing Licences—Power to impose Condition—Charge to be made for Admission—Public Health Acts—Amendment Act*, 1890 (53 & 54 Vict. c. 59), s. 51.—A bench of Justices, in granting a music and dancing licence for a hall in connection with licensed premises, imposed a condition that a sum of 3d. (at least) should be charged to each person for admission, and should not be refunded in the form of refreshment.

HELD—that sect. 51 of the Public Health Acts Amendment Act, 1890, justified the imposition of such a condition.

EX PARTE RICHARDS, (1904) 68 J. P. 536; 20  
[T. L. R. 669—Div. Ct.]

6. *Public Entertainment—Public Music and Singing—Piano in Hotel Smoking-room—Public Health Acts Amendment Act*, 1890 (53 & 54 Vict. c. 59), s. 51.—The appellant, who was the occupier of a fully-licensed hotel, kept a piano-forte in the smoking-room of the hotel. Piano-forte music and singing were frequently performed in the room, the performers being the ordinary customers of the hotel, giving their services gratuitously, and performing for the entertainment of their friends and the other customers of the hotel then using the smoking-room. No charge was made for admission to

**Theatres, Music Halls, and Shows—Continued.**—determining on the merits an application for a licence under sect. 2 of the Theatres Act, 1843, free of all restrictions.

**HELD**—that the room had not been "kept or used" for public music or other entertainment within the meaning of sect. 51, sub-s. 1, of the Public Health Acts Amendment Act, 1890.

**BREARLEY v. MORLEY**, [1899] 2 Q. B. 121; 68 [L. J. Q. B. 722; 63 J. P. 582; 47 W. R. 574; 80 L. T. 801; 15 T. L. R. 392—Div. Ct.

**7. Public Show**—"Other like place of public entertainment"—*Piano on a Portable Platform—Burgh Police (Scotland) Act, 1892* (55 & 56 Vict. c. 55), s. 397.]—A person who sets up a piano on a portable platform out of doors for the use of his party of entertainers sets up "a public show or other like place of public entertainment," within the meaning of sect. 397 of the Burgh Police Act, 1892.

**PATRICK v. WOOD**, (1906) 1 F. (J. C.) 4—Ct. of [Justiciary.

**8. Theatre—Contract to Allow Theatre to be Used for certain Performances—Right of Proprietor to Allow Theatre to be used for other Performances—Theatrical Custom—Evidence of.]**—A proprietor of a theatre who has contracted to allow his theatre to be used by a theatrical company for certain performances during a fixed period has by custom no right, in the absence of an express restriction in the contract, to allow the theatre to be used at other hours for performances by another company during that period.

**COTTON AND ANOTHER v. SOUNES**, (1902) 18 [T. L. R. 456—Wills, J.

**9. Theatre—Licence—Grant of—Discretion to attach conditions—Theatres Act, 1843** (6 & 7 Vict. c. 68).]—A county council acting as the licensing authority for the performance of stage plays, may in the exercise of their discretion, attach to the grant of the licence for such performances a condition that the licensee would not apply for a licence to sell beer, spirits, or wine on the premises of the theatre.

*Reg. v. West Riding County Council* ((1896) 2 Q. B. 386, 60 J. P. 550) followed.

Where the licensee bound himself by a deed of covenant not to apply for a licence for the sale of intoxicating liquor, a memorandum of which deed was attached to the theatre licence, the Court refused to set the deed aside.

**MANCHESTER PALACE OF VARIETIES, LD. v. [MANCHESTER CORPN.]**, (1898) 62 J. P. 425—Lancaster Palatine Court.

**10. Theatre—Licence—Discretion of Licensing Authority—Mandamus—Theatres Act, 1843** (6 & 7 Vict. c. 68), s. 9.]—A rule made under sect. 9 of the Theatres Act, 1843, that "No spirituous liquors, wines, ale, porter, cider, perry, or tobacco shall be sold or disposed of in the building," is not *ultra vires* as depriving the Excise authorities of their discretion to grant a licence under sect. 7 of the Excise Act, 1835, nor does it prevent the licensing authority from

determining on the merits an application for a licence under sect. 2 of the Theatres Act, 1843, free of all restrictions.

*Reg. v. Sylvester*, (1898) 62 J. P. 151, distinguished.

**REG. v. SHEERNESS URBAN DISTRICT COUNCIL** [(1898) 62 J. P. 563; 14 T. L. R. 533, C. A.

## THEFT.

*See CRIMINAL LAW AND PROCEDURE.*

## THREATS.

*See CRIMINAL LAW AND PROCEDURE.*

## TIME.

- I. COMPUTATION OF TIME . . . 822
- II SUNDAY OBSERVANCE . . . 823

### I COMPUTATION OF TIME.

*And see COMPULSORY PURCHASE*, 5, 6; *LANDLORD AND TENANT*, 33; *SHIPPING*, 173, 174, 181-187.

**1. Lighting-up Time**—"One Hour after Sunset"—*Greenwich Mean Time—Statutes (Definition of Time) Act, 1880* (43 & 44 Vict. c. 9), s. 1—*Local Government Act, 1888* (51 & 52 Vict. c. 41), s. 85.]—By sect. 85 of the Local Government Act, 1888, bicycles and other similar machines are required to carry a light "during the period between one hour after sunset and one hour before sunrise."

By sect. 1 of the Statutes (Definition of Time) Act, 1880, "whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time."

**HELD**—that "one hour after sunset" was not an expression of time within the meaning of the Act of 1880, and, therefore, that lighting-up time, within the meaning of sect. 83 of the Local Government Act, 1888, was to be reckoned from the time of sunset in the particular locality in which the alleged offence of riding without a light had been committed.

**GORDON v. CANN**, [1899] 68 L. J. Q. B. 434; 63 [J. P. 324; 47 W. R. 269; 80 L. T. 20; 15 T. L. R. 163—Div. Ct.

**2. Month—Lunar or Calendar—Rule in Commercial Documents—Option to Purchase Patent Rights "within six months."]**—The primary meaning of "month" in legal documents is lunar month, and commercial documents are within this general rule:

*Reg. v. Chawton*, ((1841) 1 Q. B. 247), *dictum* of Littledale, J., explained.

**Computation of Time—Continued.**

It may be shown to mean calendar month by extrinsic evidence in cases where the ordinary rules of construction admit such evidence. The belief or conduct of the parties cannot affect the construction, but an agreement to extend the time may be inferred from conduct where to insist upon the strict sense of lunar months would be inequitable.

BRUNER *v.* MOORE, [1904] 1 Ch. 305; 73 L. J. [Ch. 377; 52 W. R. 295; 89 L. T. 738; 20 T. L. R. 125—Farwell, J.

3. *Week's Notice—Notice given before 12 noon on one Monday to Expire at 12 noon on the following Monday—Notice Insufficient.*—The defendant held certain premises of the plaintiff on a weekly tenancy. By the rent-book agreement it was stipulated that either plaintiff or defendant might determine the tenancy by a week's notice to the other, and that the key was to be delivered to the plaintiff or his agent before 12 o'clock on the day of leaving.

HELD—that, on the true construction of the special agreement, a notice to quit given before 12 noon on one Monday to expire at 12 noon on the following Monday was not a week's notice, as the law does not take notice of the fraction of a day. A week's notice requires seven whole days.

WESTON *v.* FIDLER, [1903] 67 J. P. 209; 88 L. T. [769—Div. Ct.

**II. SUNDAY OBSERVANCE.**

4. *Baker—Jewish Religion—Jewish Sabbath—Lord's Day—Sunday Observance Act, 1677 (29 Chas. 2, c. 7), s. 1—Bread Act, 1822 (3 Geo. 4, c. cvi.), s. 16—Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), s. 1.*—A Jew—a master baker—kept his shop closed on Saturday during the Jewish Sabbath and on Sunday he kept his shop open, and unless he did so the Jewish community would be put to considerable hardships in the matter of fresh-baked bread. Information was laid before the magistrate of the Police Court of the district that he unlawfully exercised his trade or calling by causing to be sold or exposed for sale bread on the morning of Sunday, July 28th, 1901, contrary to the statute 3 Geo. 4, c. cvi. (local), sect. 16, which prohibited the making or baking of bread on the Lord's Day in the district. The magistrate in his discretion deemed it improper, and declined to issue a summons as requested. The Court was asked to order the magistrate, by *mandamus*, to entertain a summons.

HELD—that justices might in the exercise of their discretion refuse to issue a summons, even if there was evidence before them, if they considered that to do so would be vexatious; and that there were other methods of proceeding more applicable to this particular class of offence, viz., a prosecution under 29 Chas. 2, c. 7; and that there was no ground for interfering with the magistrate's discretion.

REX *v.* BROS, [1902] 66 J. P. 54; 85 L. T. 581; [18 T. L. R. 39; 20 Cox C. C. 89—Div. Ct.

5. *Barber and Hairdresser—Sunday Observance Act, 1677 (29 Chas. 2, c. 7), s. 1.*—Section 1 of the Sunday Observance Act, 1677, provides as follows: "No tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day or any part thereof (works of necessity and charity only excepted)."

HELD—that a barber and hairdresser is not included under the terms of the Act.

PALMER *v.* SNOW, [1900] 1 Q. B. 725, 69 L. J. [Q. B. 356; 64 J. P. 342, 48 W. R. 351, 82 L. T. 199; 16 T. L. R. 168—Div. Ct.

6. *Chipped Potato Dealer—Dressing or Selling Meat in Cook's Shop or Victualling House for such as otherwise cannot be Provided—Sunday Observance Act, 1677 (29 Chas. 2, c. 7), ss. 1, 3.*—A chipped potato dealer who cuts up, cooks and fries potatoes, serving the same warm, sometimes alone and sometimes with fish, to poor working class customers for consumption on and off the premises, is dressing or selling "meat" in a cook's shop or victualling house "for such as otherwise cannot be provided," within the meaning of sect. 3 of the Sunday Observance Act, 1677, and is therefore exempt from the restriction against Sunday trading contained in sect. 1 of that Act.

BULLEN *v.* WARD, (1905) 74 L. J. K. B. 916, 69 [J. P. 422, 93 L. T. 439; 21 T. L. R. 753, 21 Cox C. C. 28; 54 W. R. 411—Div. Ct.

7. *Prosecution for Selling Bread—Consent in Writing—Bread Act, 1822 (3 Geo. 4, c. cvi.), s. 16—Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), s. 1.*—In order that there should be a bar to the institution of proceedings in respect of a matter which is *prima facie* within the operation of a statute, it must be clear, either necessarily or by implication, from the language used that a limitation is imposed.

The provisions of the Sunday Observation Prosecution Act, 1871, do not apply to prosecutions under 3 Geo. 4, c. cvi. (which is the Bread Act applying to the Metropolis), so as to make the consent in writing required by the former Act a condition precedent to the institution of a prosecution under the latter for selling or exposing for sale bread on the Lord's Day.

REX *v.* MEAD, [1902] 2 K. B. 212; 71 L. J. K. B. [871; 69 J. P. 676; 50 W. R. 589; 87 L. T. 136; 18 T. L. R. 544; 20 Cox C. C. 337—Div. Ct.

8. *Shopkeeper—Ordinary Culling—Fourteen Years of Age—Evidence.*—The appellant was convicted under the Sunday Observance Act, 1677, of exercising certain worldly labour, business and work, the same not being a work of necessity or charity. The evidence showed that on a certain Sunday the appellant's shop was open from 120 to 10 p.m., and various persons entered and purchased different articles from the man in charge, who was selling on behalf of the appellant, but the appellant was not himself present. The appellant not only had the shop

**Sunday Observance—Continued.**

in question, but was a beer retailer in another town and a cycle repairer. No evidence was given for the appellant, and he was not personally present at the hearing. It was not proved that he was over 14 years of age.

HELD—that there was no ground for interfering with the conviction.

CONNOR v. QUEST, (1907) 71 J. P. 62; 96 L. T. [28—Div. Ct.]

**TITHES.**

See ECCLESIASTICAL LAW.

**TOLLS.**

See HIGHWAYS, 53, 117—121; MARKETS AND FAIRS, 7—10; WATER AND WATERCOURSES.

**TORTS.**

I. IN GENERAL . . . . . 825

II. SLANDER OF TITLE . . . . . 826

See also COUNTY COURTS, HUSBAND AND WIFE, 48, 49; LOCAL GOVERNMENT; TRADE AND TRADE UNIONS.

**I. IN GENERAL.**

1. *Conspiracy—Combination to do Lawful Act—Parents withdrawing Children from School—Action, Cause of—Injury.*—The appellant, a Roman Catholic, was appointed manual instructress in a national school in Ireland, of which a Presbyterian minister was the manager. The respondent, who was a Presbyterian, called a meeting of parents, and some of them determined to withdraw their children from the school. The appellant, who was paid by a capitation grant, suffered loss in consequence. The appellant sued the respondent to recover damages for conspiracy.

HELD—that there was no evidence of a conspiracy to injure the appellant, and that the action was not maintainable.

Decision of the Court of Appeal in Ireland ([1906] 1 I. R. 51) affirmed.

SWEENEY v. COOTE, [1907] A. C. 221; 76 [L. J. P. C. 49, 96 L. T. 748; 23 T. L. R. 418—H. L. (Ir.)]

2. *Sale of Goods—Condition—Purchaser not to Sell to Firms on Suspended List—Purchase by Retailer from Wholesale Dealer—Contract with Manufacturer—Interference with Contractual Relation—Right to Damages.*—The plaintiff company sold goods at trade discount prices only to wholesale dealers who would sign their wholesale dealers' agreement, and to retail dealers who would sign their retail dealers' agreement, the wholesale agreement provided that the goods should only be resold at trade

discount prices to retailers who would sign a retail agreement; by the retail agreement goods were not to be resold at less than list prices.

One E. purchased the plaintiff company's goods from a wholesale dealer, and signed a retail agreement; he resold the same goods at the same price to the defendants, who disregarded the list prices.

The plaintiffs brought an action against the defendants for an injunction to restrain them from inciting persons who had entered into retail dealers' agreements with the plaintiffs from selling the plaintiffs' goods in breach of those agreements.

HELD—that the action failed.

*Semble*, there was no contract between the plaintiff company and E.; but, even if there was, there was no cause of action; interference with contractual relations between other persons is not actionable unless it is of an active nature and produces substantial damage.

NATIONAL PHONOGRAPH CO., LD. v. EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LD., (1907) 76 L. J. Ch. 194; 96 L. T. 218; 23 T. L. R. 189—Joyce, J.

**II. SLANDER OF TITLE.**

3. *Disparagement of Goods—Rival Newspaper—False Statement as to Circulation.*—The plaintiff and the defendant were the owners of newspapers circulating in the same locality, and the defendant published a statement, which was untrue, that "the circulation of" his newspaper "is 20 to 1 of any other weekly paper" in the district; and "where others count by the dozen, we count by the hundred."

HELD—that the above statements were not a mere puff by the defendant of his own newspaper, but amounted to an untrue disparagement of the plaintiff's newspaper, and were actionable on proof of actual damage; but that as no damage was proved the action failed.

LYNE v. NICHOLLS, (1906) 23 T. L. R. 86—Eady, J.

4. *Disparagement of Rival Trader's Goods—Special Damage—Cause of Action.*—Mere puffing of one's own goods as being superior to those of other persons is not actionable; but it is actionable to falsely disparage other persons' goods as being rotten, if special damage results.

The plaintiffs, defendants, and other firms were tendering for a contract to supply wood paving blocks to a road authority. Before the final meeting of the authority for the consideration of tenders the defendants sent out a circular to certain members of the authority advising them to inspect certain roadways paved with wood supplied by the plaintiffs "which are now in a rotten condition." As a result the plaintiffs, though they obtained the contract, had to accept terms as to "retention" money, which otherwise would not have been imposed upon them.

HELD—(1) that the judge had rightly held that the circular might be defamatory, and had

**Slander of Title — Continued.**

rightly left it to the jury to say whether it was defamatory; and (2) that there was evidence of special damage justifying a verdict for the plaintiffs.

*White v. Mellin* ([1895] A. C. 154; 64 L. J. Ch. 308; 59 J. P. 628; 43 W. R. 353; 72 L. T. 334—H. L.) and *Hubbark & Sons v. Wilkinson* ([1899] 1 Q. B. 86; 68 L. J. Q. B. 34, 79 L. T. 429—C. A., see PLEADING, 9) discussed.

*ALCOTT v. MILLAR'S KARRI AND JARRAH FORESTS, LD.*, (1905) 91 L. T. 722; 21 T. L. R. 30—C. A.

**5. Malice—Damage.**—To support an action for slander of title the plaintiff must allege and prove (1) that the statements complained of were untrue, (2) that they were made maliciously, and (3) that special damage has been caused.

The defendants had obtained from the M. company in France the exclusive right to sell M. tyres in England.

**HELD**—that, upon a consideration of the various agreements, the defendants might reasonably conclude that the plaintiffs could not supply or import M. tyres. And, this being so, that there was no malice in their making a statement to that effect; for a man may push his own business, even if in so doing he incidentally injures his neighbour's: to make the act malicious, it must be done with the direct object of causing injury.

Decision of *Walton, J.* (52 W. R. 254; 20 T. L. R. 88), reversed.

*DUNLOP PNEUMATIC TYRE CO., LD. v. MAISON TALBOT AND OTHERS; CLIPPER PNEUMATIC TYRE CO. v. SAME*, (1904) 20 T. L. R. 579—C. A.

**6. Malice—Special Damage—Injuring Rights—Protection of Rights.**—The appellants, who were the plaintiffs, brought an action for trade libel, or slander of title, by reason of which the appellants suffered damage. The libel was that the appellants could not sell their goods under the label shown in the "Trade Marks Journal"; that it had become unlawful to do so by reason of the order expunging them from the Register; that the defendants would proceed against any one selling under those labels; and that the appellants had no right to use the words "Royal Baking Powder."

**HELD** (by Lord Halsbury, L.C., and Lords Davey and Robertson)—that the threat to sue must be shown to have been made for the purpose of injuring the plaintiffs, and not for the *bond fide* protection of the defendants' rights, and without any real intention to follow it up by action or other legal proceedings; that the statements in the circular were untrue and made maliciously; but as there was no clear evidence that the appellants had suffered special damage, the appellants could not claim legal damage for doing that which they had no right to do.

**HELD** (by Lords James and Morris)—that the appellants had proved neither malice nor special damage.

*ROYAL BAKING POWDER CO. v. WRIGHT, [CROSSLEY & CO., (1901) 18 R. P. C. 95—H. L. (E.).*

**7. Words Disparaging the Plaintiff's Property—"Haunted House"—Special Damage—Malice—Evidence of—Fair Comment.**—In an action to recover damages in respect of an article in a newspaper containing alleged defamatory statements against the plaintiff's property—namely, that a house owned by the plaintiff was haunted, and describing the incidents alleged to have taken place there—the jury found a verdict for the plaintiff.

**HELD**—that judgment must be entered for the defendants upon the ground that there was no evidence of special damage.

*BARRETT v. ASSOCIATED NEWSPAPERS, LD.*, (1907) 23 T. L. R. 666—C. A.

## TRADE AND TRADE UNIONS.

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See also SALE OF GOODS, TORTS.

### I. TRADE NAME.

**1. Similarity of Trader's Name—Injunction Refused.**—The plaintiffs were six persons named Attenborough, and were all related to one Robert Attenborough, who established a pawnbroker's business in London some hundred years ago. They brought an action against the defendants claiming *inter alia* an injunction to restrain them from proceeding with the registration of a company under the name of "Jay, Richard Attenborough & Co., Ltd.," or any other name of which Attenborough formed part. The Court held that on the facts of the case there was no ground shown for interference by injunction.

*ATTENBOROUGH v. JAY*, (1898) 14 T. L. R. 439; [affirming *North, J.* (1898), 14 T. L. R. 365—C. A.]

### II. TRADE CUSTOMS.

**2. Hop Trade—Right of Set-off against Principal Debt due from Factor.**—In an action brought to recover £184, the balance due in respect of 255 pockets of hops, which the plaintiffs alleged they had sold for the defendants, the defendants relied on a custom, which they said existed in the hop market, that, where a merchant was dealing with a hop factor, he had



**Trade Customs—Continued.**

a right to treat the factor as the only principal, and to settle for hops bought by payment and set-off in account with the factor only. The Court held that no such custom had been established, and that even if it had been that it would have been far too wide to be reasonable.

COOPER v. STRAUSS & Co. (1898); 14 T. L. R. [233—Kennedy, J.]

3. *Lightermen—Working Overtime—Payment by Person other than Employer.*—The plaintiff alleged that, by a custom of the River Thames, where a "foreign" or "oversea" cargo of sugar or similar heavy goods was discharged into lighters, the lightermen were entitled to be paid a shilling an hour for working overtime by the persons who got the benefit of the overtime work, in addition to the payment for overtime which the lightermen received from their employers under Lord Brassey's award.

HELD—that the alleged custom was unreasonable and was not proved.

GREY v. BUTLER'S WHARF, LD. (1898), 3 [Com. Cas. 67; 14 T. L. R. 217—Kennedy, J.]

**III. TRADE COMBINATION.**

4. *Circular—Interference with Business—Inducing Persons not to deal with Traders—Cause of Action.*—A statement of claim in effect stated that the defendants, in conjunction with others, had maliciously interfered with the plaintiffs in carrying on their business by issuing a circular asking persons not to deal with them.

It was alleged that the intention of the defendants and other signatories to the circular was to induce print-sellers to refrain altogether from dealing with any print publisher who might sell any goods to the plaintiffs, and to coerce print-sellers into refusing to supply the plaintiffs with any goods; that the defendants had so coerced the majority of the print-sellers in this country, and that the plaintiffs had suffered damage in consequence.

HELD, by Bigham, J. (Phillimore dissenting)—that, as an action would not lie against persons who, for their own benefit, combined to induce others to refrain from dealing with a particular person, the plaintiffs' statement of claim disclosed no cause of action, since the acts complained of, if done by an individual, would have been lawful, and they did not become tortious because they were done by several in combination.

BOOTS' CASH CHEMISTS (LANCASHIRE), LD. v. [GRUNDY, (1900) 48 W. R. 638, 82 L. T. 769; 16 T. L. R. 457—Div. Ct.]

5. *Combination of Insurance Companies—Agreement Not to Pay Commission Except to Brokers—Held not Wrongful.*—The A. Society had been in the habit of effecting their fire insurances through a firm of brokers, who, as is usual, received a commission from the insurance companies. In order to earn this commission for themselves the A. Society resolved to deal direct with the companies: thereupon the latter

resolved to pay no commission on the Society's insurances to anyone but a *bond fide* broker, who would undertake not to part with such commission to the insured. The A. Society then appointed the B. Society their agents to effect insurances, and the companies passed another resolution not to pay to the B. Society any commission on insurances effected for the A. Society. The B. Society and its secretary brought an action for an injunction and damages.

HELD—that they could not succeed: for

(1) it was clearly in the companies' real interests to have insurances effected through professional brokers, and therefore the resolution was not wrongful;

(2) there was in any event no damage, since the B. Society, not being professional brokers, must have accounted to the A. Society for any commissions received.

WORKMAN AND A. & N. AUXILIARY CO-OPERATIVE SOCIETY, LD. v. LONDON AND LANCASHIRE FIRE INSURANCE CO. AND OTHERS, [1903] 19 T. L. R. 360—Kekewich, J.]

**IV. RESTRAINT OF TRADE**

And see INFANTS, No. 11; MEDICINE, No. 2.

6. *Agents of Insurance Society—Agreement not to give Information about or Interfere with Business or Represent other similar Business within fifty Miles for one year on ceasing to be Agent—Breaches—Liquidated Damages—Injunction—Election.*—The plaintiffs by an agreement appointed the defendant to the office of inspector of agents, with headquarters at London or elsewhere as the plaintiffs should determine, and it was provided in clause 7 of the 1st schedule thereto that, if the defendant should cease to act at any time under the agreement for the plaintiffs, he thereby bound himself and agreed not to give any information about the plaintiffs' connections, or interfere either directly or indirectly with the business of the plaintiffs, or to represent any other corporation doing similar business to the plaintiff corporation, either directly or indirectly, within a radius of fifty miles from his headquarters within one year at least from the date of his ceasing to receive remuneration of any kind from the plaintiffs; and in case of the breach of the agreement in that behalf the defendant should pay to the plaintiffs a sum of £100 by way of ascertained and liquidated damages. The defendant committed breaches of the agreement. The plaintiffs claimed an injunction and liquidated damages.

HELD—that the plaintiffs had an option to elect between but could not adopt both remedies. If they elected to take liquidated damages there was no room for an injunction, for the £100 damages was all they were entitled to. If, on the other hand, they elected to take an injunction, they could not have judgment as well for the £100 liquidated damages.

GENERAL ACCIDENT ASSURANCE CORPORATION [v. NOEL, [1902] 1 K. B. 377; 71 L. J. K. B. 236; 50 W. R. 381; 86 L. T. 555; 18 T. L. R. 164—Wright, J.]

**Restraint of Trade—Continued.**

**7. Agents of Insurance Society—Reasonableness—Construction—Not to interfere with the "Business"—Business of Agency, not of whole Society.]**—The agents of an insurance society agreed "to introduce all the members in my agency to my successor or to any officer of the society, and not to interfere directly or indirectly with any of the business after having resigned this agency or being dismissed therefrom."

**HELD**—that upon the true construction of this covenant the word "business" referred only to the particular agency of the individual agent, and that, therefore, the covenant was not void as being too wide and unlimited as to space.

**BARR AND OTHERS v. CRAVEN AND OTHERS**,  
[1901] 89 L. T. 574; 20 T. L. R. 51.

**8. Builders' Merchant—Reasonableness of Covenant—Limit of Space]**—The defendant, on entering the employment of the plaintiffs, who were builders' merchants, carrying on business at Southampton, with branch offices at Bournemouth, Poole, Branksome, Portsmouth, and Guildford, covenanted that he would not for the period of fourteen years after the termination of his employment, at any place within a radius of thirty miles, either from the Town Hall at Bournemouth or from the Bargate at Southampton, carry on, or be concerned or interested in any capacity in carrying on, the business of a builders' merchant or manufacturer of or dealer in cement, lime, bricks, plaster, lathes, whiting, and any other building materials which at any time during his employment should be manufactured by, or dealt in, or sold on commission by the plaintiffs, or any other business, trade, or manufacture not within the foregoing of the same or a like nature or character as the business then carried on, or which during his employment might be carried on by the plaintiffs.

The defendant, after leaving the plaintiffs' employment, carried on business as a builders' merchant within seven miles of the Town Hall at Bournemouth.

**HELD**—that fourteen years was not excessive, but that the area was larger than was reasonably required for the protection of the plaintiffs' trade, and was an indivisible area, and that on that ground the covenant was unreasonable.

**Decision of Kekewich, J.** (93 L. T. 236; 21 T. L. R. 691), affirmed.

**HOOPER AND ANOTHER v. WILLIS**, (1906) 94 L. T. 624; 22 T. L. R. 451—C. A.

**9. Carrier—Excessive Restriction on Sale of Business—Canvassing Customers of Original Business.]**—A carrier between Glasgow and Dumbarton sold his business, binding himself not to carry on a similar business in the United Kingdom for a period of ten years. He broke the agreement by starting an opposition business. Interdict against his carrying on the business refused on the ground that the restriction was excessive. Interdict against his canvassing the customers of his original business granted.

**MACFARLANE v. DUMBARTON STEAMBOAT CO.**,  
[1899], 36 S. L. R. 771; 7 S. L. T. 106.

**10. Chemist—Covenant not to Compete—Duration of Restriction—Validity.]**—The defendant, a manufacturing chemist, agreed to enter the service of the plaintiffs, who were also manufacturing chemists, and to sell to them his implements of trade and trading connection. The defendant also agreed that, if the purchase was completed, he would not enter into business competition against the plaintiffs, either for himself, or as manager, or assistant, under a penalty of £200. The defendant, having left the plaintiffs' service, entered into business competition with them.

**HELD**—that the words of the agreement were not too vague, that they were not limited to the period of the defendant's service, and that the agreement was not void as being in restraint of trade.

**MARSHALLS, LD. v. LEEK**, (1901) 17 T. L. R. [26—Phillimore, J.

**11. Clerk—General Covenant—Reasonableness—Evidence—Injunction.]**—The plaintiff, a hardware manufacturer and factor, entered into an agreement with the defendant by which the defendant agreed to serve him in the capacity of "clerk, &c.," in the plaintiff's business, whereby the defendant agreed that he would not during his said service and employment, or after the determination thereof by notice, discharge, or otherwise howsoever, make known or divulge to any person or persons the secrets of the plaintiff, or the mode or principle used or adopted by him in the said business, or any part thereof, or any information whatever with regard to the same, or during or after the determination of such service as aforesaid, work for or serve any other person or persons, company or firm carrying on or engaged or dealing in the same kind of business, or any part thereof, within a radius of twenty-five miles from the works of the plaintiff without his written sanction.

The defendant left the plaintiff's employment, and entered the employment of a firm who carried on a similar business to that of the plaintiff, and were competitors in trade with the plaintiff, and whose works were about three miles from the plaintiff's.

**HELD**—that the defendant was deliberately doing what he plainly agreed not to do, and he must be restrained from continuing in the service of the firm. A restriction in restraint of trade may be good in part, and bad in part. Reasonableness of a covenant in restraint of trade is a question for the Court alone. Evidence of such reasonableness is inadmissible.

**HAYNES v. DOMAN**, [1899] 2 Ch. 13; 68 L. J. Ch. [419; 80 L. T. 569; 15 T. L. R. 354—C. A.

**12. Clerk—Negative Stipulation—Severable covenant—Injunction.]**—H. agreed to serve R. and Co. of W. as confidential clerk for a term of five years from the 1st Jan. 1895, with an option on the part of R. and Co. to renew the engagement for a further term of five years. R. and Co. had power to dismiss H. upon giving him three months' notice. H. agreed during the term to devote the whole of his time, care, and attention, to the business of R. and Co., and that

**Restraint of Trade—Continued.**

he would not "during the engagement," without their previous consent in writing, be engaged as principal, agent, servant, or otherwise, in any business similar to that of R. and Co., "or in any other business whatever" upon pain of instant dismissal. H. covenanted that if he were dismissed he would not within three years from the time of such dismissal be engaged as principal, agent, servant, or otherwise in any business similar to that of R. and Co. within 150 miles of W. In 1898, H. left the employment of R. and Co. without leave, and entered the service of a firm carrying on a similar business, and solicited orders from the customers of R. and Co., who applied for an injunction restraining H. from carrying on, as principal, agent, servant, or otherwise, any business relating to the goods sold or manufactured by them, and from soliciting orders for any other persons.

**HELD**—that the agreement by H. not to engage "in any other business" was severable from the remainder of the clause; and that upon R. and Co. undertaking not to exercise their option to renew the engagement, they were entitled to an injunction restraining H. during his engagement from carrying on or being engaged in any business similar to that of R. and Co.

Decision of North, J., reversed.

ROBINSON & CO., LD. v. HEUER, C. A., [1898]  
[2 Ch. 451; 67 L. J. Ch. 644; 79 L. T. 281;  
47 W. R. 34—C. A.]

**13. Coal Business—"Concerned or interested in"—Construction.**—A. sold his home coal business to the plaintiff, and covenanted not to be concerned or interested in a coal business in Great Britain. He sold his export and foreign coal business to a company, looking to the profits of the company for his purchase-money. The company started an English coal business.

**HELD**—that A. was not "concerned or interested" in such business merely because he had not been paid in full.

CORY & SON, LD. v. HARRISON, [1906] A. C.  
[274; 75 L. J. Ch. 714; 93 L. T. 818  
—H. L. (E.).]

**14. Construction—Consideration—Validity—Limit of Time.**—An agreement between master and servant dealing with what is to happen when that relation ceases, and in restraint of trade, must be construed according to the ordinary canons of construction.

The mere continuance of the engagement affords sufficient consideration for such an agreement.

Such an agreement between a firm of hay and corn dealers and an employee is to be construed with reference to the relation between the parties. A restriction that in the event of the employee ceasing to represent the firm he shall not enter into business for himself or with others, or with any other firm within a radius of two miles from the firm's shop in which he has been engaged without having first obtained the firm's written consent, is valid, and is confined to business of

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the same nature as the one in which the employee was then engaged. The absence of a limit of time does not render the agreement void.

HAYNES v. DOMAN ([1899] 2 Ch. 13; 68 L. J. Ch. 419; 80 L. T. 569; 15 T. L. R. 351—C. A. *supra*) followed.

HOOD AND MOORES STORES, LD. v. JONES,  
[(1899) 81 L. T. 169—Cozens-Hardy, J.]

**15. "Directly or indirectly engaged, concerned, or interested in" a Business—Entering Service of Rival Trader.**—Where a person, upon entering the employment of a trader as a servant in the business, covenants that he will not within a certain time after leaving the employment directly or indirectly be engaged, concerned, or interested in, or carry on a similar trade or business within a certain distance, it is a breach of that covenant to enter the employment of a trader carrying on a similar business as a servant in that business.

CADE v. CALFE, (1901) 22 T. L. R. 243—  
[Kekewich, J.]

**16. "Directly or indirectly interfere with, prejudice or in any manner affect"—Setting up Rival Business.**—The defendant was engaged as traveller to the plaintiff, and he agreed that he would not "on the termination of this engagement or within two years thereafter, without the consent in writing of" the plaintiff "either in his own name or in the name or names of any other person or persons, directly or indirectly, interfere with, prejudice, or in any manner affect the trade or business or reputation of the said" plaintiff, and would not solicit the latter's customers.

**HELD**—that the agreement did not prevent the defendant from setting up a rival business provided that he did not solicit the plaintiff's customers.

REEVE v. MARSH (1906), 23 T. L. R. 24—  
[Parker, J.]

**17. Hay and Straw Merchant—Reasonableness—Injunction.**—B. being in the employ of the plaintiffs, who were wholesale and retail hay and straw merchants carrying on business in the United Kingdom and elsewhere, covenanted that he would not, "for the space of twelve months next after his leaving or being dismissed, carry on the business of hay and straw merchant or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchants in the United Kingdom of Great Britain and Ireland, or in France, or in the Kingdom of Belgium or Holland, or in the Dominion of Canada."

B. having voluntarily left the plaintiff's employ, immediately entered the service of a rival hay and straw merchant in London.

**HELD** by the Court of Appeal (*dissentiente*, Vaughan Williams, L.J.)—that the restraint being reasonably required for the protection of the plaintiffs, having regard to the nature of their business, was not void, and that therefore B. must be restrained by injunction from committing a breach of his covenant.

**Restraint of Trade—Continued.**

UNDERWOOD & SONS, LD. v. BARKER, [1899]  
[1 Ch. 300; 68 L. J. Ch. 201; 47 W. R. 347;  
80 L. T. 306; 15 T. L. R. 177—C. A.]

**18. Illegal Association—Expulsion of Members—Enforcing Agreement—Injunction—Trade Union Act, 1871 (34 & 35 Vict. c. 31), ss. 2, 3, 4—Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16.]**—A tea clearing house consisted of members who were certain dock companies and tea warehouse-keepers, and apart from formal matters such as notices, the amount of the subscriptions of members and the management of the business, the substantial essence of the association was contained in rule 11, whereby all the members agreed to charge in respect of certain services to goods, such as landing, bulking, rent, &c., not less than a specified tariff, and to ensure that there should be no evasion of that contract or bargain there was a provision in rule 11 that "No other discount, no money gratuities, and no advantages, direct or indirect, shall be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in any wise relating to the tea clearing house agreement." By rule 14 it was provided that "No subscriber shall be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock, company, or tea warehouse keeper who is not a member of the clearing house or to purchase or sample any tea from the warehouse of any non-member, and by rule 15 any member or subscriber breaking or failing to observe any of the rules should be liable to expulsion by resolution of the committee."

A resolution was passed by the committee expelling the plaintiffs from membership of the association on the ground that they had committed a breach of the rules. The plaintiffs claimed an injunction restraining the defendants from acting on the resolution.

**HELD**—that the agreement between the members of the association was one which the Court had no power to enforce, as the association came within the definition of a trade union contained in sect. 16 of the Trade Union Act Amendment Act, 1876, and was illegal, and that granting the injunction would be directly to enforce the agreement.

*Rigby v. Connol* ((1880), 14 Ch. D. 482; 49 L. J. Ch. 323; 28 W. R. 650; 42 L. T. 139—Jessel, M.R.) followed.

*Swaine v. Wilson* ((1889), 24 Q. B. D. 252; 59 L. J. Q. B. 76; 54 J. P. 484; 38 W. R. 261; 62 L. T. 309—C. A.)—not to the contrary.

CHAMBERLAIN'S WHARF, LD. v. SMITH, [1900]  
[2 Ch. 605; 69 L. J. Ch. 783; 49 W. R. 91;  
83 L. T. 238; 16 T. L. R. 514—C. A.]

**19. Jeweller—Covenant by Manager not to become "interested in a similar Trade or Business"—Proprietary or Pecuniary Interest in the Success or Failure of a similar Trade or Business—Junior Assistant or Counter Salesman—Breach of Covenant.]**—The plaintiffs carried on a jewellery business with several branches in Regent Street. The defendant had

served the plaintiffs as manager of one of the Regent Street branches, covenanting amongst other things, that he would not after the termination of his engagement become "interested in a similar trade or business" to that carried on by the plaintiffs within a distance of twenty miles from Regent Street. The plaintiffs terminated the engagement in 1901, and in 1902 the defendant became one of the junior assistants or counter salesmen to other jewellers in Regent Street, close to one of the plaintiffs' branches, at a salary of £2 a week, without commission or other direct or indirect pecuniary interest in the business.

**HELD**—that the covenant, fairly construed, prohibited the defendant from being interested in a similar business in the sense that he must not have a proprietary or pecuniary interest in the success or failure thereof; and that he had not committed a breach of covenant.

*Smith v. Hancock* ([1894] 2 Ch. 377; 63 L. J. Ch. 477; 58 J. P. 638; 42 W. R. 465; 70 L. T. 578—C. A.) applied.

GOPHIR DIAMOND CO. v. WOOD, [1902] 1 Ch. [950; 71 L. J. Ch. 550; 50 W. R. 603; 86 L. T. 801; 18 T. L. R. 492—Eady, J.]

**20. Medical Man—Not to Practise in District—Reasonableness.]**—The B. slate quarries, employing 600 men in a remote village, engaged a medical man to attend to the men and their families. For so doing he was to receive a fixed salary, and to be at liberty to hold local appointment and to practise in the district "but only during the tenure of his appointment." In the event of either party terminating the agreement he was to "then discontinue practice in the district."

**HELD**—(diss. Lord Young) that the restrictive covenant was not unreasonably wide, and that the employers had sufficient interest to enforce it.

BALLACHULISH SLATE QUARRIES CO. v. [GRANT, (1904) 5 F. 1,105—Ct. of Sess.]

**21. Milk Seller—"Neighbourhood"—Injunction.]**—By an agreement dated the 18th Sept., 1893, Martin sold his retail milk business and goodwill to the defendant Stride, and covenanted "not to employ any one or retail milk on his own account in the neighbourhood of Southampton or Norham." On a breach of this covenant the County Court judge granted an injunction in the terms of the covenant. The defendant appealed on the grounds that the covenant was wider than was necessary to protect the plaintiff, and therefore void, and that the injunction was bad, not being sufficiently definite in showing exactly where the defendant could not trade.

**HELD**—that the covenant was not too wide to protect the plaintiff, and that the injunction following the terms of the covenant was not too indefinite as the parties must know its meaning, and that the word "neighbourhood" meant immediate neighbourhood.

STRIDE v. MARTIN, (1898) 77 L. T. 600—[Div. Ct.]

**Restraint of Trade—Continued.**

**22. Music Hall Artists—Restraint for Six Months after Engagement—Within Twenty Miles of Manchester—Reasonableness.**—A music-hall artiste undertook a week's engagement at a Manchester music-hall and agreed not to perform within twenty miles of Manchester before or within six months after such engagement. The radius of twenty miles included populous towns, but Manchester places of entertainment were accessible to and patronised by the inhabitants of such towns.

**HELD**—that under the circumstances the restraint was not unreasonable.

*Nordenfjelt and Maxm Nordenfjelt Guns and Ammunition Co.* ([1894] A. C. 535; 63 L. J. Ch. 908; 71 L. T. 489—H. L.) applied.

**TIVOLI (MANCHESTER) LD. v. COLLEY AND [OTHERS]**, (1904) 52 W. R. 632; 20 T. L. R. 437—Walton, J.

**23. Publisher—Limit of Time and Space—Assignee of Business—Right to Sue on Covenant.**—The defendant and his partner, who were publishers and proprietors of a magazine, sold their business to a limited company, and agreed to become managing directors of the company for three years. The agreement further provided that the vendors would not during the three years, if they continued to be managing directors, either solely or jointly, carry on or engage directly or indirectly in any other trade or business, or if they, or either of them, for any reason ceased to be managing directors or director, they or he would not, during the period of ten years from the date of their or his so ceasing, carry on or assist or take part, directly or indirectly, in the same or a similar business in the City of London, or within twenty miles thereof. A receiver, who was appointed on behalf of the debenture-holders in the company, sold the business to the plaintiff, and informed the defendant that his services as managing director would no longer be required.

**HELD**—that the covenant was not too wide; that the covenant was not put an end to by the receiver informing the defendant that his services would no longer be required; and that the benefit of the covenant passed to the assignee upon the assignment of the goodwill of the business.

**WELSTEAD v. HADLEY**, (1905) 21 T. L. R. 165—C. A.

**24. Reasonableness—Policy of the Law**—Observations as to the law with regard to covenants in restraint of trade, and their validity.

**DOTTRIDGE BROS., LD. v. CROOK**, (1907) 23 [T. L. R. 644—Neville, J.

**25. Reasonableness—Covenant Unlimited in Area but Limited in Time—Manufacturers of Brewing Materials—Manager to Firm of Manufacturers—Reasonableness.**—The defendant was employed as manager by the plaintiffs, who were the manufacturers of certain products used in brewing, and he covenanted with them that he

would not, for a period of five years after leaving their employment, enter or be in the employment of any house carrying on a similar business, or carry on or be engaged in any such business, excepting any business not competing or calculated to compete with the plaintiffs' business. The plaintiffs had a large business in England, and were extending their business to other countries in different parts of the world. Within five years after leaving plaintiffs' employment the defendant entered into the employment of a person carrying on a similar business in England competing with the plaintiffs.

**HELD**—that the covenant was not unreasonable, as being too wide, and was therefore valid.

**WHITE, TOMKINS & COURAGE v. WILSON**, (1907) [23 T. L. R. 469—Eady, J.

**26. Reasonableness—A Question for the Judge, not for the Jury**—Where a covenant in restraint of trade is impugned by the covenantor as being unreasonable the question of unreasonableness is (after the jury have found the necessary facts) a question for the judge.

*Mallan v. May* ((1843) 11 M. and W. 553; 63 R. R. 708) followed.

A manager of a business covenanted with his employers, who were cider merchants, manufacturing chemists, and cordial compounders, not to engage in a similar business within five years of leaving their service.

The business was not a very large business, and the great bulk of the customers were in England.

**HELD**—that a "world wide" restriction was too sweeping, and unnecessary for the protection of the employers, and that, therefore, it could not be enforced.

**DOWDEN & POOK, LD. v. POOK**, [1904] 1 K. B. [45; 73 L. J. K. B. 38; 52 W. R. 97; 89 L. T. 688; 20 T. L. R. 39—C. A.

**27. Reasonableness—Space Limit—"Eastern Hemisphere"—Pneumatic Tube Company**—The plaintiff company were introducing a new and peculiar business, virtually unknown except in America, into Europe and the Eastern Hemisphere generally, where a considerable business was expected.

They engaged the defendant as their manager; and he agreed, in the event of his leaving their service, not to engage or be employed during the next five years in any similar business "within the limits of the Eastern Hemisphere."

**HELD** (Cozens-Hardy, L.J., dissenting)—that the covenant did not go beyond what was reasonably necessary for the protection of the plaintiffs' business, having regard to the peculiar nature of the business, and the position occupied by the defendant.

*Per* Cozens-Hardy, L.J.—The covenant was unreasonably wide and void, the case being governed by *Dowden and Another v. Pook* (*supra*).

**LAMSON PNEUMATIC TUBE CO. v. PHILLIPS**, (1904) 91 L. T. 363—C. A.  
27—2

**Restraint of Trade—Continued.**

**28. Restaurant—Covenant by Servant not to Enter the Service of a Rival Establishment—Validity of such Contract by Receiver and Manager appointed by the Court.**—The receiver and manager of a restaurant business, appointed by the Court in certain Chancery proceedings, required each of the waiters at the restaurant to sign an agreement that in consideration of the employer retaining the waiters' services at 4s per week, the latter agreed not to enter into the service of a new restaurant, about to be opened in the vicinity, during the current year, and in case of breach to pay £1 for every day he might remain in the service of the new restaurant as liquidated damages.

**HELD**—that the receiver and manager had authority to enter into the agreement, and that it was a reasonable agreement necessary for the protection of the business.

**HOWARD v. DANNEB**, (1901) 17 T. L. R. 548—  
[Byrne, J.]

**29. Sale of Business—Covenant not to be Interested in any Business of a Like or Similar Nature—Director of a Company.**—The defendant sold to the plaintiff his business of an annatto and food preservatives manufacturer and dealer in condensed milk, and covenanted that he would not either solely or jointly or as agent or manager carry on or be interested in a similar business or any business of a like or similar nature. The defendant held 100 shares in and was a director of a company which manufactured dairy utensils and were general dairy outfitters, and which sold to a limited extent annatto, which they bought wholesale from the plaintiff, to some of their customers.

**HELD**—that the company were carrying on a competing business, and that the defendant must be restrained by injunction in the terms of the covenant.

**CASTELLI v. MIDDLETON**, (1901) 17 T. L. R. 373—Joyce, J.]

**30. Sale of Goods to Wholesale Traders—Wholesale Traders when they sold to others were to procure an Agreement that they would not sell below certain Prices—Validity.**—The plaintiffs were manufacturers of embrocation for horses and cattle, and also for human beings. The defendants were minded to buy the embrocation with a view to selling it again, that is, to buy wholesale in order to sell to others retail, and the plaintiffs made a bargain with them that they should not sell it below certain prices, and that when they sold to others they would procure from those others an agreement that they would not sell it below certain prices.

**HELD**—that the contract was valid on the ground that a man is entitled, when he is selling his own goods, to make a bargain as to the use to be made of them by the purchaser and was not in restraint of trade.

**ELLIMAN SONS & CO. v. CARRINGTON & SON**, [Ld., [1901] 2 Ch. 275; 70 L. J. Ch. 577; 49 W. R. 532; 84 L. T. 838—Kekewich, J.]

**31. Schoolmaster—Assignability—Reasonableness.**—A proprietor of schools, who takes from his teachers a covenant that they will not teach in competition with his schools within two years of leaving his employ, cannot assign the benefit of the covenant to a person who purchases his schools.

**Quære**—whether the following covenant is unreasonably wide “not to teach French for two years in any town in which he shall have been employed by the employer, or where there is a branch of the B. School of Languages, or within a ten-mile radius of such towns.”

**BERLITZ SCHOOL OF LANGUAGES v. DUCHENE**, [(1904) 6 F. 181—Ct. of Sess.]

**32. Sole Agency—Sole Right to supply Wine to a Restaurant—Agreement to take Shares in the Business—Issue of Shares at a Discount—Contract unlimited as to Time—Restraint of Trade—Change in Firm.**—A letter signed by two directors of the defendant company, provided that the plaintiffs, a firm of wine merchants, should have the exclusive right of supplying certain wines to the company, in consideration of the plaintiffs taking and paying for 200 shares in the company.

**HELD**—that the plaintiffs could enforce the contract, although they had since admitted a new partner into their firm. That, as two directors could by the articles form a quorum, it was rightly inferred by the Judge that the letter was (in the absence of evidence to the contrary) intended to bind the company; that the contract was one for a sole agency, and not in restraint of trade, and therefore could not be impeached as being unlimited as to time; and, finally, that the contract was not one to issue shares at a discount, and that other consideration could be found for it in the plaintiffs' implied undertaking to supply as much wine as might be required of good quality and at reasonable prices.

**SERVAIS BOUCHARD AND OTHERS v. PRINCES** [HALL RESTAURANT, LD., (1904) 20 T. L. R. 574—C. A.]

**33. Solicitor's Clerk—Reasonableness—Claim for Liquidated Damages—Injunction.**—A clerk to a firm of solicitors covenanted that, if his engagement should be terminated, he would not “act for any person who is or has within the previous five years been a client of the firm.”

**HELD**—that the covenant referred to persons who should be clients at the date of the termination or within five years before that date, and was not unnecessarily wide.

In such cases a plaintiff, though claiming liquidated damages in his writ, may drop that claim in his statement of claim, and has not, if he does so, waived his right to ask for an injunction.

**LEWIS AND LEWIS v. DURNFORD**, (1907) 24 T. L. R. 64—Eady, J.]

**34. Stockbroker—Covenant—Reasonableness—Validity.**—The defendant, who was em-

**Restraint of Trade—Continued.**

played by a firm of stock and sharebrokers at Cardiff, covenanted that he would not, within twenty years after leaving his employer's service, carry on the business of a stock and sharebroker within fifty miles of Cardiff.

HELD—that the covenant was reasonable.

LYDDON v THOMAS, (1901) 17 T. L. R. 450—  
[Farwell, J.]

**35. Tailor—Future Businesses—Validity—Reasonableness—Severability.**—By an agreement in writing the defendant agreed to serve the plaintiff, who was a tailor at Weybridge, as a cutter, and he further agreed "not to enter into any business arrangement in competition with, or that would in any way interfere with, the business carried on by" the plaintiff "at his establishments in Weybridge, or the City of London, or at any of his addresses of the future."

HELD—that the agreement was unreasonable and void as being too wide, and that it could not be severed by disregarding the part as to future addresses

BEETHAM v. FRASER, (1905) 21 T. L. R. 8—  
[Div. Ct.]

**36. Traveller—Agreement to devote whole of time—Negative stipulation against doing other business—Injunction.**—The defendant having engaged himself as traveller for the plaintiffs, a firm of wine merchants, agreed to devote the whole of his time during the usual business hours to the business of the plaintiffs, and not directly or indirectly engage or employ himself in any other business, or transact any business with or for any person or persons other than the plaintiffs for a term of ten years. At the expiration of about six months of the term, the defendant left the plaintiffs' employ and entered that of another firm of wine merchants, and the plaintiffs moved for an injunction restraining him from engaging in any other business, or transacting business for any other persons during the term of ten years.

HELD—that the negative stipulation in the contract was unreasonable, and ought not to be enforced, and motion refused.

BEHRMANN v BARTHOLOMEW, [1898] 1 Ch. 671;  
[67 L. J. (Ch.) 319, 78 L. T. 646; 14 T. L. R. 361, 46 W. R. 509—Romer, J.]

**37. Traveller for Flour Millers—Principal Company—Subsidiary Company—Servant of Subsidiary Company—Arca.**—The defendant in 1905 entered into an agreement with the chairman of a flour milling company to serve the company (called the principal company) or one of five subsidiary companies of which the chairman of the principal company was a director, at a yearly salary, the service being determinable by a month's notice on either side; and the defendant agreed that he would not within the United Kingdom enter the service of any other flour miller, or directly or indirectly engage in selling or dealing in flour or other goods dealt in or manufactured by the principal and subsidiary

companies within five years from the expiration of his engagement with either the principal or any of the subsidiary companies without the consent of the principal company. The defendant was in fact employed as a traveller by one of the subsidiary companies, called the Cleveland Co., in the North of England, until his engagement was determined by a month's notice. The business of this company was confined to three counties in the North of England. The defendant then entered the service of and travelled for a firm of millers in the Eastern counties. The principal and subsidiary companies brought an action for an injunction to restrain him from continuing in the service. It appeared that the businesses of the six plaintiffs extended in the aggregate to every part of the United Kingdom.

HELD—that, the defendant having been only in the employment of the Cleveland Co., which carried on business in the North of England, the area of the United Kingdom, specified in the agreement, was too wide for their protection, and the agreement was therefore unreasonable; and the fact that all the plaintiff companies had a common management or were interested in each other's business was immaterial.

Decision of Neville, J. ([1907] 1 Ch. 189; 76 L. J. Ch. 119; 23 T. L. R. 144) reversed.

HENRY LEETHAM & SONS, LD. AND OTHERS v. WHITE, [1907] 1 Ch. 322; 76 L. J. Ch. 304, 96 L. T. 318; 23 T. L. R. 254; 14 Mans.—C. A.]

**V. TRADES UNIONS.****(a) Miscellaneous.**

And see ACTION, No 5.

**38. Dissolution—Distribution of unexpended Funds—Resulting Trust.**—A trade union society registered under the Trade Union Acts, 1871 and 1876, passed a resolution to dissolve itself. The rules contained no provision for the application of the funds in the event of a dissolution. The Crown laid no claims to the funds as *bona vacantia*.

HELD—that there was a resulting trust in favour of the existing members at the time of the dissolution in proportion to the amount contributed by each member to the funds of the society; and that, in taking the account, it was not necessary to pay any regard to payments for fines and forfeiture or for benefits received under the rules.

Cunnack v. Edwards, ([1896] 2 Ch. 679; 65 L. J. Ch. 801; 45 W. R. 99; 75 L. T. 122; 12 T. L. R. 614—C. A.) distinguished.

IN RE PRINTERS AND TRANSFERERS AMALGAMATED TRADES PROTECTION SOCIETY, [1899] 2 Ch. 184; 68 L. J. Ch. 537; 47 W. R. 619; 15 T. L. R. 394—Byrne, J.]

**39. Libel Appearing in Newspaper of Trade Union—Trustees Registered as Proprietors—Indemnity out of Funds of Union—Ultra Vires—Trade Union Act, 1871 (34 & 35 Vict. c. 31), ss. 8, 9**—A newspaper, which was carried on to protect the interests of the members of a trade union, was registered in the names of the trustees of the

**Trades Unions—Continued.**

trade union as the proprietors thereof. A libel upon the plaintiff was published in the newspaper. The trustees had not authorised the publication of the libel. In an action against the trustees for libel :—

**HELD**—that, as the property in the newspaper was vested in the trustees, they were liable, and that they were entitled to be indemnified out of the funds of the society.

**HELD ALSO**—that the carrying on of the newspaper was not *ultra vires*, as it was started to protect the interests of members of the society within sect. 2 of the first rule of the society.

LINAKER v. PILCHER AND OTHERS, (1901) 70 [L. J. K. B. 396, 49 W. R. 413, 84 L. T. 421, 17 T. L. R. 256—Mathew, J.

**40. Maintenance—Instigating Member to bring Action for Libel—Reasonable and Probable Cause—Paying Cost of Action—Common Interest.**—The objects of a trade union as stated in the rules, were the raising of funds for mutual benefit by the contributions of the members, which were to be applied (*inter alia*) to giving legal aid to members when necessity arose in their relation with employers, and in cases of a dispute arising between members and their employers, or unlawful treatment of members by their employers, the executive committee were, if they considered the merits of the case justified such a course, to provide legal aid for the members

A member of the union was dismissed by his employer without a week's notice, and in answer to a letter written to him by the general secretary of the union the employer stated that the member was discharged for dishonesty. The union took proceedings on behalf of the member to recover a week's salary in lieu of notice, and the employer paid the amount. The executive committee of the union obtained the members' consent to bring an action for libel against the employer, founded upon his letter to the general secretary, and brought an action and employed their own solicitors, whose costs they paid. The action was dismissed with costs. The employer sued the union to recover his taxed costs of the action for libel.

**HELD**—that the union had instigated the plaintiff to bring the action, for which there was no reasonable or probable cause, that the union had wrongfully maintained the plaintiff in the action, having no common interest, and that, therefore, the union were liable.

*Semble*—There was nothing in the rules of the union to justify the action; but even if there was, the rules could not justify an act which would be wrongful if done by an individual.

GREIG v. THE NATIONAL AMALGAMATED [UNION OF SHOP ASSISTANTS, WAREHOUSEMEN AND CLERKS, (1906) 22 T. L. R. 274—Lord Alverstone, C.J.

**41. Officer Withholding Books—Demand by Executive Council of Trade Union to Branch to deliver up Moneys, Books, Securities, and Papers**

—*Wilful Withholding—Absence of Fraud or Criminality—Jurisdiction of Justices—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 12*—

The executive council of a trade union having had a dispute with one of their branches, demanded that all the moneys, books, papers, and securities held by the trustees of the branch should be delivered up to them. The trustees of the branch refused to comply with this demand, and the executive council accordingly took out a summons to enforce their demand under sect. 12 of the Trade Union Act, 1871. The magistrate dismissed the summons on the ground that no fraud or criminality was alleged, and that he had therefore no jurisdiction.

**HELD**—that the decision of the magistrate was right.

Barrett v. Markham ([1872] L. R. 7 C. P. 405; 41 L. J. M. C. 118; 36 J. P. 535, 27 L. T. 113—Div. Ct.) followed.

MADDEN v. RHODES AND OTHERS, [1906] 1 [K. B. 534; 75 L. J. K. B. 329; 70 J. P. 230, 54 W. R. 373; 94 L. T. 741, 22 T. L. R. 356; 21 Cox C. C. 180—Div. Ct.

**42. Registration—Liability to Sue and be Sued by Registered Name—Trade Union Act, 1871 (34 & 35 Vict. c. 31)—Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22).**—A trade union, registered under the Trade Union Acts, 1871 and 1876, may sue and be sued by its registered name.

Decision of the Court of Appeal ([1901] 1 K. B. 170; 70 L. J. Q. B. 219; 64 J. P. 788, 49 W. R. 101; 83 L. T. 471; 17 T. L. R. 68) reversed.

TAFF VALE RAILWAY CO. v. AMALGAMATED [SOCIETY OF RAILWAY SERVANTS, (1901) A. C. 426, 70 L. J. K. B. 905; 65 J. P. 596; 50 W. R. 44; 85 L. T. 147, 17 T. L. R. 698—H. L. (E)]

**43. Registered as a Limited Company—Invalidity of Registration—No Title to sue for Fines.**—A Manufacturers Defence Association was registered under the Companies Acts as a limited company, its object being to prevent bottles, &c., belonging to members being dealt with by unauthorised persons.

In an action by the company to recover from a member a fine imposed in accordance with its articles and byelaws.

**HELD**—that the association was a trade union within the meaning of the Trade Union Act Amendment Act, 1876, that its registration was therefore void, and that as an unincorporated company it could not maintain the action.

EDINBURGH AND DISTRICT AERATED WATER [MANUFACTURERS DEFENCE ASSOCIATION v. JENKINSON, (1904) 5 F. 1159—Ct. of Sess.

**(b) Rules.**

**44. Action Against Trade Union and Officer of Union—Cost of Officer's Defence—Ultra vires**—The plaintiffs were members of the Liverpool No. 1 Branch and the Southport Branch of the Amalgamated Society of Railway



**Trades Unions—Continued.**

Servants. They asked for an injunction to restrain the trustees of the society from acting in pursuance of certain resolutions of the executive committee of the society, and from employing the funds or expending the moneys of the society on the separate or other defence of the organising secretary of the society for the West of England and South of Wales to an action brought by the Taff Vale Railway Company against the society and him.

**HELD**—that one of the rules of the society gave power to institute legal proceedings which the executive committee might deem to be in the interests of the members; that there was no evidence to show that it was deemed by the society or the executive committee that the defence of the organising secretary was in the interest of members; that his defence was not vital to the interests of the society; that the defence of the society should be dissociated from the organising secretary in view of the action of the latter and the men prior to a certain strike; and that the plaintiffs were entitled to succeed, and an injunction would be granted against them.

**ALFIN v. HEWLETT**, (1902) 18 T. L. R. 664—  
[Joyce, J.]

**45. Application of Funds contrary to Rules—Strike Pay—Action by Member for an Injunction—“Directly enforcing Agreement”—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4.**—A trade union, authorised by its rules to grant strike pay only under certain conditions, misapplied its funds by granting strike pay in cases not falling within its rules.

A member thereupon brought an action against the union, its trustees and some of its officials for an injunction restraining them from making such payments.

**HELD**—that the action was maintainable, being brought to prevent misapplication of the funds of the union, and not for the purpose of “directly enforcing” an agreement for the application of the funds to provide benefits to members within the meaning of sect. 4 of the Trade Union Act, 1871.

**Wolfe v. Matthews** ((1882) 21 Ch. D. 194; 51 L. J. Ch. 833; 30 W. R. 838; 47 L. T. 158—Fry, J.) approved.

Decision of C. A. ([1903] 1 K. B. 308; 72 L. J. K. B. 176; 88 L. T. 134; 19 T. L. R. 193) affirmed.

**YORKSHIRE MINERS’ ASSOCIATION AND OTHERS v. HOWDEN AND OTHERS**, [1905] A. C. 256; 74 L. J. K. B. 511; 53 W. R. 667; 92 L. T. 701; 21 T. L. R. 431—H. L. (E).

**46. Inducing Breach of Contract—Strike—Grant of Strike Pay after Contracts at an End—Strikes Unauthorised by Union—Liability of Union.**—Where workmen break their contract and go on strike, persons who afterwards merely help to maintain such strike incur no liability to the employers.

In an action by colliery owners against a

trade union for inducing workmen to break their contracts,

**HELD**—that there was no evidence that the union in the first instance authorised the acts of certain officials who originated the strike, and that the union was not rendered liable by the fact that after the strike had begun it gave pay to the strikers, although its rules did not authorise such payments.

**DENABY AND CADEBY MAIN COLLIERIES, LD. v. YORKSHIRE MINERS ASSOCIATION AND OTHERS**, [1906] A. C. 537; 75 L. J. K. B. 961; 95 L. T. 561; 22 T. L. R. 543—H. L. (E).

**47. Benefit on Sickness—Insanity of Member—Alteration of Rules to his Prejudice—Validity of Alteration—Action against Union for Sick Benefit—Jurisdiction to Entertain—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4 (3).**—The insanity of a member of a trade union does not render invalid an alteration in the rules duly carried out, although such alteration may prejudicially affect the interests of the insane members.

**Quære**—whether an action will lie against a trade union to enforce payment of benefits.

**Swaine v. Wilson** ([1890] 24 Q. B. D. 252; 59 L. J. Q. B. 76; 54 J. P. 484; 38 W. R. 261; 62 L. T. 309—C. A.) discussed.

**BURKE v. AMALGAMATED SOCIETY OF DYERS**, [1906] 2 K. B. 583; 75 L. J. K. B. 533—  
Div. Ct.

**48. Fine—Claim to restrain Society from enforcing Fines—Action not maintainable—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4.**—The plaintiffs, members of a trade union, sought to restrain the union from enforcing certain fines imposed upon the plaintiffs, which they alleged to be *ultra vires* and unjust.

**HELD**—that in consequence of sect. 4 of the Trade Union Act, 1871, the action was not maintainable.

**Rigby v. Connol** ((1880) 14 Ch. D. 482; 49 L. J. Ch. 328; 28 W. R. 650, 42 L. T. 139—Jessel, M. R.) followed.

**MULLETT AND OTHERS v. UNITED FRENCH [POLISHERS LONDON SOCIETY]**, (1904) 91 L. T. 133; 20 T. L. R. 595—Kekewich, J.

**49. Levy—Member of Parliament—Rules—No Machinery Provided for Making Levy—Ultra vires—Trade Union Acts, 1871 (34 & 35 Vict. c. 31), s. 4; and 1876 (39 & 40 Vict. c. 22), s. 16.**—One of the rules of a trade union provided that one of its objects was to provide funds wherewith to pay the expenses of returning and maintaining representatives in Parliament. The rules, however, prescribed no machinery by which a levy from the members could be made for that purpose. A ballot of the members was taken upon a proposal to make a levy for the above purpose, and the proposal was carried.

**HELD**—that the rule was not *ultra vires* or illegal; and that, as the majority of the members had honestly, without fraud or oppression,

**Trades Unions—Continued.**

resolved to make a levy, the Court would not interfere.

STEELE v. SOUTH WALES MINERS' FEDERATION, [1907] 1 K. B. 361; 76 L. J. K. B. 333; 96 L. T. 260, 23 T. L. R. 228—Div. Ct.

50. *Rules in Restraint of Trade—Other Rules for Benefit of Members—Attempt to Enforce by Action—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4.*—Some of the rules of a workmen's society provided for benefits to sick and injured members; but the rules dealing with such objects formed only a small number of the whole, and the main object of the society was organisation for trade purposes.

HELD — that the society was an "illegal society," and that sect. 4 of the Trade Union Act, 1871, did not allow a member of it to enforce by action his claim to a benefit under the rules.

Old v. Robson ((1890) 55 L. J. M. C. 41; 54 J. P. 597; 38 W. R. 95; 62 L. T. 282—Div. Ct.) followed

SAYER v. AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS, (1903) 19 T. L. R. 122—Bruce, J.

51. *Rules for benefit of Members—Other Rules in Restraint of Trade—Attempt to enforce by Action—Illegal Society—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4.*—Some of the rules of a society were friendly society rules dealing with the payment of sick benefits, general expenses, &c.; but there were some rules which were clearly trade rules, breach of which might entail a member's expulsion. Trade protection appeared to the Court to be its primary object, and the two classes of rules were so mixed up that they could not be separated.

HELD — that the society was an "illegal society," and that sect. 4 of the Trade Union Act, 1871, did not allow a member to bring an action to recover a superannuation allowance alleged to be due to him.

Old v. Robson ((1890) 55 L. J. M. C. 41; 54 J. P. 597; 38 W. R. 95; 62 L. T. 282—Div. Ct.) followed

Decision of Div. Ct. (88 L. T. 686; 19 T. L. R. 426) affirmed

CULLEN v. ELWIN AND OTHERS, (1904) 90 [L. T. 840; 20 T. L. R. 490—C. A.]

52. *Strike without Approval of Committee—Forfeiture of all Claims on Union—Ultra Vires*—The rules of a trade union, the management of which was vested in a council, under whom an executive committee acted, provided that no lodge was to give notice of a strike until its case had been laid before a council or committee for their approval and that any lodge, or number of men in a lodge, ceasing work without the approval of either the committee or council should forfeit all claims on the union. A number of men in a lodge ceased work on account of a dispute with their employer without

having laid their case before the council or the committee for their approval. The executive committee refused to grant strike pay, but the council on appeal allowed it.

HELD—that the resolution of the council was *ultra vires*.

IN RE DURHAM MINERS' ASSOCIATION, WATSON v. CANN, (1901) 17 T. L. R. 39—C. A.

**(c) Conspiracy.**

53. *Procuring Discharge of Servant—Cause of Action—Malice—Motive.*—Where an act is lawful in itself the motive with which it is done is immaterial. To induce a master to discharge a servant, if the discharge does not involve a breach of contract, or to induce a person not to employ a servant, though done maliciously, and resulting in injury to the servant, does not give him any cause of action.

Keeble v. Hickeringill (11 East, 574, n.) and Lumley v. Gye (2 F. & B. 216) discussed and explained; Temperton v. Russell, (1893) 1 Q. B. 715 disapproved

Judgment of the Court of Appeal, *Sub nom. Flood v. Jackson*, [1895] 2 Q. B. 21; 69 J. P. 388; 65 L. J. Q. B. 665; 73 L. T. 161; 43 W. R. 453, reversed (the Lord Chancellor (Halsbury), Lords Ashbourne and Morris dissenting).

ALLEN v. FLOOD, [1898] A. C. 1; 62 J. P. 595, [67 L. J. Q. B. 119; 77 L. T. 717; 14 T. L. R. 125, 46 W. R. 258; H. L. (E.).

54. *Conspiring with others to induce a person not to employ the Plaintiff*—The jury found that the defendant had conspired with others to induce a person not to employ the plaintiff, nor to permit him to hire or drive a cab.

HELD—that this gave the plaintiff no cause of action.

Allen v. Flood, [1898] A. C. 1 (*supra*) considered.

HUTLEY v. SIMMONS, [1898] 1 Q. B. 181; 67 L. J. Q. B. 213, 14 T. L. R. 150—Darling J.

55. *Maliciously inducing Employee not to Continue in Employment of Trader—Maliciously inducing Customers to Cease to Deal with Trader—Intention to Injure Trader—Interference with Trader's Liberty of Action—Right of Action—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), ss. 3, 7.*—The plaintiff complained of the defendants and proved to the satisfaction of a jury that the defendants wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff, that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff.

HELD—that the plaintiff's rights had been infringed by the defendant's conduct so as to give him a cause of action, that the defendants violated their duty to the plaintiff and his customers and servants, which was to leave them

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in the undisturbed enjoyment of their liberty of action, and this violation of duty by the defendants resulted in damage to the plaintiff.

**HELD ALSO**—that sect. 3 of the Conspiracy and Protection of Property Act, 1875, has no application to civil actions, it is confined entirely to criminal proceedings.

*Allen v. Flood* ([1898] A. C. 1; 67 L. J. Q. B. 119; 62 J. P. 595; 46 W. R. 239; 77 L. T. 717; 14 T. L. R. 125—H. L. (E), No 53, *supra*) distinguished.

*Temperton v. Russell* ([1893] 1 Q. B. 715; 62 L. J. Q. B. 412; 57 J. P. 676; 41 W. R. 565; 69 L. T. 78—C. A.) followed.

Decision of the Irish Court of Appeal *sub nom. Leatham v. Craig* ([1899] 2 I. R. 667, 744) affirmed.

*QUINN v. LEATHEM*, [1901] A. C. 495; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749—H. L. (Ir.)

**56. Inducing Persons to refuse Employment to Workman—Object, to compel Payment of Money due to Union—Liability of Union and Officers.**—Two officers of the defendant union, for the purpose of injuring the plaintiff, a member of the union, and to punish him for his offence in not paying what he owed to the society, induced the plaintiff's fellow-labourers to refuse to work with him and induced employers to refuse him employment.

**HELD**—that the two officers were liable to the plaintiff; and that the union was also liable on the ground that the officers acted for the benefit of the union, and that (even if they were not so acting) their acts had been adopted by a general meeting of the union.

*Quinn v. Leatham* ([1901] A. C. 495; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749—H. L. (Ir.), *supra*) followed.

Decision of Walton J. (18 T. L. R. 500) varied.

*GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND AND OTHERS*, [1903] 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386; 19 T. L. R. 708—C. A.

**57. Procuring Breach of Contract—No Justification—Cause of Action—Absence of Intent to Injure.**—It is an actionable wrong to procure a breach of contract unless there be some justification for so doing.

The executive council of a coal miners' trade union were authorised by the members to declare a general holiday, at any time they might think it necessary for the protection of wages and of the industry generally, in order to arrest the downward price of coal. The council subsequently declared a general holiday without notice to the masters, when all the miners left off work for the day. In doing so the council acted from an honest desire to forward the interests of the men, having been solicited by the men to advise and guide them on the point, and not from a desire to injure the masters, and

without any malice towards them. In an action by the masters against the trade union and its officers for wrongfully and maliciously inducing the men to break their contracts of service,

**HELD**—that the defendants showed no justification for their action and were liable in damages.

Decision of C. A. ([1903] 2 K. B. 545; 72 L. J. K. B. 893; 89 L. T. 393; 19 T. L. R. 708) affirmed.

*SOUTH WALES MINERS' FEDERATION AND OTHERS v. GLAMORGAN COAL CO. LD., AND OTHERS*, [1905] A. C. 239; 74 L. J. K. B. 325; 53 W. R. 593; 92 L. T. 710; 21 T. L. R. 441—H. L. (E.)

**58. Trade Union—Procuring Servant to be Discharged—Masters' Federation—No Breach of Contract—Lock out of Men at one Place—Man Obtaining Employment with Federated Employer—Name of Workman Sent to such Employer.**—One of the rules of a master builders' federation provided that no member should employ any workman who was on strike, or locked out, from the workshop of another member. At the request of the A. branch of the federation, the secretary sent notice to a firm of employers at L that the plaintiff, one of the men working for them, had been, and still was, locked out at A, and the employers in consequence wrote to their foreman to the effect that he had better be discharged, or they would get into trouble. The plaintiff was dismissed, but with the proper length of notice, and he now sued the A. branch and three of its officers for wrongfully and maliciously procuring his discharge. The County Court Judge held that there was no evidence to support his case.

**HELD**—that the plaintiff had failed to bring his case within the rules laid down in *Quinn v. Leatham* ([1901] A. C. 495; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289—H. L., No. 55, *supra*), and could not recover.

*BULCOCK v. ST. ANNE'S MASTER BUILDERS' FEDERATION AND OTHERS*, (1903) 19 T. L. R. 27—Div. Ct.

**59. Trade Union—Procuring Breach of Contract—Sufficient Justification for Interference—Equal or Superior Right—Not being actuated by Improper Motives is Insufficient—Right of Action.**—A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

The plaintiff entered into a contract by which he became entitled to demand of a firm that they should teach him the trade of a stonemason. The firm and the men in their employ were members of the defendant society. In consequence of the action of the society, the firm did not employ the plaintiff as a stonemason or instruct him in his trade, because the society threatened that they would authorise their members to give two hours' notice to quit the firm's service if the plaintiff was taught.

**HELD**—that it was not a justification that the society acted *bona fide* in the best interests of

**Trades Unions—Continued.**

the Society of Masons, *i.e.*, in their own interests; that it was not enough that they were not actuated by improper motives; that their sufficient justification for interference with the plaintiff's right must have been an equal or superior right in themselves, and that no one could legally excuse himself to a man, of whose contract he had procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or *bonâ fide*, or in the interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage.

READ v. FRIENDLY SOCIETY OF OPERATIVE [STONEMASONS OF ENGLAND, IRELAND AND WALES, [1902] 2 K. B. 88; 71 L. J. K. B. 634; 50 W. R. 619; 86 L. T. 593; 18 T. L. R. 577—Div. Ct.

HELD, on appeal (varying decision of Divisional Court)—that the plaintiff was entitled to maintain an action against the defendants, for the defendants had knowingly and for their own ends, procured the commission of an actionable wrong, and had procured it by the use of illegal means and it was immaterial that they seemed to have acted in good faith and in the best interests of their society.

READ v. FRIENDLY SOCIETY OF OPERATIVE [STONEMASONS OF ENGLAND, IRELAND, AND WALES, [1902] 2 K. B. 732; 71 L. J. K. B. 994; 51 W. R. 115; 87 L. T. 493; 19 T. L. R. 20; 66 J. P. 822—C. A.

**(d) Offences.**

60. "*Watching and Besetting*"—*Nuisance—Conspiracy and Protection of Property Act, 1875* (38 & 39 Vict. c. 81), ss. 3, 7.—Watching and besetting a man's house in order to compel him to do or not to do what is lawful for him not to do or do is a nuisance at common law, and is, therefore, done "wrongfully and without lawful authority" within the meaning of sect. 7 of the Conspiracy and Protection of Property Act, 1875, unless some reasonable justification for it is consistent with the evidence. Watching and besetting are only lawful in the cases mentioned at the end of the section, *viz.*, for the purpose of obtaining or communicating information. Watching and besetting the house or place of business of one person with a view to compel another person is within the section.

Decision in *J. Lyons & Sons v. Wilkins* ([1899] 1 Ch. 811; 65 L. J. Ch. 601; 45 W. R. 19; 74 L. T. 358—C. A.) approved.

Decision of Byrne, J., affirmed.

J. LYONS & SONS v. WILKINS, [1899] 1 Ch. 255; [68 L. J. Ch. 146; 63 J. P. 339; 47 W. R. 291; 79 L. T. 709; 15 T. L. R. 128—C. A.

61. "*Watching and Besetting*"—*Nuisance—Conspiracy and Protection of Property Act, 1875* (38 & 39 Vict. c. 86), s. 7.—Watching or besetting is unlawful within the meaning of sect. 7, sub-sect. 4, unless it is in order merely

to obtain or communicate information. Watching or besetting a house or other place where the workmen are is unlawful, if done in order to compel a master to do or abstain from doing what he has a legal right to abstain from doing or to do.

*J. Lyons & Sons v. Wilkins* ([1899] 1 Ch. 255; 68 L. J. Ch. 146; 63 J. P. 339; 47 W. R. 291; 79 L. T. 709; 15 T. L. R. 128—C. A., *supra*) followed.

There is nothing in the Conspiracy and Protection of Property Act, 1875, which defines the duration of the watching. It may be for a short time. The word "attendance" does not necessarily imply any lengthened attendance upon the spot; nor is there anything in the statute to limit its operation to a place habitually frequented by the workman, such as the house where he resides or the place where he works. The words "place where he happens to be" embrace any place where the workman is found, however casually.

CHARNOCK v. COURT, [1899] 2 Ch. 35; 68 [L. J. Ch. 550; 63 J. P. 456; 47 W. R. 633; 80 L. T. 564—Stirling, J.

62. "*Watching and Besetting*"—*Picketing—Offence—Conspiracy and Protection of Property Act, 1875* (38 & 39 Vict. c. 86), s. 7, sub-s. 4.—The defendants stationed pickets to watch the plaintiffs' printing works for the purpose of inducing the workmen employed by the plaintiffs to join the union, and then to determine their employment by proper notices, the object being to compel the plaintiffs to become employers of union men and to abstain from employing non-union men. There was no evidence that the pickets invited the men to break their contracts. This was carried out without causing by violence, obstruction, or otherwise a common law nuisance.

HELD—that this was not an offence within sect. 7, sub-sect. 4, of the Conspiracy and Protection of Property Act, 1875, and an action would not lie in respect thereof.

Per Vaughan Williams and Moulton, L.J.J.: The object of sect. 7 is to give, in respect of certain specified classes of acts, for which there was previously a civil remedy, a criminal remedy by summary proceedings before justices.

WARD, LOCK & CO., LD v. THE OPERATIVE [PRINTERS' ASSISTANTS' SOCIETY AND ANOTHER, (1906) 22 T. L. R. 327—C. A.

## TRADE MARKS AND DESIGNS.

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## I. REGISTRATION.

## 1. Application.

1. *Application to Register a Name in Plain Letters—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64 (1) (a).*—H.B.H. Princess Christian had given her consent to the applicant that a multiple-eyed needle, which the applicant alleged she had invented, should be called the Princess Christian needle. The applicant applied to register the words "Princess Christian" in plain letters as a trade mark in Class 13 in respect of needles with multiple eyes.

HELD—that the registration must be refused on the ground that, according to sub-sect. (a) of sect. 64 of the Patents, Designs and Trade Marks Act, 1883, there was not in the case a name of an individual or firm printed, impressed or woven in some particular and distinctive manner, and this was an application to register a name in plain letters.

IN RE CARROLL'S APPLICATION TO REGISTER  
[A TRADE MARK, (1899) 16 R. P. C. 82—  
Kekewich, J.]

2. *Appeal to Board of Trade—Appeal referred to Court—Directions by Board of Trade—Trade Marks Rules, 1890, No. 23.*—The applicants applied to register a label. The Comptroller refused to proceed with the application, as the mark did not consist of any of the essential particulars required as a condition of the registration of a new trade mark. The applicants appealed to the Board of Trade, who referred the appeal to the Court, directing that notice of the application should be served upon the Comptroller-General and Liebig's Extract of Meat Company, Ltd.

HELD—that the direction was authorised by Rule 23 of the Trade Marks Rules, 1890, which have the force of a statute, and that both the Comptroller-General and Liebig's Extract of Meat Company, Ltd., must be served.

IN RE EXTRACT OF MEAT (BARON LIEBIG) PHOTOGRAPH BRAND, LD., (1900) 17 R. P. C. 161—Cozens-Hardy, J.]

## 3. Title of Applicants—User in England.]—

Previous to 1893, one Schering had manufactured in Germany a solution of formic aldehyde (or formaldehyde) in water, the proportion being 40 per cent. of formaldehyde to 60 per cent. of water. This he used for disinfecting and photographic purposes. He formed a company, and in 1893 invented the word "Formalin," meaning 40 per cent. solution of formaldehyde. In the same year letters patent were granted in Great Britain to S. P. for the preparation called "Formalin" on a communication from abroad by the *Chemische Fabrik auf Actien vormals E. Schering*, described in the specification as "The new antiseptic material called formalin . . . a water-white liquid of pungent odour, and it contains 40 per cent. of pure formaldehyde combined with 60 per cent. of water."

In 1894, Schering or his company obtained the registration in Germany of the word "formalin" as an invented word. In March, 1897, the Formalin Hygienic Co., Ltd., was incorporated in this country, and on April 6th, 1897, by assignment from Schering's Co., the Formalin Hygienic Co. obtained letters patent, and were appointed sole agents in Great Britain and other countries for Schering's company. On July 25th, 1898, the Formalin Hygienic Co. applied for the registration of the word "Formalin" as a trade mark.

HELD—that the applicants had no title to apply for the registration, they had no right whatever to manufacture and sell "Formalin" as their own manufacture, that the particular word "Formalin" had never in England represented to the trade at large or to the public any manufacture of any particular individual.

IN RE THE FORMALIN HYGIENIC CO., LD.,  
[(1900) 17 R. P. C. 486—Farwell, J.]

4. *Form of Application to Register Old Trade Mark by Firm—Essential Particulars—Disclaimer—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 64, 74.*—An application was made to register a trade mark consisting of a label which (*inter alia*) contained the device of a lion rampant surrounded by a border with ornamental work outside and with a band underneath; it had also on another part the device of a scroll unfurled from a roller, on which the directions for use appeared.

The applicants proved user of the label before the 13th of August, 1875, and continuous user since. The trade was small for a good many years. Pink labels were used up to 1877, and since 1877 yellow labels differing from the pink were used in connection with the same goods, and were used ever since. In 1894 another variety of yellow label was also adopted and used ever since, but there had been no abandonment of the pink label.

HELD—that (1) it was not necessary in the application to state the names of the members of the firm for the time being since the alleged first user, nor even to insert the words "and their predecessors in business, members of the firm for the time being." (2) Assuming that the mark in question was properly registerable as an old mark under sect. 64 (3) (ii.), there need not be a disclaimer under sect. 74 (1), sub-head 2, because

**Registration—Continued.**

no addition to the mark as used was asked for (3). The mark, however, was not registerable, inasmuch as sect. 64 (3) (ii.) refers only to marks consisting of a word or words, letter, figure or combination of letters or figures or of letters and figures, used as a trade mark—figures meaning numerals. (3) The applicants could not register the old mark without stating essential particulars as defined in sect. 64 (1), and disclaiming the exclusive right of added matter.

IN RE WRIGHT, CROSSLEY & CO.'S APPLICATION  
[FOR A TRADE MARK, [1900] 2 Ch. 218; 69 L. J. Ch. 589; 83 L. T. 150; 17 R. P. C. 386—Byrne, J.]

**5. Disclaimer by Amendment—Mark Already on Register Identical in Essentials—Superfluity—Convenience—Patents, Designs and Trade Marks Acts, 1883 and 1888 (46 & 47 Vict. c. 57, s. 62; 51 & 52 Vict. c. 50, s. 8)]**—The applicants applied to register a trade mark the essential particulars of which were stated to be the combination of devices and the word "Hero," and the applicants disclaimed any right to the exclusive use of the added matter except in so far as it consisted of their own name. The applicants disclaimed the word "Hero" as being an essential part of the mark.

HELD—that the application failed on two grounds:

First, in point of form, viz., that a disclaimer must be contained in the application and is not allowed to be inserted by amendment.

In re *Meeus' Application* ([1891] 1 Ch. 41; 60 L. J. Ch. 96; 39 W. R. 216; 63 L. T. 610; 8 R. P. C. 25—Chitty, J.) and In re *Apollinaris Company's Trade Marks* ([1891] 2 Ch. 186; 61 L. J. Ch. 625; 39 W. R. 309; 65 L. T. 6, 8 R. P. C. 137—C. A.) followed.

Secondly, because the application was to register a mark which was identical in all the essentials of the mark with another existing registered mark, and which absolutely covered it; that the application was an absurd one, and that the Court would not allow an application to be put on the register which was absolutely superfluous so far as English law was concerned, and would cumber the register needlessly and unnecessarily, simply on the suggestion that it might be a convenience in some foreign countries, with a view to some other proceedings, to have a duplicate registration of the mark.

*Baker v. Rawson* (1889) 45 Ch. D. 519; 60 L. J. Ch. 49; 63 L. T. 306—North, J.) followed.

IN RE PLAYER & SONS' TRADE MARK, [1901]  
[1 Ch. 382; 70 L. J. Ch. 359; 81 L. T. 190; 18 R. P. C. 65—Cozens-Hardy, J.]

**6. Device likely to Deceive—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 72 (2)]**—A company had for several years on the register in respect of cider two marks, one consisting of a device or devices in the centre of which was the figure of an apple, and in part of the border round that device were the words "Apple Brand," and the other device simply consisting of the words "Apple Brand." Their

cider was known in the trade as "Apple Brand." The applicants had the word "Pomril" alone on the register in respect of cider, and they asked to have put on the register a device the prominent feature of which was the figure of half an apple showing the pips, within the edges of which was the word "Pomril." The Comptroller refused to register it without the consent of the company.

HELD—that the applicants were not entitled to have on the register the device of an apple, or a representation of an apple in any way which would be likely to lead to the word "Apple" or "Apple Brand" becoming in any way identified or associated with their goods, that the proposed device was likely to deceive, and that the application must be refused.

IN RE POMRIL, LD., (1901) 17 T. L. R. 279, 18 R. P. C. 181—Joyce, J.]

**7. Similar Mark on Register—User—Rectification—Five Years' Registration—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 72, 76, 90.]**—In order to entitle a person to register a mark, there being a similar mark already on the register, he must make out that there was a user of the mark in England before that date.

The applicants carried on business as brewers and wine and spirit merchants, and dealers in aerated waters in Dorsetshire. The respondents carried on business as mineral water manufacturers in Yorkshire. Neither trader was known nor were his goods known in the district of the other trader. The applicants and their predecessors in title had carried on their business from before 1876 to the present time. In 1882 they added to that business a business in aerated waters. In 1875 or thereabouts, they adopted as their trade mark, in connection with the brewery business, a pictorial representation of a badger, and they had used it in connection with that business ever since. When, in 1882, they commenced the manufacture of aerated waters, they never used the trade mark in connection with aerated waters in any other manner than by making use of price lists on the back of which they placed the words "Trade Mark" and the picture of a badger. In 1887 the respondents' predecessor in title adopted a pictorial representation of a badger as his trade mark in connection with his mineral water business, and he registered that trade mark for goods in Class 44, that is to say mineral and aerated waters, natural and artificial, including ginger beer," and he had ever since used it in labels upon his bottles.

In 1901 the applicants registered their trade mark for goods in Class 42, that is to say "Fermented liquors and spirits." They sought to register the same for goods in Class 44. The applicants moved to remove the respondents' mark.

HELD—that the registration of both marks could not be allowed, that neither of the marks was an old mark, that is to say a mark in use before August 13th, 1875.

*Jackson & Co. v. Napper* (1886) 25 Ch. D.

**Registration—Continued.**

162, 177; 56 L. J. Ch. 406, 35 W. R. 228, 55 L. T. 836—Stirling, J.) followed.

HELD ALSO—that the respondents' mark having been on the register for more than five years was not conclusive evidence of his right to its exclusive use.

*Edwards v. Dennis* ((1885) 30 Ch. D 454; 55 L. J. Ch. 125, 54 L. T. 112—C. A.) followed.

HELD ALSO—that the respondents' mark ought not to be taken off as the entry of his mark upon the register in 1888 was not made without sufficient cause, seeing that the respondents predecessor acted *bona fide* and without knowledge of the applicants' business or trade mark, and the applicants' predecessor in title had never used the mark upon aerated waters, or upon any wrapper or case containing such goods, and that the respondents were entitled to retain the mark, and the applicants' mark could not be put on

IN RE VERITY'S TRADE MARK, IN RE APPLICATION OF HALL AND WOODHOUSE, LD., (1902) 18 T. L. R. 214; 19 R. P. C. 58—Buckley, J.

8. *Distinctive Words Forming Part of a Label—"Added Matter"*—*Disclaimer—Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 64—*Patents, Designs, and Trade Marks Acts, 1888* (51 & 52 Vict. c. 50), s. 10.]—Application was made for registration of a trade mark in Class 42 in respect of baking powder. The application claimed that the essential particular of the trade mark was that it was a distinctive label. The label proper was on a red foundation, and alongside there were, on a yellow foundation, descriptive words praising the article and giving instructions for its use.

HELD—that the yellow part was "added matter" and must be disclaimed, because it came within the second sub-sect. of sect. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by sect 10 of the Patents, Designs, and Trade Marks Act, 1888, and the motion must be dismissed with costs.

*In re Clement et Cie's Trade Mark* ([1900] 1 Ch. 114; 69 L. J. Ch. 52, 48 W. R. 67; 81 L. T. 400; 16 T. L. R. 28, 16 R. P. C. 611—C. A., No. 22, *infra*) followed.

IN RE ROYAL BAKING POWDER COMPANY'S APPLICATION FOR A TRADE MARK, 50 W. R. 454, 18 T. L. R. 423; 19 R. P. C. 261—Farwell, J.

9. *Goods Not "of the Same Description"—"Millennium"*—*Previously Registered for Flour, etc.—Used on Carts Delivering such Flour—Now Allowed for Carriages Generally—Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 72.]—The applicants sought to register the word "Millennium" as a trade mark for carriages generally. It had previously been registered for flour, bread, etc., by a firm of millers, and was used on the vans and carts used to deliver such products; and the millers now opposed the application, on the ground that the proposed use of the word might lead to con-

fusion, and cause the public to purchase products not in fact manufactured by them.

HELD—that the opponents were not registered in respect of "the same description of goods," and that the application should be allowed.

IN THE MATTER OF LAKE AND ELLIOTT'S APPLICATION FOR A TRADE MARK, (1903) 20 R. P. C. 605—Kekewich, J.

10. *Application Wrongly Made in Name of Old Proprietors—Proposed Mark Never Used as a Trade Mark by Itself prior to August, 1875—Application Refused—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 41—*Trade Mark Rules, 1900, rules 5 and 11.*]—The business of J. H. & Co. had been transferred by J. H., its proprietor, to M. & Co., Ltd., and the latter now applied in the name of J. H. & Co. for the registration of a device used by J. H. prior to 1875.

The application was refused on the ground (1) that it was not made in the right name, and (2) that the proposed mark was never used before the year 1875 without the name "J. H." or "J. H. & Co." being used in juxtaposition with it

IN THE MATTER OF JAMES HEDDLE & Co.'S APPLICATION TO REGISTER TRADE MARKS, (1903) 20 R. P. C. 599—Byrne, J.

11. *Opponent Not Selling the Particular Goods—Opponent Using Same Mark (Unregistered) for Goods in Same Class—Application Allowed*]—An application by L. to register a device as a trade mark in respect of gelatine for purposes of goods was opposed by F. & Co.

It appeared that F. & Co. had not traded in gelatine, but had used the same device (not registered as a trade mark) in respect of other food in the same class, viz., sago and tapioca.

HELD—that having regard to the circumstances, there was no reasonable probability of deception, and that registration should be allowed.

IN RE LEINER'S APPLICATION FOR A TRADE MARK, [1903] 20 R. P. C. 253—Byrne, J.

12. *Mark calculated to Deceive—Similar to Marks already Refused—Discretion of Comptroller—Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 73.]—The comptroller has a discretion as to the registering of trade marks, and the Court will not lightly overrule the judicial exercise of that discretion.

Thus the Court refused to interfere where the comptroller refused to register a mark on the ground that similar marks had been put forward by other persons and refused, and that the applicants declined to make inquiries as to whether such persons were using the marks

IN RE BOOTH'S DISTILLERIES Co.'S APPLICATION, (1904) 21 R. P. C. 18—Farwell, J.

13. *Design and Patent for same Invention—Second and similar Design—Use of one Number only—Knowledge of Seller—Patents, Designs and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), ss. 47, 61.]—A patent and a registered design for the same invention may coexist.

**Registration—Continued.**

The plaintiffs applied for letters patent for an invention, and, before they obtained them, registered a design.

HELD—that the registration was valid

The plaintiffs subsequently registered a second design which was very similar to the first.

*Semble*, in such a case it is not necessary to mark machines with both registered numbers.

The defendants had no knowledge of the registration at the date when an action for infringement was commenced against them; but they sold some machines after writ, and, upon an application for an interlocutory injunction, they offered to keep an account

HELD—that they were not liable in damages for sales effected before writ, but that they could not rely on want of knowledge in answer to the plaintiffs' claim for an injunction.

Decision of Byrnes, J. ([1904] 1 Ch. 264; 73 L. J. Ch. 266; 90 L. T. 342; 20 T. L. R. 144; 21 R. P. C. 137) affirmed.

WERNER MOTORS, LD. v. A. W. GAMAGE, LD., [1904] 2 Ch. 580; 73 L. J. Ch. 770; 20 T. L. R. 796; 21 R. P. C. 621; 53 W. R. 167; 91 L. T. 588—C. A.

**14. Infringement—Classes of Goods—Spirits—Sloe Gin—Cat and Barrel Mark—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 64, 105.]**—The plaintiffs, an old-established firm of distillers and spirit merchants, about 1849 adopted a "cat and barrel" mark for their goods, more especially for their "Old Tom gin." In 1879 they registered this mark under the Act of 1875 in class 43 for fermented spirits and liquors as a mark which had been in use for over twenty-five years. Two other "cat and barrel" marks of a much later date, and not very similar, are also on the register. It appeared that in 1879 the plaintiffs were not manufacturing sloe gin, but they were then selling dry gin and sweetened gin, and in 1898 began to sell sloe gin.

HELD—that the plaintiffs' registration extended to sloe gin; and that the defendants in using a mark like that of the plaintiffs for sloe gin had committed an infringement.

*Edwards v. Dennis* ((1885) 30 Ch. D. 451; 55 L. J. Ch. 127, 54 L. T. 112—C. A.) discussed.

The doctrine of that case only applies where the parties deal in goods of a substantially different character.

BOARD & SON v. HUDDART, (1904) 89 L. T. 718; 20 T. L. R. 142; 21 R. P. C. 149—Eady, J.

**15. "Distinctive Mark"—Apollinaris—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (4), (5).]**—The owners of the Apollinaris spring at N. applied to register the word "Apollinaris" as a trade mark in class 44 for mineral waters. It was proved that the word meant, in commerce, mineral water from the applicants' spring and no other.

HELD—that the word should be deemed a "distinctive mark" and registered upon the owners

undertaking to use it only in respect of water from their property at N. or in the neighbourhood.

IN RE "APOLLINARIS" TRADE MARK, [1907] 2 Ch. 178; 76 L. J. Ch. 437; 96 L. T. 877; 23 T. L. R. 515; 24 R. P. C. 436—Kekewich, J.

**16. Design—Mark Capable of being registered as a Design—Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 9.]**—It is not a fatal objection to an application to register what is claimed to be a trade mark that the mark in question is capable of being registered as a design.

Registration as a trade mark and registration as a design are not mutually exclusive.

IN RE UNITED STATES PLAYING CARD CO., (1907) 24 T. L. R. 140—Eady, J.

**17. Associated Trade Marks—"Closely Resembling a Trade Mark Already on the Register"—"For the Same Goods or Description of Goods"—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 24.]**—Sect. 24 of the Trade Marks Act, 1905, which provides that "if application be made for the registration of a trade mark so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant, the tribunal hearing the application may require as a condition of registration that such trade marks shall be entered on the register as associated trade marks"—does not apply where the owner of a mark already registered in respect of a certain class of goods applies to have it registered in respect of another class of goods, but where some person seeks to register a trade mark resembling one already registered by someone else in respect of the same kind of article.

IN RE BIRMINGHAM SMALL ARMS CO'S APPLICATION, [1907] 2 Ch. 397; 76 L. J. Ch. 571, 97 L. T. 330; 23 T. L. R. 650; 24 R. P. C. 568—Kekewich, J.

See also No. 21.

**(2) Invented or descriptive name; secondary meaning.**

**18. Invented Word—Reference to Character or Quality of Goods—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64, sub-s. 1—Patents, &c., Act, 1888 (51 & 52 Vict. c. 50), s. 10, sub-s. 1.]**—The provision in sub-sect. 1 (d) of sect. 10 of the Trade Marks Act, 1888, is not qualified by the condition in (e). The two clauses are independent.

Therefore a word which is "an invented word" within clause (d) may be registered as a trade mark, though it has "reference to the character and quality of the goods" within the meaning of clause (e).

The word "Soho" is capable of registration as a trade mark in respect of photographic paper.

Judgment of the Court of Appeal reversed.

*Re Furbensfabriken Application* ((1894), 1 Ch. 645) overruled.

EASTMAN PHOTOGRAPHIC MATERIALS CO. v. COMPTROLLER - GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS, [1898] A. C.



**Registration—Continued.**

571; 67 L. J. (Ch) 628; 79 L. T. 195; 15 R. P. C. 476; 14 T. L. R. 527; 47 W. R. 152—H. L. (E.)

**19. Invented Word—Similar sound to word which cannot be Registered—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), s. 10 (1) (d) (e)**—Where a particular word cannot be registered as a trade mark, another word sounding exactly like it, but spelt differently, cannot be registered.

Decision of Kekewich, J. (77 L. T. 495; 14 T. L. R.) affirmed.

**IN RE RIPLEY AND SONS' TRADE MARK, (1898)**  
[78 L. T. 367; 15 R. P. C. 151; 14 T. L. R. 299—C. A.]

**20. Passing off—Action to Restrain—Motion for Interlocutory Injunction—Form of Injunction.**—In 1887, B. & Co. commenced to sell Indian cigars under the brand "Flor de Dindigul," and had since sold the same in large quantities. The cigars were often asked for and sold as "Dindigul" cigars; the name "Dindigul" had not prior to B. & Co.'s use been used as part of the name of a cigar. In 1897 H. commenced to sell cigars under the brand "Cigarro de Dindigul." B. & Co. commenced an action against H. to restrain H. from using in connection with cigars the words "Cigarro de Dindigul," "Dindigul," or "Flor de Dindigul," and also from passing off his goods as the goods of B. & Co. B. & Co. alleged that in the defendants' shops the defendant's cigars had been sold in response to orders for "Flor de Dindigul" cigars. The defendant claimed the right to use the name "Cigarro de Dindigul," on the ground that Dindigul was a district in India in which the tobacco was grown of which his cigars were made. B. & Co. moved for an interlocutory injunction.

**HELD**—that B. & Co. were entitled to an interlocutory injunction restraining the defendant from using the name of "Flor de Dindigul" or "Cigarro de Dindigul," as the brand or title of any cigars not being the plaintiffs' cigars, and from supplying any cigars not being the plaintiffs' cigars in response to orders for "Flor de Dindigul" cigars, and from using the name "Dindigul" in connection with the sale of cigars not being the plaintiffs' cigars without clearly distinguishing such cigars from the plaintiffs' cigars; but the order was not to prevent the defendant from describing any cigars sold by him which were in fact made of "Dindigul" tobacco as being so made.

**BEWLAY & CO., LD. v. HUGHES, (1898) 15 R. P. C. [290—North, J.]**

**21. Trade Mark—Application for Registration—Word "having no reference to the Character or Quality of the Goods"—"Typograph"—Comptroller's refusal to Register upheld on Appeal—Patents, &c., Act, 1883, sec. 64 (1) (e), and Patents, &c., Act, 1888, sec. 10.**—The Linotype Company, Ltd., applied for registration of the word "Typograph" as a trade mark in clause 5, viz., unwrought and partly wrought metals

used in manufacture, and in class 7, viz., agricultural and horticultural machinery and parts of such machinery. The Comptroller refused registration, and, on appeal to the Board of Trade, the appeal was referred to this Court. On the evidence, it appeared that "Typograph" was a dictionary word meaning a type-making and type-setting machine. The applicants were manufacturers of machines of this nature. The appeal as to class 7 was not opened.

**HELD**—that the word "Typograph" was not, under the circumstances, a word having no reference to the character or quality of the goods, and was not entitled to registration.

**IN RE LINOTYPE CO.'S TRADE MARK, (1898) 14 [R. P. C. 900—Kekewich, J.]**

And see No. 26, *infra*.

**22. Rectifying Register—Geographical Term—Distinctive Words—Addition to Device—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 64, 74.**—In 1888 Clement et Cie, trading as the Compagnie du Vin de St. Raphael, made an application for the registration of a trade mark for medicated wine. The application was granted. In 1898 the Société Anonyme du St. Raphael-Quinquina moved to rectify the register by removing the trade mark, or by a disclaimer to the exclusive use of the words "St. Raphael" or "Saint Raphael."

**HELD**—that the respondents did not adopt the words "St. Raphael" and "Saint Raphael" as intending to refer to any of the French towns called St. Raphael, but for a different reason, and that the words were an addition to the descriptive device or label within the meaning of the 64th section of the Patents, Designs and Trade Marks Act, 1883; and that the motion must be refused.

**The Smokeless Powder Company's Trade Mark ([1892] 1 Ch. 590; 61 L. J. Ch. 391; 9 R. P. C. 109) followed.**

The decision of Kekewich, J. (1889) (47 W. R. 407; 80 L. T. 230; 15 T. L. R. 231; 16 R. P. C. 173) affirmed.

**IN RE CLEMENT ET CIE'S TRADE MARK, [1900]**  
[1 Ch. 114; 69 L. J. Ch. 52; 48 W. R. 67; 81 L. T. 400; 16 T. L. R. 28—C. A.]

**23 Ordinary Word—Presumption of Design to Pass Off Goods—Burden of Proof.**—An invented name has either no meaning at all, or no meaning in relation to the goods which it denotes. A trader who selects such a name for the purpose of distinguishing his goods from those of other traders is entitled to be protected in the use of the sign which he has chosen. In such a case the mere fact of the use of the arbitrary sign by a rival trader raises a presumption of a design to pass off his goods under false colours which it is not easy to displace.

The claimant to the exclusive use of an ordinary word in the English language, properly applicable to the goods in question, has to establish that it is one which has so acquired a technical and secondary meaning, differing from its natural meaning, that it can be excluded from the use of every one else.

**Registration—Continued.**

A man who has to prove that words, which are descriptive or expressive of the quality of the goods, have acquired the secondary sense, assumes a much greater burden than the man who has to prove the same thing of a word not significant and not descriptive, but what is compendiously called a fancy word.

*Reddaway v. Banham* ([1896] A. C. 199; 65 L. J. Q. B. 381, 44 W. R. 638; 74 L. T. 289; 13 R. P. C. 218) distinguished.

*CELLULAR CLOTHING CO. v. MAXTON & MURRAY*, ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397)—H. L. (Sc.)

**25** "*Savonol*"—*Foreign Word with Meaningless Suffix—Registered for more than Five Years—Action for Infringement—Motion to Rectify—Patents, Designs and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), ss. 76, 77a, 90—*Patents, Designs, and Trade Marks Act, 1888* (51 & 52 Vict. c. 50), s. 18.]—The word "*Savonol*" being meaningless, is an "invented word," and as such is capable of being registered as a trade mark for soaps, notwithstanding that the French word "*savon*" had been used for many years in the soap trade. Even if "*Savonol*" does suggest "*savon*" and "*soap*," it is only a covert or skilful allusion to the character or quality of the goods, and may still be an "invented word."

A meaningless suffix like "*ol*" is distinguishable from such terminations as "*ette*" and "*ine*," which indicate resemblance.

*Eastman's Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trade Marks* ((1898) A. C. 571; 67 L. J. Ch. 628, 47 W. R. 152, 79 L. T. 195, 15 R. P. C. 476—H. L. (E.) No. 18, *supra*) commented on.

Where a motion to rectify the register by the removal of a trade mark more than five years old is heard together with an action for infringement of the trade mark as one matter, the Court has power under sect. 77a of the Patents, Designs and Trade Marks Act, 1883, to grant a certificate that the right to the exclusive use has come in question.

*J. C. J. FIELD & Co., Ltd. v. WAGEL SYNDICATE, Ltd.*, [1900] 1 Ch. 651, 69 L. J. Ch. 365; 48 W. R. 390; 82 L. T. 231, 17 R. P. C. 266—Buckley, J.

**26** "*Tachytype*"—*Patents, Designs and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 64. *Patents, Designs and Trade Marks Act, 1888* (51 & 52 Vict. c. 50) s. 10 (d)]—For a word to be an "invented word" within sect. 64 of the Patents, Designs and Trade Marks Act, 1883, it need not be invented by the applicants for registration, nor need there be a prior publication of it within the jurisdiction.

Certain people in America, the Tachytype Company, invented the word "*Tachytype*." The applicants, the Linotype Company, took an assignment by purchase from the American company of certain Letters Patent and leave and licence to use the name so far as the Tachytype Company were concerned, and they got an assignment of the mark or name and of such

goodwill of the business, if any, which the Tachytype Company had in this country. The Tachytype Company never had any business in this country. The name, except for the purpose of a publication or two to be found in the Patent Office Records and in the title of one specification, was absolutely unknown in this country.

HELD—that "*Tachytype*" was an invented word within the meaning of sect. 64 (1) (d) of the Patents, Designs and Trade Marks Act, 1883, capable of being registered, even though it might have some reference to the character or quality of the goods.

*IN RE LINOTYPE CO., LD.*, [1900] 2 Ch. 238; [69 L. J. Ch. 625; 82 L. T. 794; 16 T. L. R. 353, 17 R. P. C. 380—Cozens-Hardy, J.

And see No. 21, *supra*.

**27.** *Passing off—Action to Restrain—"Whitstable Oysters"—Personal Term—Description of Particular Class—Secondary Meaning.*—The plaintiffs brought an action against the defendants for an injunction to restrain them from passing off oysters under the description of (*inter alia*) "*Whitstable*" or otherwise described as "*Whitstable natives*," or "*Whitstable oysters*," any oysters not being in fact oysters cultivated and matured upon the grounds or beds of the plaintiffs.

HELD (Rigby, L. J., dissenting)—that the term "*Whitstable*," used in connection with oysters, meant "a particular class of oyster, which must answer to the requirements of the trade as to appearance, and also that it was a geographical term in the sense that it must have a connection, more or less, with *Whitstable*," that oysters, answering the description above given, if produced on the defendants' laying ground, might, as well as those of the plaintiffs, and those from the Pollard bed of the Sea Salter Company, be properly described as "*Whitstable oysters*," and that that name did not connote exclusively oysters supplied by the plaintiff company and the Sea Salter Company.

Decision of Buckley, J. ((1900) 17 R. P. C. 461) affirmed.

*WHITSTABLE OYSTER FISHERY CO. v. HAYLING [FISHERIES, LD. AND GEORGE TABOR, (1901)* 18 R. P. C. 435—C. A.

**28** "*Word or Words having no Reference to the Character or Quality of the Goods*"—"Nectar"—*Trade Marks Act, 1888* (51 & 52 Vict. c. 50), s. 10 (1) (e)]—The applicants sought to register the word "*Nectar*" in respect of tea, coffee and cocoa as a trade mark in class 42.

HELD—that "*Nectar*" was not a word "having no reference to the character or quality of the goods," as it was intended to denote, and did denote, a very superior kind of tea, coffee and cocoa.

*IN RE HARRISONS AND CROSSFIELD'S APPLICATION*, (1901) 18 R. P. C. 34—Byrne, J.

**29.** "*Invented Word*"—"Uneda"—*Variations of Orthography—No Change in Sound*—

**Registration—Continued.**

"Reference to Character or Quality of the Goods"—*Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 64—*Patents, Designs, and Trade Marks Act, 1888* (51 & 52 Vict. c. 50), s. 10.]—A mere variation of the orthography or termination of a word is not sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form.

On an appeal from Cozens-Hardy, J., affirming the refusal of the comptroller to register the word "Uneeda" as applied to biscuits, or the class of goods in which biscuits are contained,

**HELD**—that the word "Uneeda" was merely a putting together of three of the commonest of common English words, "You need a," and a misspelling of the first of them without change in the sound, and was not an "invented word" within sect. 64, sub-sect. 1 (d). of the Trade Marks Act, 1883, and that the three words were and were intended to be, commendatory and suitable to describe something which a purchaser would find comforting and advantageous to use as being of the quality and character which would be suitable for his wants, and they were not within sub-sect. 1 (e).

Decision of Cozens-Hardy, J. ([1901] 1 Ch. 550; 70 L. J. Ch. 318; 84 L. T. 259; 17 F. L. R. 241; 18 R. P. C. 170) affirmed.

**IN RE "UNEEDA" TRADE MARK, [1902] 1 Ch. 783; 71 L. J. Ch. 353; 50 W. R. 467; 86 L. T. 439; 18 T. L. R. 453; 19 R. P. C. 281—C. A.**

**30. Passing off—Action to Restrain—Name indicating Manufacture—Geographical Term—"Worcester China"—Secondary Meaning Distinguishing Goods.**—Between 1889 and 1897 the word "Worcester," as applied to current trade productions, acquired and had a secondary meaning as denoting goods made by the plaintiffs at one or other of their manufactories to the exclusion of all other manufacturers of china or porcelain and similar articles. For some time prior to 1889 the plaintiffs had adopted, and they still used, in connection with their business the word "royal," so that on all their business show-cards relating to goods made at Dighs their goods were referred to as "Royal Worcester." With reference to all goods made by the plaintiffs at the "Dighs," then called "The Royal Porcelain Works," they had, from some time previously to March, 1889, used, as generally as possible, the word "royal" as well as "Worcester" in connection with their goods. In 1896 E. L., who had quitted the employ of the plaintiff company in the previous year, commenced the manufacture of porcelain in Worcester, and the defendant company was incorporated in the year 1898 for the purpose of taking over his business, and they carried on business in succession to him. It was not disputed that there were no natural advantages in the way of soil or water or otherwise attaching to Worcester making it specially suitable for the manufacture of porcelain. The actual method and ingredients of the paste used had varied, and it was not contended that "Worcester

china" meant only china of a particular paste, style, model, design, or colour. Although no actual instance of deception had been proved, yet the acts of the defendants were calculated to deceive purchasers and the public into the belief that the goods of the defendants were the goods of the plaintiffs.

**HELD**—that an injunction must be made to restrain the defendants, their servants, and agents, from selling, or offering, or exposing, or advertising for sale, or procuring or enabling to be sold, any goods made of china or porcelain, or any similar material not manufactured by the plaintiffs or by their predecessors in business, or by some one of them (because he was clearly entitled to sell "Old Worcester" as "Worcester") under or in connection with the word "Worcester," without clearly distinguishing such goods from the goods of the plaintiffs.

*Montgomery v. Thompson* (1891) A. C. 217; 60 L. J. Ch. 757; 64 L. T. 748; 55 J. P. 756; 8 R. P. C. 361—H. L. (E.) followed.

**WORCESTER ROYAL PORCELAIN CO., LD. v. [LOCKE & CO., (1902) 18 T. L. R. 712; 19 R. P. C. 479—Byrne, J.]**

**31. Passing off—Action to Restrain—Name Indicating Manufacture—Agents Allowed to Publish Principal's Name—Legal Duty of Agents—Use of Initials of Principals on Corks used for Bottles containing Wines or Spirits Not supplied by Principals—Account of Profits—Distribution of Costs.**—In order to constitute an actionable wrong—a wrong where a plaintiff complains of something being done—you must find a duty on the part of the defendant towards the plaintiff to abstain from doing that which is complained of.

The plaintiffs carried on business in London at "Findlater's Corner," London Bridge, as merchants of wines, spirits, and other liquors. The defendants carried on a similar business at Bournemouth. The defendants and their predecessor for many years acted as agents for the plaintiffs and sold large quantities of goods supplied by the plaintiffs, and built up a large business in the neighbourhood of Bournemouth by the use of the plaintiffs' firm in connection therewith, and the place where the defendants' business was carried on became known as, but was not named by the corporation of Bournemouth, "Findlater's Corner." The defendants were encouraged by the plaintiffs to give as much publicity as possible to the name of plaintiffs' firm in connection with their business, in order that the reputation of the plaintiffs' firm might be instrumental in attracting and extending business for their common benefit. There was a good deal of evidence to show that the plaintiffs' firm had been, and was known as "Findlater," but that over England the plaintiffs' goods were not known as "Findlater & Co.'s" goods, or the firm as "Findlater & Co."

**HELD**—that there was no legal duty on the part of the defendants to abstain from using the term "Findlater & Co.," nor to abstain from using the term "Findlater's Corner"; that there must be a declaration negating the

**Registration—Continued.**

defendants' right to use the initials "F. M. T. & Co." on corks in bottles containing wines and spirits not supplied by the plaintiffs, and an account of profits limited to six years from the time of the issue of the writ; and that under the circumstances the costs ought to be distributed, and the defendants directed to pay one-third of the plaintiffs' costs, and no order made as to their own.

FINDLATER, MACKIE, TODD & Co. v. HENRY  
[NEWMAN & Co., (1902) 19 R. P. C. 235—  
Kekewich, J.]

**32. Passing off—Action to Restrain—Name Indicating Manufacture—"Camel-hair Belting"—"Karmal"—Defendants' Name Prefixed—Injunction.**—The plaintiffs were manufacturers of belting of different kinds, including a special kind known as "Camel-hair Belting" which was not made exclusively of camels' hair, but of a material called in the trade "camel tops," composed of cotton, goats' hair and sheep's wool, with a small quantity of camel's hair added. The name "Camel-hair Belting" had come to mean in the trade the plaintiffs' belting and nothing else. The defendants had been holding out their goods as Reddaway's goods; *i.e.*, they had been holding out that they sold goods, "Camel-hair Belting." They also sold "Frictionless Engine Packing Company's Camel-hair Belting." They also used the word "Karmal" repeatedly in their catalogues. Correspondence showed that they used the words "Camel-hair Belting" freely and without distinguishing it as if Reddaway's had no preferential rights. The plaintiffs claimed an injunction.

**HELD**—that an injunction ought not to go against the use of the words "Frictionless Engine Packing Company, Limited," but that an injunction should be granted restraining the defendants from using the words "Camel-hair" or "Karmal" as descriptive of or in connection with belting manufactured by them in the terms of *Reddaway v. Banham*, [1896] A. C. 199; 65 L. J. Q. B. 381; 44 W. R. 638, 74 L. T. 289; 13 R. P. C. 218—H. L. (E)

F. REDDAWAY & Co., LD. v. FRICTIONLESS  
[ENGINE PACKING Co., LD., AND H. G.  
SMALL, (1902) 19 R. P. C. 505—  
Palatine Court of Lancaster—Hall, V.-C.]

**33. Passing off—Action to restrain—"Oval Blue"—Words purely descriptive and in common use accurately describing the thing sold—Acquisition of—Burden of Proof—Testimony of Persons trapping—Duty of—Injunction.**—The plaintiff began to sell blue for laundry purposes in oval form twenty-five years or so prior to this action being brought. Other manufacturers had sold blue in squares and in circular form. The public asked for the blue which had been sold in the oval shape as "Oval Blue," the blue which had been sold in the squares as "Square," and the blue which had been sold in circular shape as "Circular." The defendant, a retail dealer, had for many years

dealt with the plaintiff as a purchaser from him of his "Oval Blue." In February, 1902, some time after the defendant had ceased to purchase the plaintiff's blue, she sold laundry blue in similar cakes or blocks, but not of the plaintiff's manufacture, in response, as plaintiff alleged, to orders for "Oval Blue." The plaintiff claimed an injunction.

**HELD**—that the plaintiff's evidence stopped far short of the discharge of the burden, which is not impossible but extremely difficult to discharge—namely, to show that the words "Oval Blue," purely descriptive and in common use in the English language, and accurately describing the article sold, could be acquired by a man on the evidence that he had alone for several years made articles of that shape and sold them under those words; and that on that issue the plaintiff entirely failed, and had not made out his claim to a monopoly of the words "Oval Blue"

Statement in Lord Davey's speech in *Cellular Clothing Co., Ltd. v. Maaton and Murray* ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397—H. L. (Sc.), No. 23, *supra*) adopted.

**HELD ALSO**—that the plaintiff failed on the issue as to whether the defendant had been guilty of personal fraud in having concealed the cakes that she was selling by deliberately turning them face downwards on the counter so as to cover the words "Bobby Blue," which anybody would at once have recognised and have known that it was not the plaintiff's "Oval Blue," because his name appeared on his packets.

**HELD ALSO**—that if you want the Court to rely upon the testimony of persons trapping, when they have completed their trap and have got the victim in it, the least they can do is to tell him that that is the occasion that they are going to give evidence about in Court, so that, then and there, the victim may be able to recall and recover his recollection of the circumstances and be ready to give his account in Court, so that the Court shall not be asked to rely upon the testimony of witnesses for the plaintiff on the ground that the defendant cannot possibly remember what took place. The ordinary course is also to ask for a bill to be made out.

RIPLEY v. GRIFFITHS, (1902) 19 R. P. C. 591—  
[Farwell, J.]

**34. Trade Name—Passing off—"Silverpan" Jams—Secondary Meaning as indicating Jams of Plaintiffs' Manufacture—Injunction.**—The plaintiffs were one of the first firms of jam manufacturers to adopt the practice of making jam in pans lined with silver; and from the beginning they used the word "Silverpan" on their labels, and registered it in 1887 with their signature below as a trade mark. Upon an application by the present defendants in 1902 this mark had been struck off the register; and the defendants now openly used the word and applied it to their own jams. The plaintiffs brought an action for an injunction.

The Vice-Chancellor of the County Palatine of Lancaster found as a fact that the word "Silverpan" had acquired a secondary meaning in the

**Registration—Continued.**

particular district as denoting jams manufactured by the plaintiffs, it appearing, *inter alia*, that the other firms, who first used silver pans for their jams, had employed a slightly different expression; and he accordingly granted an injunction restraining the defendants from selling their jams under the name "Silverpan" without distinguishing them from those of the plaintiffs.

ON APPEAL, HELD—that the Vice-Chancellor had taken a correct view of the evidence.

HENRY FAULDER & Co., LD. v O. & G. [RUSHTON, LD., (1903) 19 T. L. R. 452; 20 R. P. C. 477—C. A.]

**35. Passing Off—Action to Restrain—Corsets—“Erect Form”—Ornamental Scroll Printing—Fanciful Name—Calculated to Mislead.**—In 1901 the plaintiffs introduced into the United Kingdom a certain class of their corsets designated in advertisements and on boxes as "W. B. Erect Form Corsets," the last three words being printed in a fancy scroll. Subsequently they used the words "America's Leading" in place of their initials "W. B."

The defendants soon after began to use in connection with their own corsets (of every style) the words "C. B. Erect Form Corsets" printed in a similar scroll.

Buckley, J., held—that the defendants' conduct was likely to cause purchasers to mistake the defendants' goods for those of the plaintiffs, that the words "erect form" were not plainly descriptive like such a word as "cellular," but were a fanciful designation with only a far-fetched reference to the character of the goods, and that the scroll was in no way descriptive; and further that the letters "C. B." formed no real distinction; and that therefore the plaintiffs were entitled to an injunction.

ON APPEAL, HELD (Romer, L.J., dissenting)—that the description of the goods taken as a whole, including the scroll, was not intended, and not calculated, to deceive. The words "erect form" were descriptive, and the initials "C. B." were so well known as to distinguish the defendants' goods from those of the plaintiffs; and that therefore there was no ground for granting an injunction.

Decision of Buckley, J. (88 L. T. 168; 19 T. L. R. 239, 20 R. P. C. 289), reversed.

WEINGARTEN BROTHERS v. CHARLES BAYER & [Co., (1903) 89 L. T. 56; 19 T. L. R. 604; 20 R. P. C. 649—C. A.]

**36. Infringement—Photographic Films—"Kodak"—"Brownie"—"Bull's Eye"—"Panoram"—Cameras—"Panoram"—Invented Words—Action for Injunction—Motion to Remove Trade Marks—Costs—Patents, Designs, and Trade Marks Acts, 1883 (46 & 47 Vict. c. 57) s. 64 (1), and 1888 (51 & 52 Vict. c. 50), s. 10 (1).**—If a word is a newly-invented word, when adopted as a trade mark, the mark is not invalidated because not registered at once.

A word may be a perfectly good invented word, although it has some slight reference to the character or quality of the goods.

The plaintiffs sought to restrain the defendants from passing off other manufacturers' photographic films as and for those of the plaintiffs by the use of the names "Kodak," "Brownie," "Bull's Eye," or "Panoram," or by the use of letters used as abbreviations therefor, *e.g.*, P.K. (Pocket Kodak), F.P.K. (Folding Pocket Kodak), C.K. (Cartridge Kodak), B.E. (Bull's Eye). The defendants, in reply, moved to expunge from the Register of Trade Marks the marks "Kodak," "Brownie," and "Bull's Eye" as applied to films, and the mark "Panoram" as applied both to cameras and films, on the grounds that the word "Panoram" was descriptive in its application to cameras and films, that the other three words were descriptive as applied to films, and also that "Kodak" was not an "invented" word within the meaning of the Act, having been invented some three years before it was registered for films.

The Court found upon the evidence that the words "Kodak," "Brownie," and "Bull's Eye" as applied to films were used as describing exclusively the plaintiffs' films.

HELD—that "Panoram" was merely descriptive, as applied both to cameras and films, and must be expunged:

That "Brownie" and "Bull's Eye" were not descriptive as applied to either cameras or films, having no real reference to the character or quality of the goods, to both classes of which they were applied simultaneously:

That "Kodak" also was a good trade mark, for the reasons specified at the head of this note.

**Costs.**—The defendants, having succeeded on the motion as to "Panoram," were ordered to pay the taxed costs, less £20.

*Eastman Photographic Materials Co., Ltd. v. Comptroller-General* ([1898] A. C. 571, No. 18, *supra*) followed.

KODAK, LD. v. LONDON STEREOSCOPIC CO., LD.; [KODAK, LD. v. GEO. HOUGHTON & SON; IN RE TRADE MARKS OF KODAK, LD., (1903) 19 T. L. R. 297; 20 R. P. C. 337—

Swinfen Eady, J.]

**37. Passing off—Local Name—Mineral Waters—"Caledonia Waters"—"From New Springs at Caledonia"—Infringement.**—The appellants were the owners of certain mineral water springs called Caledonia Springs, and also of an hotel known as the Caledonia Springs Hotel; the whole locality had come to be known as Caledonia Springs, and the appellants sold their mineral water under the name "Caledonia Water." The respondent sank a new well in the same district, and sold water therefrom as being "from new springs at Caledonia."

HELD—that the appellants were not entitled to an injunction to restrain the respondent from using these words. The latter was entitled to indicate the local source of the water sold by him, and there was no attempt on his part to pass off his goods as those of the appellants.

GRAND HOTEL CO. OF CALEDONIA SPRINGS, [LD. v. WILSON, [1904] A. C. 103; 73 L. J. P. C. 1; 52 W. R. 286; 89 L. T. 456; 20 T. L. R. 19; 21 R. P. C. 117—P. C.]

**Registration—Continued.**

**38. Passing off—Band—Name of Band—“White Viennese Band”—Addition of Proprietor’s Name.]**

HELD, upon the evidence—that the plaintiff had failed to establish that the words “White Viennese Band” (without prefixing his own name) had acquired a secondary signification as denoting his band only; and that consequently he could not restrain the defendants from applying those words to their bands.

WURM v. WEBSTER AND GIRLING, [1904] 21 R. P. C. 373—Kekewich, J.

**39. “Tabloid”—Trade Name—Name denoting Maker’s Goods—Presumption of Validity from long user—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64, 1 (c).]**—The word “tabloid” as applied to compressed drugs made up in a bi-convex shape was registered in 1884 as a trade mark by the firm of Burroughs, Wellcome & Co.

The word “tabloid” was invented for the purpose of being so used.

HELD—that it was in 1884 a distinctive fancy word not in common use within the meaning of sect 64 (1) (c) of the Act of 1883. A word may be a fancy word although there is about it a suggestion of a descriptive meaning, so long as it does not intelligibly describe the article sold.

*Re Bovril* ([1896] 2 Ch. 600; 65 L. J. Ch. 715; 45 W. R. 150; 74 L. T. 805—C. A.) applied.

HELD ALSO, apart from any question of trade mark—that the word had always denoted the compressed drugs of the firm who invented it and that they were entitled to an injunction to restrain the use of it for the purpose of “passing off” drugs not of their make.

When a trade mark is impeached after having been registered for many years, the proprietor is entitled to the benefit of any doubt as to its validity. Decision of Byrne, J. ([1904] 1 Ch. 736; 52 W. R. 205; 20 T. L. R. 111; 21 R. P. C. 69), affirmed.

WELLCOME v. THOMPSON AND CAPPER, [1904] 1 Ch. 736; 73 L. J. Ch. 474; 32 W. R. 581; 91 L. T. 58; 20 T. L. R. 415; 21 R. P. C. 217—C. A.

**40. “Bioscope” Passing off.]**—The word “Bioscope” held not to be an “invented word” capable of registration in 1898 as a trade mark under sect. 64 of the Patents, &c., Act, 1883.

WARWICK TRADING CO. LD. v. URBAN LTD., [1904] 21 R. P. C. 240—Joyce, J.

**41. Trade Name—Passing Off—Name of Article—“Fels Naptha Soap”—“Ladybird Naptha Soap”—“Rock Oil Naptha Soap”—Absence of Naphtha.]**—A person who attempts to prove that words which are merely descriptive of the quality or nature of goods have acquired a secondary meaning as denoting only goods of his make, has a much harder task than a person who attempts to prove the same thing in respect of a “fancy” word.

When a person invents a new article and attaches a descriptive name to it, it necessarily follows that such descriptive name denotes his goods only, until some rival appears on the market; such fact does not go far towards establishing the proposition that the name has acquired a permanent secondary meaning as denoting only his goods.

In 1901 the plaintiffs introduced into England a soap, having naphtha for an ingredient, which they called “Fels Naptha” soap; this soap soon commanded an extensive sale, and, whilst it was the only soap of the kind, appears to have been often spoken of as “Naptha” soap. In 1902 the defendants put upon the market a rival soap under the name of “Ladybrand Naptha” soap. In a “passing off” action by the plaintiffs,

HELD—that the fact that the defendants’ soap might contain no naphtha made no difference; that there was nothing in the get-up of the defendants’ soap of which the plaintiffs could complain; and that, with regard to the use of the word “naptha,” it was a word really descriptive of the soap; and that it had not acquired a secondary meaning as denoting the plaintiffs’ soap to the exclusion of all others; and that therefore the action failed.

*Cellular Clothing Co. v. Manton and Murray* ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397 (H. L. Sc.) No. 23, *supra*) applied.

Decision of Byrne, J. (19 T. L. R. 340, 20 R. P. C. 437), affirmed, and decisions of Kekewich, J. (20 R. P. C. 443, 447), affirmed *pro forma* for the purposes of a further appeal in all three cases.

FELS v. THOMAS HEDLEY & CO., LD.; FELS v. STEPHENSON BROS.; FELS v. CHRISTOPHER THOMAS & BROS., (1904) 20 R. P. C. 85—C. A.

**42. Trade Marks—Word Representing Sound of Letters—Registration—Patents, Designs and Trade Marks Acts, 1883 (46 & 47 Vict. c. 57), s. 64, and 1888 (51 & 52 Vict. c. 50), s. 10.]**—The owners of a Trade Mark consisting of the letters “V. Z.” which had been registered as an old mark in 1885, now applied to register as a new mark the word “Vezet.”

Held—that the application should be granted *Quære*, whether a word which merely represents the sounds of a combination of letters could be registered if the applicants had not an old mark consisting of those letters.

IN RE VERSCHURE AND ZOON’S TRADE MARK, [(1905) 74 L. J. Ch. 684; 22 R. P. C. 568—Warrington, J.]

**43. Variation of English Word—“Absorbine”—Patents, Designs and Trade Marks Acts, 1883 (46 & 47 Vict. c. 57), s. 64, and 1888 (51 & 52 Vict. c. 50), s. 10 (1).]**—The word “Absorbine” as applied to an embrocation for removing swellings by absorption is not an “invented word” capable of registration as a trade mark, being merely a variation of an existing English word.

**Registration—Continued.**

Decision of Joyce, J. ([1904] 1 Ch. 696; 73 L. J. Ch. 212; 52 W. R. 414; 90 L. T. 85; 20 T. L. R. 200; 21 R. P. C. 97), affirmed.

CHRISTY v. TIPPER, [1905] 1 Ch. 1; 74 L. J. Ch. [55; 53 W. R. 147; 91 L. T. 712; 21 T. L. R. 53; 21 R. P. C. 755—C. A.

44. "*Haematogen*" — *Descriptive word—Patents, Designs and Trade Marks Acts, 1883* (46 & 47 Vict. c. 57), s. 64 (1) (d), and 1888 (51 & 52 Vict. c. 50), s. 10 (1).—For a word to be an "invented word" capable of registration as a trade mark, it must be substantially a newly coined word and newly coined for the purpose of being used as such trade mark.

In 1899 the plaintiff registered the word "haematogen" as a trade mark for a preparation of haemoglobin made from ox blood and glycerine. It appeared that since 1885 the word haematogen had been used in medical works to denote a certain substance then discovered in yolk of eggs, and believed to contribute to the formation of red corpuscles in blood. The plaintiff had used the word for commercial purposes since 1890; the defendants first used it in 1902.

HELD—that "haematogen" was not in 1899 an "invented word," and must be removed from the register; and further that it had not acquired a secondary meaning as denoting the plaintiff's goods, and that therefore the claim for "passing off" failed, such claim being confined to the use of the word, and not extending to the "get up" of the defendant's goods.

*Cellular Clothing Co. v. Maxton and Murray* ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397—H. L., No. 23, *supra*) followed.

Per Vaughan Williams, J.: In such cases, if the primary meaning of a word is simple and known to everyone, it is extremely difficult to establish that in any particular trade the word has lost its well-known and original meaning and acquired a secondary meaning to the exclusion thereof.

Decision of Warrington, J. (20 T. L. R. 586; 21 R. P. C. 576), affirmed.

HOMMEL v. GEBRUDER BAUER & Co, (1905) 21 [T. L. R. 80; 22 R. P. C. 43—C. A.

45. *Secondary Meaning of a Trade Description*—"Identical with"—"*Burberry*" Coats.—The plaintiffs had acquired a reputation for their waterproof garments under the names "Burberry," "Slip On," and "Burberry Slip-On." The defendants advertised "Burberry's Slip-On Coats," stating that they had "added this manufacture to their macintosh department," and that their coats were "identical with Burberry's." They sold under this advertisement coats not made by the plaintiffs.

HELD—that the names in question were not descriptive of a particular kind of coat by whomsoever made, and that the plaintiffs were entitled to an injunction.

BURBERRY v. RAPER & PULLEYN, [1906] 23 [R. P. C. 170—Warrington, J.

46. "*Calculated to Deceive*" — "*Direct Reference to the Character or Quality of the Goods*"—*Trade Marks Act, 1905* (5 Edw. 7, c. 15), ss. 9 (4), 11, 19, 21.—The word "motorine" was registered as a trade mark for lubricating oil suitable for, but not confined to, motors. The word became known as meaning the particular lubricating oil which bore that name and which the owners of the trade mark manufactured. The applicants applied to register the word "motricine" as a trade mark for a petrol spirit for driving motor cars and oil engines. Both oils were derived from petroleum. The Comptroller refused to register it. Upon appeal the Judge came to the conclusion upon the evidence that it was possible that there might be confusion between the two terms.

HELD—that registration ought to be refused, the applicants not having made out that the mark, if registered, would not be calculated to deceive.

The applicants moved to expunge the trade mark "motorine" from the register.

HELD—that the word had "no direct reference to the character or quality of the goods," and was therefore properly on the register under sect. 9, sub-sect. 4, of the Trade Marks Act, 1905.

IN RE AN APPLICATION FOR REGISTRATION [BY COMPAGNIE INDUSTRIELLE DES PÉTROLES AND IN RE PRICE'S PATENT CANDLE CO.'S TRADE MARK, [1907] 2 Ch. 435; 76 L. J. Ch. 646; 97 L. T. 235; 23 T. L. R. 672; 24 R. P. C. 585—Warrington, J.

47. *Similarity—Descriptive Name—Calculated to Deceive.*—An injunction to restrain the defendant company from using the word "electromobile" as part of their name was refused, the word being a descriptive word, and not having acquired a secondary meaning as denoting the plaintiff company.

Decision of Warrington, J., (1907) 97 L. T. 196; 23 T. L. R. 631; 24 R. P. C. 638 affirmed.

ELECTROMOBILE CO., LD. v. BRITISH ELECTRO-MOBILE CO., LD., AND OTHERS, (1907) 24 T. L. R. 192—C. A.

48. *Professional Designation*—"Incorporated Accountant"—*Name Appropriated to One Society—Unauthorised Use by Others—Fancy or Descriptive Word—Pecuniary Damage—Injunction*—The plaintiff society, the Society of Accountants and Auditors, was incorporated in 1885, and had for its object to form a body of accountants which, by means of examinations, should enable its members to acquire a certain status among accountants generally. In 1886 the members, on the advice of the society, used the title "incorporated accountant," and in 1905 this title was understood to denote a member of the society. In 1905 the defendant society, the London Association of Accountants, was incorporated with objects similar to those of the plaintiff society, and advised its members to use the title "incorporated accountant, London Association."

HELD—that "incorporated accountant" was a fancy and not a descriptive term; that it had

**Registration—Continued.**

come to denote a member of the plaintiff society, and that such society had a pecuniary interest in restricting the use of the term to qualified persons; and that therefore the plaintiff society was entitled to an injunction restraining individuals from using the term in business, and restraining the defendant society from holding out its members as entitled to so use it.

*Society of Accountants in Edinburgh v. Corporation of Accountants, Ltd.* ((1893) 20 R. 750) followed.

SOCIETY OF ACCOUNTANTS AND AUDITORS v. [GOODWAY AND LONDON ASSOCIATION OF ACCOUNTANTS, LD., [1907] 1 Ch. 489; 76 L. J. Ch. 384; 96 L. T. 326; 23 T. L. R. 286; 24 R. P. C. 159—Warrington, J.

49. *Registration—Fancy Word—Patented Article—Trade Marks Act, 1905* (5 Edw. 7, c. 15), ss. 3, 9, 35, 36—*Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), ss. 64, 90.]—The true meaning of sect. 36 of the Trade Marks Act, 1905, is that a trade mark registered under an earlier Act is not to be removed from the register on the ground that originally it was not properly registrable, if when removed it could properly be registered under the Act of 1905. Such a mark is not protected merely because it could originally have been properly registered if the Act of 1905 had then been in force.

A word which has already been applied as a name to a patented article is not a "fancy word" properly registrable under sect. 64 of the Act of 1883.

A word which is the name of a patented article is not an "invented word" within sect. 9 of the Act of 1905, nor can it be a "trade mark" within the definition in sect. 3 since it is not distinctive of the trade of a particular individual.

IN RE GESTETNER'S TRADE MARK, [1907] 2 Ch. 478; 76 L. J. Ch. 616; 24 R. P. C. 545—Neville, J.

See also Nos. 50, 146.

**3.—Alteration and Rectification.**

50. *Action to Restrain Infringement of Trade Mark and Passing Off—"Triticumina"—Fancy Word—Representations as to Patents—Alleged Infringement—"Triticine"—Action Dismissed—Mark Struck Off—Patents, &c., Act, 1883, s. 64 (1) (e)*—In March, 1886, the plaintiffs' predecessors in business registered the word "Triticumina" as a trade mark in Class 42, in respect of leaven and wheat-meal biscuits, bread, cakes, and other preparations from wheat. Patents were taken out in 1885 and 1886 for improvements in wheaten meal by the same persons. In 1891 this trade mark and these patents became vested in the plaintiffs. In 1896 the plaintiffs brought an action (1) for infringement of the said trade mark, and (2) alleged passing off by the defendants of their goods as the plaintiffs' by the use of the word "Triticine." The defendants alleged that they had used the

word "Triticine" before the invention of the word "Triticumina." They moved to expunge the trade mark from the register on the grounds (1) that it was the name of a patented article; (2) that it was descriptive. The plaintiffs had for some years sold "Triticumina" flour, "Triticumina" meal, "Triticumina" food, and other products in the name of which the word "Triticumina" occurred. It appeared that in certain advertisements the plaintiffs had used the word "patent" in connection with these articles. The trial of the action and the hearing of the motion came on together.

HELD—(1) that the word "Triticine" had been used by the defendants' predecessors for wheat-meal products before the registration or use by the plaintiffs of the word "Triticumina"; and, further, (2) that the plaintiffs had not shown that the use of "Triticine" by the defendants would deceive, and that the action must be dismissed, but, under the special circumstances of the case, without costs.

HELD—also, that the word "Triticumina" was not a fancy word, being derived from "Triticum" wheat by the addition of the suffix "ina," and being intended to be descriptive, also that the word was either the name of a patented article, in which case it was not a good trade mark, or else that the plaintiffs and their predecessors had represented their articles sold under the word "Triticumina" as patented, and *semble* (without deciding the point) that in such case the word could not be a good trade mark. The trade mark was, therefore, ordered to be expunged, with costs against the plaintiffs. The test laid down in *Re Van Duzer and Leaf's Trade Mark* (4 R. P. C. 31) has not been altered by the decision in *Re The Trade Mark Bouril* (13 R. P. C. 382).

MEABY & CO., LD. v. TRITICINE, LD., (1898) [15 R. P. C. 1, 14 T. L. R. 42—North, J.

51. *Action for Infringement and for Passing Off—Same Description of Goods—Calculated to Deceive—Mark Expunged—Interlocutory Injunction Granted—Patents, &c., Act, 1883, ss. 72 and 90*—The E. Company invented, and had for some years used, the word "Kodak" in connection with their goods, and especially for cameras; and the word occurred in all their registered trade marks. The company had made a speciality of cameras suitable for bicyclists, and the appliances for fixing the same to bicycles, and had largely advertised "Bicycle Kodaks." They held all the shares in a limited company called The Kodak Company, Ltd., which, however, had not commenced business. In August, 1897, the J. G. Company applied for and obtained registration of the word "Kodak" as a trade mark in Class 22 (in which the E. Company had no registered trade mark) for bicycles and other vehicles included in that class; and in October, 1897, The Kodak Cycle Company, Ltd., was registered, with a nominal capital of £100, and this company and the J. G. Company commenced to advertise "Kodak Cycles." The E. Company and The Kodak Company, Ltd., commenced an action against the J. G. Company and The Kodak Cycle Com-



**Registration—Continued.**

pany, Ltd., to restrain the defendant companies (1) from carrying on business under the name Kodak Cycle Company, Ltd.; (2) from passing off their goods as the goods of the plaintiffs; (3) for infringing the trade marks of the E. Company. They moved for an interlocutory injunction, and also moved to expunge the registration of "Kodak" by the J. G. Company.

**HELD**—that the word "Kodak" had become identified with the E. Company and with their goods, that the evidence showed a close connection between the bicycle and photographic trades, that registration had been obtained by an untrue statement to the Registrar, that the defendants were trying to get the benefit of the reputation of the E. Company, and that the trade mark must be expunged as being calculated to deceive; also that the plaintiffs were entitled to an injunction to restrain the defendants from trading under the name Kodak Cycle Company, Ltd., and from selling their goods as "Kodak."

**EASTMAN PHOTOGRAPHIC MATERIALS CO.,**  
[*LD. v. JOHN GRIFFITH'S CYCLE CORPORATION, LD.*, (1898) 15 R. P. C. 105—*Romer, J.*]

**52. "Person Aggrieved"—Motion Dismissed—Appeal—Patents, &c., Act, 1883, s. 90.**—In 1887 Wright, Crossley & Co., registered "Wright, Crossley & Co.," as a trade mark, used prior to August 13th, 1875, in Class 42. The Royal Baking Powder Company moved to rectify the register by expunging this mark, the chief ground taken being that the words had not been used as a trade mark prior to August 13th, 1875. The respondents objected that the applicants were not persons aggrieved within sect. 90 of the Patents, &c., Act, 1883. There had been litigation of various kinds between the applicants and respondents.

On the hearing of the motion, it was held that the applicants were not persons aggrieved, as they had not shown any practically possible way in which they might be damaged by the presence of the trade mark on the register, and that the trade mark was not in itself illegal or improper within the meaning of the judgment of Bowen, L.J., in *Paine & Co. v. Daniells & Sons' Breweries* (10 R. P. C. 219). The application was dismissed, with costs. The applicants appealed.

The appeal was dismissed, with costs.

**IN RE WRIGHT, CROSSLEY & CO. (TRADE MARK,**  
[No. 70,078], (1898) 15 R. P. C. 377—*C. A.*]

**53. Non-user—No bonâ fide Intention of dealing in Goods—Trade Marks expunged.**—The appellants had never at any time dealt in goods in Class 42 (the Food Class) and had not at the time of registration any bonâ fide intention of doing so. The Court ordered the registration of the two trade marks for Class 42 to be expunged.

The decision of the Court of Appeal ([1898] 2 Ch. 432; 67 L. J. Ch. 576; 79 L. T. 206; 15 T. L. R. 538) affirmed.

**BATT (JOHN) & CO. v. DUNNETT**, [1899] A. C. 428; 68 L. J. Ch. 557; 81 L. T. 94; 15 T. L. R. 424; 16 R. P. C. 411—*H. L. (E.)*

**55. Registration in Wrong Name—Inadvertence and Mistake—Costs—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 47, 61, 87.**—If it appears to the satisfaction of the Court that the registration of a design by an agent in his own name was made inadvertently and by mistake, in lieu of the name of the author, an order to vary the register by removing therefrom the name of the agent, and substituting therefor the name of the author, will be made, the appellant to pay the costs of the Comptroller.

**IN RE GROCOTT'S DESIGN**, (1900) 17 R. P. C. 139  
[—*Kekewich, J.*]

**56. Non-user—Non-appearance of Proprietor—Service abroad of Notice of Motion**—A word was registered as a trade mark in 1891 upon the instructions and in the name of an American giving Chicago as his address, with the name and address of an English firm of patent agents as his address for service. In 1899 an American company applied for the registration of the same word as their trade mark, they having used it for a long time in America, and also more recently in England. This application was objected to by the Comptroller, in view of the previous registration. Thereupon inquiries were instituted by the company, the result of such inquiries being that the registered proprietor could not be found to have ever used the mark, or done any business either in America or in England; that he could not be traced in Chicago or elsewhere; that letters addressed to him at Chicago were returned through the Dead Letter Office; and that the patent agents named as the address for service could give no information with respect to him. The company then gave notice of motion to rectify the register by expunging the mark, and left a copy of this notice at the address for service, and sent another copy of it in a registered packet to Chicago, accompanied by a letter as directed in *In re Compagnie Générale d'Eaux Minérales et des Bains de Mer* ((1891), 3 Ch. 451, 60 L. J. Ch. 728; 40 W. R. 89—*Stirling, J.*)

On proof of these facts and the registered proprietor not appearing, though more than twenty-eight days had elapsed since the dispatch of the packet and letter to Chicago.

**HELD**—that the mark should be expunged.

**IN RE ASHTON'S TRADE MARK**, (1900) 48 W. R. 389—*Stirling, J.*

**58. Action to Interdict—Action to Expunge—Patronymic—Advertisements.**—In 1891 John Dewar and Sons, the predecessors of John Dewar and Sons, Ltd., used as a trade mark for whisky the words "Dewars' whisky," and afterwards sought to interdict James H. Dewar from calling his whisky "Dewar's whisky." James H. Dewar then sought to have it declared that the entry of the trade mark was made in the register without sufficient cause, that it was illegal and ought to be expunged, and that John Dewar and Sons had no right to the exclusive use of the words "Dewars' whisky" as a trade mark for whisky.

**HELD**—(1) that John Dewar did not in and prior to August 13th, 1875—the date of the first

**Registration—Continued.**

Trade Mark Statute—use the words “Dewars’ whisky” as a trade mark, stamped upon or attached to his goods, and accordingly John Dewar & Sons, Ltd., had failed to discharge the *onus* upon them, and the trade mark must be expunged; (2) that John Dewar and Sons, Ltd., had not established in point of fact that their whisky was so known as “Dewars’ whisky,” that their name had acquired in the market a secondary sense, that is to say, that it no longer denoted, as it did at first, simply whisky made and sold by a person of the name of Dewar, but denoted, and was understood to denote, whisky made or sold by them; and (3) that James H. Dewar by his advertisement had not done anything to suggest that his whisky was that of John Dewar and Sons, Ltd.

JOHN DEWAR AND SONS, LTD. v. JAMES HAGGART  
[DEWAR, (1900) 17 R. P. C. 341—Court of Session.]

**59. Action for Infringement—User—Onus of Proof.**—The plaintiff brought an action against the defendants claiming an injunction, restraining the defendants from (1) infringing his registered trade marks in connection with medicine for animals; (2) from infringing his copyright in a label or sheet of letterpress giving directions as to the use of such medicine; (3) from passing off the defendant’s goods as and for the plaintiff’s goods. At the trial the plaintiff abandoned the claim for an injunction in respect of the alleged infringement of the trade marks and of the copyright in the label or sheet, and the defendants intimated that they could not contest the claim in respect of the passing off. The defendants moved for the rectification of the register.

**HELD**—that the plaintiff was entitled to an injunction in respect of the passing off; that the defendants made out by the production of bottles, and by what was shown as to the way in which the goods were sold, that *prima facie* there was no user of one of the marks as a mark in connection with the goods, and, assuming that *onus* to be upon the defendants, that was *prima facie* evidence to shift that *onus*, and to throw upon the plaintiff the obligation of showing that it was used in connection with the goods, and that *onus* he had not discharged, and that the mark must be rectified. As to the other mark, it was wrong, and must be expunged, so that the benefit of the Act, 1883, should not be preserved to the plaintiff.

*In re Dexter’s Application, In re Wills’s Trade Mark*, ([1893] 2 Ch. 262; 62 L. J. Ch. 545; 68 L. T. 793—Wright, J.) not followed.

DAY v. RILEY AND WHITTAKER, (1900) 48 [W. R. 556; 17 R. P. C. 517—Buckley, J.]

**60. Motion to Rectify by Expunging Name and Entering Applicants’ Names—Costs.**—F. acquired by an agreement for an assignment in 1889, Trade Mark No. 25,422, consisting of a tree with the word “Koptica,” from H. H.’s name was left on the register as proprietor of the trade mark. H. forgetting his assignment

to F. in 1896, assigned the trade mark to R. R. was registered as proprietor. F.’s executors moved to rectify the register by expunging the name of R., and by entering their names as proprietors instead.

**HELD**—that the executors were entitled to succeed in having the name expunged from the register. But inasmuch as the notice of motion went on to ask for what could not be granted—the restoration of their names to the Registrar—and inasmuch as it was possible there would have been no dispute at all if that had not been put forward, no costs were allowed to the applicants.

IN RE HARNESS’ TRADE MARK, (1900) 17 [R. P. C.—Farwell, J.]

**61. Rectification—Non-user—“Calculated to Deceive.”**—In January, 1898, the mark “Mother Red Cap” was registered by the predecessors in title of the applicants. That mark was never used, and any intention to use it was abandoned early in 1898. In April, 1898, they registered the simple mark “Red Cap,” and in June, 1899, the respondents registered “Night Cap.” Both were registered for the same class. “Night Cap” was substantially and largely used. In August, 1899, the applicants registered “White Cap.” “Red Cap” was put on the market some time in 1900. “White Cap” had not been used at all. There were no designs or pictures; the marks were mere words.

**HELD**—that “Red Cap” did not suggest “Night Cap,” nor did “Night Cap” suggest “Red Cap,” and that “Night Cap” was not a mark “calculated to deceive,” and the motion to expunge “Night Cap” was dismissed with costs.

IN RE HEDLEY’S TRADE MARK, (1901) 17 [R. P. C. 719—Cozens-Hardy, J.]

**62. Disclaimer—Distinctive Word—Word “calculated to Deceive or otherwise.”—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 64, 73, 74.**—The trade mark “Silverpan, Henry Faulder and Company, Limited,” was registered in 1886 under the Patents, Designs and Trade Marks Act, 1883, in Class 42 for preserves. The company brought an action against O. & G. Rushton, Ltd., claiming an injunction to restrain the defendants from infringing the trade mark. O. & G. Rushton, Ltd., applied to have the trade mark removed, or that a disclaimer be entered of the exclusive right of the word “Silverpan” as being a distinctive word or calculated to deceive or otherwise. It was conceded that at the date of the registration “Silverpan” meant jam manufactured in pans made of silver, and the word was open to the trade.

**HELD**—that the word “Silverpan” was a distinctive word within sect. 74 of the Act, and that it ought to be disclaimed, and the trade mark ought to be struck off.

*In re Smokeless Powder Company’s Trade Mark* ([1892] 1 Ch. 590; 61 L. J. Ch. 391; 40 W. R. 507; 66 L. T. 407; 9 R. P. C. 109—Chitty, J.) distinguished.

*Burland v. Brownburn Oil Co, In re Burland’s Trade Mark* ((1889) 42 Ch. D 274; 58 L. J. Ch.

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816; 38 W. R. 89; 61 L. T. 618—Chitty, J.) approved.

Decision of Kekewich, J. (1900) 83 L. T. 726; 18 R. P. C. 37, reversed.

IN RE FAULDER'S TRADE MARK, (1901) 18 [R. P. C. 536—C. A.]

63. *Application to alter Old Mark—The Word "Limited" not to be abbreviated.*—Holbrooks, Ltd., applied that leave might be given to alter three trade marks, of which they were the registered proprietors, by altering the words "Holbrook & Co.," as they then appeared in each of the trade marks, to the words "Holbrooks, Ltd."

HELD—that the order as asked might be granted, except that "Limited" in full was to be used instead of the abbreviated form "Ld."

IN RE HOLBROOKS, LD., (1901), 18 R. P. C. 447 [Cozens-Hardy, J.]

64. *Action for Infringement—Leave and Licence—Geometrical Figure—Device of a Diamond—Fraudulent Intention—"Calculated to Deceive"—Trade Mark Common to the Trade at Date of Registration—Rectification of Register.*—On January 1st, 1876, Bass & Co., a firm of brewers, registered a label for beer with the device of a geometrical diamond and the words "Trade Mark" upon such device. On January 17th, 1876, they registered the mark of a geometrical diamond, coloured red, and claimed eleven years' user before January 15th, 1876. On March 24th, 1883, Bass, Ratcliff and Gretton, Ltd.—the plaintiffs—who had succeeded to the business of Bass & Co., registered the mark of a geometrical diamond without the words "Trade Mark" on it.

In March, 1900, the plaintiffs commenced an action against the defendants—a brewing firm—to restrain them from using the device of a diamond. On September 24th, 1900, the defendants, in consideration of £250, agreed to withdraw their show-cards and enamel plates bearing the mark, and also to take the mark from all their advertisements; and they undertook not to use a geometrical figure of a diamond in any form whatever in the future.

Subsequently the defendants began to use in the centre of a show-card a device which the plaintiffs said was in reality a diamond with only the ends squared out. The plaintiffs sued the defendants for an infringement of their two registered trade marks. The defendants pleaded leave and licence.

HELD—that the defendants had not proved leave and licence; that there was not the slightest evidence that the defendants had used or intended to use the mark complained of on their casks or as labels for the bottles of their beer, but there was clear evidence that the defendants had used, and intended to use, it upon show-cards and advertisements; that the design used by the defendants was something of an entirely different character to a diamond, as it had ten points and ten angles, and was not a geometrical figure; that fraudulent intention was entirely beside the question; and that there was no infringement.

The defendants had served the notices of motion for the rectification of the Register of Trade Marks by removing therefrom the two registered trade marks.

HELD by Kekewich, J. (86 L. T. 186; 18 T. L. R. 108; 19 R. P. C. 129)—that the first registered trade mark was common to the trade in 1876, and was improperly registered, not in the sense that the Comptroller ought not to have put it on, but that the applicants had no right to have it put on, and that it must come off; and that, therefore, the second registered trade mark was also common to the trade in 1883, because it was registered as an old mark, and the one fell with the other.

On appeal (reversing Kekewich, J.):

HELD—that the trade mark of Messrs. Bass was properly registered at the time it was registered; and that Bass & Co.'s trade mark had not become, nor ever had become, common to the trade.

HELD ALSO—that the words "Trade Mark" on the diamond could not mislead anyone nor do any harm.

In re Apollinaris Co.'s Trade Mark ([1891] 2 Ch. 186; 61 L. J. Ch. 625; 65 L. T. 6—C. A.) discussed.

IN RE BASS, RATCLIFF AND GRETTON, LD. [(No. 2) AND OTHERS, [1902] 2 Ch. 579; 71 L. J. Ch. 779; 51 W. R. 86; 87 L. T. 408; 18 T. L. R. 785; 19 R. P. C. 529—C. A.]

65. *Application to alter Old Mark.—No Opposition by Comptroller—Order Made.*—In 1876 S. Maw, Son and Thompson were registered under a certain trade mark in certain classes, user before August 13th, 1875, being claimed. The registration of this trade mark was renewed in 1890. Subsequently the firm of S. Maw, Son & Sons succeeded to the business of S. Maw, Son and Thompson, and were registered as proprietors of the trade mark, and they applied for leave to alter the trade mark by substituting for the word "Thompson" the word "Sons." The Comptroller-General, who had been served, did not appear to oppose.

HELD—that the order might be made.

IN RE MAW, SON AND THOMPSON'S TRADE MARK, (1902) 19 R. P. C. 260—Buckley, J.

66. *"Combination of Devices"—Three Labels—Mode of User—Essential Particulars—Sufficient Description—Registration too Wide—Patents, Designs and Trade Marks Acts, 1883 (46 & 47 Vict. c. 57), s. 64; 1885 (51 & 52 Vict. c. 50), s. 10.*—The plaintiffs on the application for registration of the trade mark in question, to which the labels were affixed in such a way as to show the mode of user, contained a statement of the essential particulars with a disclaimer, which was objected to by the Comptroller, and by his desire this statement and disclaimer were amended by substituting therefor the following words: "The essential particular of the trade mark is the combination of devices, and we disclaim any right to the exclusive use of the added

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matter except in so far as it consists of our own name and address."

The plaintiffs had hitherto used the trade mark by pasting the largest and smallest labels on different sides of the outside wrappers of their bundles of yarn, and the medium label on the inside wrappers. There was no evidence as to user in respect of goods other than cotton yarn. The defendants, who were dealers in yarn, were alleged to have infringed the trade mark in respect of yarn. The plaintiffs sued the defendants for infringement, and the defendants sought to have the trade mark removed from the register.

**HELD**—that the description was sufficient within sect 64 of the Patents, Designs and Trade Marks Act, 1883, as amended by the Act of 1888; that the plaintiffs could put on their goods all three labels to distinguish their goods; that the labels could be put at different ends or different sides of the packages; and that if the defendants wished to limit the trade mark to cotton yarn their remedy would be to rectify the register and not to strike the mark off.

*In re Player & Son's Trade Mark* ([1901] 1 Ch. 382; 70 L. J. Ch. 359; 84 L. T. 190; 18 R. P. C. 65—Cozens-Hardy, J., No. 6, *supra*) distinguished.

*In re Spencer's Trade Marks* ([1886] 3 R. P. C. 73) followed.

*Edwards v. Dennis* ([1885] 30 Ch. D. 454; 55 L. J. Ch. 125; 54 L. T. 112—C. A.) followed.

**IN RE A. AND A. CROMPTON & CO.'S TRADE MARK**, [1902] 1 Ch. 758; 71 L. J. Ch. 497; 50 W. R. 426; 86 L. T. 657; 18 T. L. R. 398; 19 R. P. C. 265—Eady, J.

**67. Distinctive Mark—Indicating Manufacturer or Trader—Indicating Goods—"Vaseline"—Rectifying Register—Onus of Proof—Trade Marks Registration Act, 1875** (38 & 39 Vict. c. 91), s. 10.]—It is the duty of the applicant for the removal of a trade mark from the register to satisfy the Court that it was not used in England as a trade mark before August 13th, 1875, the date of the commencement of the Trade Marks Registration Act, 1875.

In 1865 R. A. Chesebrough took out patents—which did not mention "Vaseline"—in England and America for an improvement in refining petroleum and other hydrocarbon oils. This improvement consisted in the filtration of those oils through animal charcoal (sometimes named "bone black") or wood charcoal, or other filtering material.

In 1872 the same inventor took out in America a patent for "Improvements in products from petroleum." He stated in his specification that he had invented "a new and useful product from petroleum," which he had termed "Vaseline," and that "the substance from which 'Vaseline' is made is the residuum of petroleum left after the greater part of the petroleum has been distilled off." The process of making "Vaseline" was described as consisting of the "filtering of the aforesaid petroleum residuum through bone black, according to the process described in the American patent of 1865;" and the claim was

for "The new article of manufacture named by me 'Vaseline,' substantially as herein described." This invention was never patented in England. It was therefore open to anyone in England, after the American patent became known here, to manufacture the new article for which that patent was granted in the United States. There was evidence of the sale in England by R. A. Chesebrough of "Vaseline" manufactured by him in 1873, 1875, and 1877. There was abundant evidence that the name "Vaseline" had always been understood in England to denote the manufacture of R. A. Chesebrough and his successors the Chesebrough Company.

In 1874 R. A. Chesebrough obtained an English patent for producing the same article, "Vaseline," by a new process.

In 1877 the word "Vaseline" was registered in England in four classes, one being Class 3.

The question arose whether in these circumstances the Court ought to come to the conclusion that the word "Vaseline" was, at the date of registration, improperly placed on the register as an old trade mark under the Act of 1875. It was admitted by the respondents that the evidence did not establish that the word "Vaseline" was used in England as a trade mark before August 13th, 1875, the date of the commencement of the Act of 1875. The applicant, E. T. P., moved for an order rectifying the register by the removal therefrom of the trade mark "Vaseline." The Comptroller and the Chesebrough Manufacturing Company were respondents to the application.

**HELD**, by Vaughan Williams and Stirling, L. J. J. (Cozens-Hardy, L. J., dissenting)—that the onus of proof which lay on the applicant was not discharged; that as regards the entry in the *Trade Marks Journal* of 1877 the word "Vaseline" ought there to be read in the same sense throughout, and to be regarded as denoting the goods manufactured by the Chesebrough Company; that the applicant had failed to show that the word "Vaseline" was not in use by itself as a trade mark in England previously to August 13th, 1875, and that an order should be made refusing the application to rectify the register.

*In re Leonard and Ellis' Trade Mark* ([1884] 26 Ch. D. 288; 53 L. J. Ch. 603; 51 L. T. 35—C. A.) followed.

*Linooleum Manufacturing Co. v. Nurn* ([1878] 7 Ch. D. 834; 47 L. J. Ch. 430; 26 W. R. 463; 38 L. T. 448—Fry, J.) distinguished.

Decision of Buckley, J. ([1901] 17 T. L. R. 259; 18 R. P. C. 191), reversed upon further evidence.

**IN RE CHESEBROUGH'S TRADE MARK "VASELINE,"** [1902] 2 Ch. 1; 71 L. J. Ch. 427; 86 L. T. 665; 18 T. L. R. 468; 19 R. P. C. 342—C. A.

**68. Registration for Entire Class—Non-User for some of that Class—Immediate bona-fide Intention to Use the Mark for such Portion of the Class—Rectification of Register Excluding such Portion of the Class—Patents, Designs, and Trade Marks Act, 1883** (46 & 47 Vict. c. 57), s. 90.]—Where there has been first a registration by a trader of a mark for a whole class, then user of the mark for some goods in that class and sale of other goods in the same

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class for more than twenty years in connection with other marks and never in connection with the mark in question, then in respect of the last-named articles there never was at the time of registration any such intention to use the mark as to bring the case within the principle requiring *de facto* user, or immediate intention to use the mark in connection with a particular description of goods at the time of registration, to entitle a man to be on the register in respect of such goods; and the register ought to be amended by excluding such goods for which the mark stands on the register.

Principle of *Edwards v. Dennis* ((1885) 30 Ch. D. 454; 55 L. J. Ch. 125; 54 L. T. 112—C. A.) applied.

IN RE REGISTERED TRADE MARK NO. 22,206 [OF MAURICE JOHN HART, [1902] 2 Ch. 621; 71 L. J. Ch. 869; 51 W. R. 107; 87 L. T. 426, 18 T. L. R. 778; 19 R. P. C. 569—Byrne, J.

**69. Registration for Entire Class—Limitation to Parts of Class—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 90.]**—In 1883 the respondents, or their predecessors in title, applied for and obtained registration of a trade mark (No. 32,194), consisting mainly of an open hand, in Class 1 for "Chemical substances used in manufactures, photography, and philosophical research, anti-corrosives, and anti-foulers."

In 1890 the respondents applied for and obtained registration of another trade mark (No. 152,830), which consisted solely of an open hand, in Class 1 for "Chemical substances used in manufactures, photography, and philosophical research, anti-corrosives, and anti-foulers, including compositions for ships' bottoms."

In 1901 the applicant applied for registration of a mark consisting of an open hand, for "Glue and gelatine" in Class 1. Glue and gelatine were not articles which were or had ever been manufactured or sold by the respondents, nor were they nor had they ever been ingredients of any such articles.

**HELD**—that the applicant's mark, though identical with one and closely resembling the other of the respondents' marks, would not if registered be calculated to deceive, because it would not be on the register with respect to the goods or description of goods for which the respondents ought to be registered, and that both the respondents' and applicant's respective marks must be limited to the goods for which they had been and were actually used, so as to avoid, as far as possible, further applications to limit.

*Edwards v. Dennis* ((1885) 30 Ch. D. 454; 55 L. J. Ch. 125; 54 L. T. 112—C. A.) followed.

IN RE THE TRADE MARKS OF SUTER, HART-MANN, AND RAHTJEN'S COMPOSITION CO., LD., (1902) 19 R. P. C. 42—Byrne, J.

**70. Consent Order—Agreement as to further use of Mark—Notice to Comptroller.]**—Where on a motion to rectify the Register of Trade Marks by expunging therefrom a certain trade mark, the applicant and respondent had agreed

to an order and that the future arrangements with regard to the mark and the use of it were to be put in an agreement.

**HELD**—that notice must be given to the Comptroller of the appointment before the Registrar to settle the order, as the Comptroller should know of the special terms put in the order.

IN RE GOLDING'S TRADE MARK, (1902) 19 [R. P. C. 375—Joyce, J.

**71. Accidental Omission to Keep Old Mark Alive—Two Years' Interval—Registered Anew—"Special and Distinctive Word"—Laches of Applicant—Action for Infringement—Evidence of "Passing off"—Judge's own Observation—Division of Total Costs of Action and Motion—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64 (1), and 1888 (51 & 52 Vict. c. 50), s. 10.]**—A. was the owner of two trade marks, registered in 1876 as old marks, in respect of corsets and other underclothing, viz.:—the word "Swanbill" and the figure of a Swan. By accident the mark "Swanbill" was allowed to lapse for two years, and was then registered anew in 1892.

In 1901 he commenced an action against Messrs. Swan & E., complaining that they were infringing his "Swan" trade mark by advertising a "Swan" corset with the figures of two swans beneath the picture thereof; and to this action the defendants replied by moving to expunge both of A.'s trade marks—"Swanbill," on the ground that the original registration had been abandoned, and that at the time of re-registration the word was not "special and distinctive"; and the figure of a Swan, on the ground that it had never been used for the goods in respect of which it had been registered. The motion and action were heard together. The defendants at the outset abandoned their motion as to the "Swan" mark.

**HELD**—that there had been no such adjudication as to its validity as would justify the Court granting a certificate under sect. 77 (a).

As to the word "Swanbill" :—

**HELD**—that it must be expunged, for when re-registered in 1892 it was proved by evidence not to be "distinctive" in the sense required by sect. 64 (3) of the Act of 1883, as interpreted by Fry, L.J., in *Wood's Trade Mark* (1886), 33 Ch. D. 262; 55 L. J. Ch. 377; and that *laches* on the part of the defendants (who had known of the registration in 1896), though it would affect the question of the costs of the motion, did not disentitle them to succeed, in the absence of any evidence that the plaintiff had been thereby prejudiced in opposing the motion.

In the action for infringement :—

**HELD**—that it is not necessary for the plaintiff in a passing-off action to call witnesses to say that they have been, or would be, deceived, but the Judge must use his own eyes; and in the present case there was no reasonable possibility of mistake being made, and the action must fail.

*London General Omnibus Co. v. Larrell* ([1901] 1 Ch. 135; 70 L. J. Ch. 17; 17 T. L. R. 61, No. 137, *infra* discussed).

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Under the circumstances the plaintiff was ordered to pay two-fifths of the taxed costs of action and motion.

**BOURNE v. SWAN & EDGAR, LD., IN RE**  
[BOURNE'S TRADE MARKS, [1903] 1 Ch. 211;  
72 L. J. Ch. 168; 51 W. R. 213, 87 L. T. 589;  
19 T. L. R. 59; 20 R. P. C. 105—Farwell, J.]

**72. Motion for Leave to Alter Old Trade Mark—New Address—Adding Words “Great Britain”**—*Form of Order—Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 92.]—Leave was given to the owner of a trade mark to alter it by correcting the address, which formed part of it, from 18 New O. Str. to 4 Great O. Str., and also by adding “Great Britain” after “London.” The street and premises had been renamed and renumbered; and it was stated that in some countries “London” alone was regarded as an incomplete address. The applicant undertook to supply a block to the Patent Office.

**IN RE THE TRADE MARK OF COCKLE (JAS.) & CO., (1903)** 20 R. P. C. 353—Farwell, J.

**73. “Person Aggrieved”**—*Costs of Person Equitably Entitled to Existing Mark—Letter—Whether a sufficient Disclaimer—Patents, Designs and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 90.]—A company had agreed to sell its assets and goodwill to a new company by an agreement which was sufficient to pass the right to a certain trade mark lately registered by it.

Before completion, a rival company applied to have the mark in question removed from the register, on the ground that it had been used prior to registration.

**HELD**—that such company was a “person aggrieved,” whether or not its own claim to the mark was good.

**HELD ALSO**—that the old company as legal owners, and the new company as equitable owners, were both properly made parties to the application; and that a letter written by the latter to the applicants was not a sufficient disclaimer to relieve them of the liability to pay costs.

**IN RE THE TRADE MARK “ZONOPHONE,” (1903)**  
[20 R. P. C. 450—Byrne, J.]

**74. Passing off—Name of Firm—Scotch Business—Extended to England—Name already used in England—No probability of Deception—Action Dismissed—Trade Mark—Costs.**]—The plaintiffs were the assignees of MacFarlane & Co., who had been whisky distillers in Scotland with a local reputation from 1740 to 1897. In 1897 the defendants, at the suggestion of a business colleague named MacFarlane, began to use and subsequently registered the mark “MacFarlane & Co.” for a brand of their whisky.

The plaintiffs, upon extending their trade into England, brought an action to restrain the defendants from using the name MacFarlane & Co. and also moved to remove the defendants' trade mark from the register.

**HELD**—that the action failed as no deception or risk of deception had been proved.

It being admitted that the trade mark, not being the signature of an existing firm, was invalid, an order was by consent made for rectification with costs, but no costs of evidence as none had been given on the motion.

Decision of Buckley, J. (21 R. P. C. 357), affirmed.

**MACMILLAN AND OTHERS v. EHRLMANN BROS.,**  
[LD., [1904] 21 R. P. C. 647—C. A.]

**75. “Quaker”**—*Spirits. &c.—Whether a Word having reference to the character or quality of Goods, or calculated to deceive or disentitle to Protection—Patents, Designs and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), ss. 64, 73—*Patents, Designs and Trade Marks Act, 1888* (51 & 52 Vict. c. 50), s. 10.]—A firm of wine merchants registered the word “Quaker” as a mark for fermented liquors and spirits other than whisky. The secretary of the Society of Friends applied to remove the mark on the grounds that it was not entitled to protection, and was scandalous and liable to deceive, or had reference to the character or quality of the goods.

**HELD**—that no legal damage could be caused to the society or to those members of it who were total abstainers, and that they were not persons aggrieved; further, that the word was not calculated to deceive, or disentitled to protection, nor had it reference to the character or quality of the goods, and that the motion must be dismissed with costs.

**IN RE ELLIS & CO.'S TRADE MARKS, (1904)** 21  
[R. P. C. 617—Farwell, J.]

**76. Motion to rectify by exclusion of certain Goods—No intention to use for such Goods—Mark common to Trade**]—In 1878 the plaintiffs, who then sold milk in England, registered, in Class 12, a trade mark consisting of the figure of a milkmaid and the words “Milkmaid Brand.” In 1901 they began to sell butter in this country for the first time, and they then registered a very similar trade mark in the same class.

In 1902 they brought an action for infringement of these marks and for “passing off” in respect of the defendants' use of the figure of a milkmaid for advertising their butter.

**HELD**—that the action failed on the facts, but that a motion of the defendants to limit the use of the plaintiffs' marks succeeded, and that the register must be rectified by excluding butter from the goods for which they were registered, on the grounds that the plaintiffs never used, or intended to use, the 1878 mark for butter, and that the figure of a milkmaid was common in the trade before the later mark was registered.

Decision of Joyce, J. (20 R. P. C. 509), affirmed.

**ANGLO-SWISS CONDENSED MILK CO. v. PEARKS,**  
[GUNSTON, & TEE, LD., IN RE TRADE MARKS OF ANGLO-SWISS CONDENSED MILK CO.,  
(1904) 20 T. L. R. 238; 21 R. P. C. 261—C. A.]

**77. Similarity**—“Neostyle”—“Cyclostyle”—“Neo-Cyclostyle”—*Goods marked in this Country*

## Registration—Continued.

for Export only—Acquiescence.]—The word "Cyclostyle" was registered as a trade mark in 1882 in respect of a patented copying apparatus; in 1888 the manufacturer invented improvements, and commenced to sell the improved apparatus under the name "Neo-Cyclostyle," which, however, he did not register as a trade mark. Besides selling in the United Kingdom, he exported these improved machines to K. in America; and all machines so exported (and no others) were marked "Neostyle."

In 1900 K., to the knowledge of the manufacturer formed the Neostyle Manufacturing Co., Ltd., for the sale in England of "Neostyle" goods; and in 1901 he registered "Neostyle" as a trade mark. In 1902 the manufacturer moved to rectify the register by striking out the entry.

HELD—that the manufacturer was a "person aggrieved" within the meaning of sect. 90 of the Patents Act, 1883; that K. had acquired no right to register "Neostyle" as a trade mark, and that the company had acquired no exclusive right to use the word; and that therefore the mark must be expunged.

Decision of Kekewich, J. (20 R. P. C. 329), reversed.

IN RE NEOSTYLE COMPANY'S TRADE MARK, [1904] 20 R. P. C. 803—C. A.

78. Application to alter Old Mark—Addition of Word "Limited" to Signature—Objection to—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 92.]—Where a signature (e. g., H— and S—) is an essential particular of a trade mark, *semble* it would be a breach of sect. 92 of the Patents, Designs, and Trade Marks Act, 1883, to add to it the word "Limited"

The difficulty may be avoided by leaving the signature standing and adding below in ordinary type "Proprietors, H— and S—, Limited."

IN RE HAMMOND AND STOW'S TRADE MARK, [1905] 22 R. P. C. 299—Farwell, J.

79 Invalid Mark—Action for Damages for Wrongful Registration—Damnum absque injuria.]—T. & Co. were agents for sale of an American flour known as "Diamond Dust." They sold none, and R. was appointed agent in their place. T. & Co. thereupon registered "Diamond Dust" as a trade mark of their own, and prosecuted R. for selling flour under that name contrary to the provisions of the Merchandise Marks Act.

As they still claimed a right to the mark, R. sued to expunge the entry, and for damages for wrongful registration and for the loss caused him by his inability to sell under the name. T. & Co. abandoned the mark just before trial.

HELD—that as the mark had been registered in pursuance of a statutory right, the case was one of *damnum absque injuria*, and R. could not recover damages, but that, in view of T. & Co.'s conduct, they must pay his costs up to the date of abandonment.

REID v. THOMSON & Co., (1905) 22 R. P. C. 376 [—Ct. of Sess.]

## II. DECEPTION.

## 1. By use of same trade name.

80. Alleged Concurrent User—Effect of Dying Out and Subsequent Revival of Defendant's Trade.]—D. and A., in 1881, began to sell goods marked with a trade name to one customer. This was continued till 1883, when they stopped selling until February, 1886, and thenceforth sold to numerous customers, and their trade increased very largely and became very important. In November, 1885, they registered their trade name as part of a trade mark. W., in April, 1885, applied to register the same trade name by itself as a trade mark, but was refused registration. Shortly afterwards he commenced to sell goods under this trade name, and continued to do so in substantial quantities until the early part of 1887, when his trade began to dwindle until it rapidly came down to one or two sales a year, and finally ceased altogether for at least a twelvemonth. W. then began selling his goods marked with the trade name to B. At the end of 1896, this came to the notice of D. and A., and they commenced an action against W. and B. in January, 1897, not based on trade mark, but to restrain them from selling goods under the trade name. It appeared that D. and A. were aware of one parcel of W.'s goods being sold to P. in 1886, but they thought the matter had come to an end, and therefore took no steps on this occasion.

HELD—that the trade name was proved to denote the plaintiffs' goods exclusively in the market, and that the plaintiffs were entitled to an injunction to restrain the defendants from using the trade name without distinguishing their goods from the goods of the plaintiffs, and to 40s. damages and costs.

DANIEL AND ARTER v. WHITEHOUSE AND [BRITTON], [1898] 1 Ch. 685; 67 L. J. Ch. 262; 15 R. P. C. 134—Barnes, J.

81. Action for Passing Off—Person Trading in His Own Name—Get-up—Features Common to the Trade—Injunction Granted at Trial—Appeal Allowed.]—The plaintiff, who carried on business as Jamieson & Co., at Aberdeen, as a manufacturer of harness composition, brought this action to restrain George Jamieson, who was also a manufacturer of harness composition at Aberdeen, from passing off his goods as the goods of the plaintiff. It appeared, at the trial, that there were two other manufacturers of harness composition named Jamieson at Aberdeen, one being Peter Jamieson, who was prior in date to all the others. The evidence was to the effect that the tins used by the defendant were, as regards size and shape, and that the labels thereon were, as regards their colour and the colour of the printing, similar to the plaintiffs' and to Peter Jamieson's, but were common to the trade. In 1892, the plaintiff, in consequence of proceedings taken by Peter Jamieson, agreed with him that he, the plaintiff, should put on his tins, "Jamieson & Co.," diagonally in writing, and a registered trade mark consisting of a horse. The defendant, when he first started business at Aberdeen, put "G. Jamieson" on his tins, but

**Deception—Continued.**

subsequently, on the complaint of Peter Jamieson, substituted "George Jamieson." "Aberdeen" appeared on all the labels above referred to.

**HELD**—by Byrne, J., that the whole combination used by the defendant was calculated to deceive; that the arrangement between Peter Jamieson and the plaintiff, and the fact that each of them might be injured, did not prevent the plaintiff suing alone; and that there had not been such delay or acquiescence on the part of the plaintiff as disentitled him to sue.

*Fullwood v Fullwood* (9 Ch. D. 176) followed.

An injunction was granted, with costs.

A man entering a trade in which other persons of a like name have established a reputation has a burden cast on him to distinguish his goods from theirs.

The defendant appealed.

**HELD**—on appeal, that the distinctive features of the plaintiff's tins were the signature, "Jamieson & Co.," and the trade mark, and that the defendant's goods had no similarity to the plaintiff's goods, except in features that were common to the trade, and that he had not passed off his goods as the goods of the plaintiff. The appeal was allowed, with costs.

A man is not bound to use extra precautions to avoid confusion between his goods and those of other persons in the trade, if such confusion arises solely from similarity of his own name with theirs, and from the use of features common to the trade, but such a case must be distinguished from the case where the name of a particular trader has, in the market, come to denote his goods.

*Per* Vaughan Williams, L.J.—A misrepresentation by a plaintiff on his goods does not preclude him from recovering damages at law.

*JAMIESON & CO. v JAMIESON*, (1898) 15 R. P. C. [169; 14 T. L. R. 160—C. A.]

**82. Trade Name—Initial Letters—Rival Traders Having Same Initials**—[A corset maker, whose initials were "C. B.," marked the corsets made by him with those letters. In an action of interdict brought by him against another rival corset trader, who sold corsets stamped "C. B. & Co." (the "C. B." being printed in larger type than the "Co."), which were made by Connell Brothers & Co., it was proved that for a long time the "C. B." corsets had become well known to the trade as being made solely by the pursuer, and that the defendants had so marked their corsets as to mislead purchasers into believing that they were the pursuer's corsets. The Court held that the pursuer was entitled to an interdict against the defendants selling corsets, not made by the pursuer, if marked in such a manner as to induce those who purchased them in believing that they were the pursuer's "C. B." corsets.]

**HELD ALSO**—that the fact that the pursuer held certain registered trade marks, in relation to one of which he had disclaimed the exclusive right to the letters "C. B.," did not preclude him from preventing the use of the letters "C. B." by his rival in trade.

*Rosenthal v. Reynolds*, (1892) 9 Pat. Cas. 189—distinguished.

*BAYER v. BAIRD*, (1898) 25 R. 1142; 35 Sc. L. R. [913—Ct. of Sess.]

**83. Name taken by Defendant—Fraud—Injunction absolute.**—[In 1892 the defendant, who was then known by the name of Louis Lesser St. Leger Forbes Gower, but whose original name was Louis Lesser Dutch, took by deed-poll the name of Louis Marius Pinet. This deed was registered in 1894. In 1893 he began to carry on under his new name the business of manufacturing "elevators," a contrivance for increasing the apparent height of short persons, and boots and shoes specially made for this purpose, and that of concealing the defect of persons whose legs were of unequal length. In 1897 he sold this business to a company, incorporated under the name of Maison Pinet, Limited. The memorandum of association enabled the company to carry on a general boot and shoe-making business. F. Pinet and Cie., of Paris, whose boots were proved to have a world-wide reputation, brought an action against Maison Pinet, Limited, and on the 26th October, 1897, the Court of Appeal granted an injunction restraining the defendant company from carrying on business as manufacturers of boots and shoes under any name of which Pinet formed a part, without clearly distinguishing their boots and shoes from those made by the plaintiffs. At this time it was supposed that Pinet was L. M. Pinet's original name. The defendant company then entered into an agreement to sell their business to a new company, to be called Maison Louis Pinet, Limited. F. Pinet and Cie. then brought this action against L. M. Pinet, both companies, and their directors, for an absolute injunction against the use of the name Pinet.]

**HELD**—that the defendant, L. M. Pinet, having adopted the name Pinet for fraudulent purposes, the plaintiffs were entitled to an absolute injunction restraining him and both the companies from using the name Pinet, or any description including that name, in connection with boots or shoes, and from purporting to sell to, or doing anything purporting to confer upon any other person the right to use that name in connection with boots and shoes.

*PINET (F.) ET CIE. v. MAISON LOUIS PINET*, [Ld., [1898] 1 Ch 179, 67 L. J. Ch. 41, 77 L. T. 613; 15 R. P. C. 65; 14 T. L. R. 87; 46 W. R. 506—North, J.]

**84. Dissolved company—Goodwill and Assets sold by Liquidator to new Company with different Name—Person trading under Name similar to dissolved company—Injunction.**—[A company incorporated under Letters Patent was wound up, and the goodwill and assets sold by the liquidator. Subsequently, the appellant company, having a different name to the dissolved company, was formed to take over the assets of the dissolved company. The respondent declared his intention to trade under a similar name to that of the dissolved company. For upwards of seven months the respondent carried



**Deception—Continued.**

on his business under the name similar to that of the dissolved company, with the acquiescence of the liquidator of the old company, and, until the action to restrain him from using the name was commenced, of the purchasers of the goodwill.

**HELD**—that the liquidator could not transfer the right to use the name of the dissolved company, which was a grant from the Crown; that it was competent for the liquidator to sell the goodwill of the old company together with the other assets; that the promoters of the appellant company might have applied for incorporation under the same name as the old company, subject to any objection which might be urged by the respondent; that the appellant company had the right to describe themselves as the successors of the old company, and as carrying on the same business, but no right to use the old company's name as their trade mark or firm name; that the respondent had no right to hold himself out as successor to the old company; but the appellant company had no right to restrain the respondent from using the name similar to that of the old company.

**MONTREAL LITHOGRAPHING CO., LD. v. SA-BISTON, [1899] A. C. 610; 68 L. J. P. C. 121; 81 L. T. 135; 16 R. P. C. 444—P. C.**

**85. Passing off Goods—Action to Restrain—Name designating Type, not the Manufacturer.**—On the 23rd of November, 1885, F. S. Winsor, a member of the firm of Winsor & Co., registered a design for an interceptor or sewage trap. This design expired in 1890. Winsor & Co. transferred their business to Winsor & Co., Ltd. Winsor & Co., and Winsor & Co., Ltd., sold interceptors made according to the registered design, and these interceptors were at the commencement of the action in 1898 against the defendants, and always had been, marked with the name of the firm and the word "registered" and the number. The plaintiffs sought to restrain the defendants from selling "Winsor Interceptors" not being the plaintiffs' goods.

**HELD**—that upon the evidence the term "Winsor Interceptor" or "Winsor Trap" denoted a trap of a particular type or pattern, and that in the trade the name had got to mean the type of machine or interceptor, and not necessarily those which were sold by the plaintiffs; and further that the defendants in supplying "Winsor Interceptors" did not thereby intend to, and did not thereby, in fact, represent their goods to be the goods of the plaintiffs.

**WINSOR & CO., LD. v. ARMSTRONG & CO., (1899) [16 R. P. C. 167—Byrne, J.]**

**86. Passing Off—Injunction.**—The word "Dunlop" was first used by the predecessors in title of the plaintiff company in connection with accessories to cycles. The defendant chose to carry on business in the name of the Dunlop Lubricant Company because of the word "Dunlop," and because the word "Dunlop" suggested the plaintiff company, and for no other reason. He was restrained from carrying on business under that name and describing his goods as

"Dunlop" goods, that being the chief word that he used on the covers of his goods, with regard to his burning oil and his graphite, which he sold.

**DUNLOP PNEUMATIC TYRE CO., LD. v. DUNLOP LUBRICANT CO., (1899) 16 R. P. C. 12.**

**87. Passing Off—Action to restrain—Concurrent User—"Dolly Blue."**—In the year 1871 R., whose goods were sold by the defendants, registered as a design under the Designs Act a picture of what is known in the North of England as a "Dolly Tub"—that is to say, a washing tub with a peg called a dolly per standing up in it. In the year 1876 he registered the same design as his trade mark under the Trade Marks Act; and from 1876 down to 1888 the trade mark was invariably stamped upon the paper in which R.'s blue was wrapped up. R.'s blue was sold under the description of "Dolly Blue." R.'s blue was also called "Oral Blue." E. began to make blue in the year 1884, and down to 1888 his blue was issued to the public under the description of "Filter Blue" or "Filtered Blue." Afterwards he sold his blue as "Dolly Blue," and in December, 1890, R. wrote to him, saying, "You know that my blue has been asked for as 'Dolly Blue,' and take care that you do not get into trouble for using the name 'Dolly Blue' at all." To that letter there was no answer. In 1894 a company was formed, which took over the business of E. The plaintiffs brought an action against the defendants for supplying blue not being the plaintiffs' to persons ordering "Dolly Blue."

**HELD**—that the plaintiffs had not succeeded in proving that the name "Dolly Blue" was exclusively applicable or had been exclusively applied to their goods.

**EDGE & SONS, LD. v. GALLON & SON, (1900) [17 R. P. C. 557—H. L. (E.)]**

**88. Passing off—Action to restrain—Name indicating Manufacturer—Two firms of same Surname—Name identified with Manufacture of One Firm—Right to exclusive Use of—User without qualifying Words—Tendency to deceive.**—A distillery in Dublin was carried on under the name of John Jameson & Son until 1891, when the firm was converted into a limited liability company under the name of John Jameson & Son, Ltd. (the plaintiffs). Another distillery founded about the same period in Dublin was carried on under the name, first, of William Jameson, then of Jameson & Robertson, and finally of William Jameson & Company, until 1889, when, with two other distilleries, it was acquired by the defendants, the Dublin Distillers' Company, Ltd. Previous to that date the labels used for whiskey made at this distillery bore the name "William Jameson & Co." or "W. Jameson & Co.," but in 1898 the defendants altered the label, substituting for those words the description "Jameson's Whiskey." The plaintiffs thereupon required the defendants to revert to the former words, and describe their whiskey as "William Jameson & Co.'s," or even as "Wm. Jameson & Co.'s." The defendants declined to do this, but offered to insert the letter "W," before "Jameson's."

**Deception—Continued.**

In an action to restrain the defendants from selling their whiskey under the name of "Jameson's Whiskey, without the prefix "William," or some other distinctive indication that the whiskey was not that manufactured by the plaintiffs, the Court was of opinion on the evidence that the name "Jameson's Whiskey" had become so identified with the plaintiffs' whiskey, that the use of it by the defendants, without qualifying words to show that the article was their own make, was likely to mislead purchasers into the belief that it was the "Jameson's Whiskey" made by the plaintiffs; that there was not any indication on the labels that the defendants' whiskey was that made at the distillery of William Jameson & Co., and that the defendants' conduct was likely and tended to so mislead.

**HELD**—that the plaintiffs were entitled to an injunction.

**JAMESON v. DUBLIN DISTILLERS' Co., [1900]**  
[1 Ir. R. 43—V.-C.]

**89. Passing off—Using own Name—Action to Restrain—Business turned into a Limited Company—Fraudulent Intention—Resemblance of Packets.]**—No man is justified in attempting to pass off his goods as the goods of another, whatever may be the means he uses for the purpose.

Generally fraudulent intention is not material, partly because a man is presumed to intend the natural consequence of his own act, and partly because although he may have acted in ignorance in the first instance, yet if he continues that course of conduct after he has got knowledge of the facts, he then becomes guilty of the fraud, because he knows then in what the fraud consists.

No man is entitled to a monopoly of his own surname. Every man has a right to trade in his own name so long as he does not use it in such a manner as to represent that he is carrying on his rival's trade.

No element of suspicion of fraud attaches to the man who has established a business under his own name if he turns that business into a limited company, and applies to that limited company his own name with the word "limited," because the reason for doing so is obvious, that he desires to retain the goodwill which he has gained for that name.

S. Chivers & Sons, of Histon, in Cambridge-shire, had carried on business as jam manufacturers since 1873. In 1888 they began to manufacture table jelly.

Samuel Chivers, of Cardiff, began to manufacture jam in 1877, and carried on the business till 1880. He then took in a partner, and carried on business as S. Chivers & Co. In 1895 they were incorporated as a limited company under the title of S. Chivers & Co., Ltd. In 1898 the company began to make table jelly, which they sold in packets with a label having a marked resemblance to that of S. Chivers & Sons, of Histon, who brought an action to restrain its use,

**HELD**—that, as a fact, both from a view of the article and also upon the evidence, that nobody, apart from the use of the word "Chivers," could possibly mistake the packet of the defendants for that of the plaintiffs; that the defendants had no fraudulent intention; that "Chivers' Jelly" or "Chivers' Table Jelly" had not acquired a secondary meaning, and had not come to mean jelly made by the plaintiffs, and not jelly made by persons of the name of "Chivers"; that the defendants did not by their course of dealing describe their jelly in such a way as to lead persons to believe it was the jelly of the plaintiffs; and that the plaintiffs could not be allowed to monopolize the name of "Chivers" so as to prevent the name of "Chivers" being used at all.

**Jameson v. Jameson** (1898) 15 R. P. C. 181, No. 81, *supra*; **Powell v. Birmingham Vinegar Brewery Co.** ([1896] 2 Ch. 54; 65 L. J. Ch. 563; 44 W. R. 688; 74 L. T. 509; 13 R. P. C. 235), and **Cellular Clothing Co. v. Mauston & Murray** ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809, 16 R. P. C. 397—H. L. (Sc.), No. 23, *supra*) followed.

**S. CHIVERS & SONS v. S. CHIVERS & CO., LD.,**  
[1900] 17 R. P. C. 420—Farwell, J.

**90. Purchase of Goodwill of Proprietor's Business by Limited Company—Company keeping alive Goodwill—Omission to mention Name of Company—Penalty—Right to Restrain use of former Proprietor's Name—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 41, 42.]**—It is competent for a limited company to acquire the goodwill of a number of properties, and to keep alive that goodwill by keeping the name in such a position and using it in such a way as to show that they are carrying on the trade to which the goodwill attached which they had bought, but they must comply with sect. 41 of the Companies Act, 1862.

The plaintiffs bought the goodwill of a business carried on as "Talmey & Co." Preferring to keep on the old name they sent out bills in the name of "Talmey & Co.," and the weekly books were in that name. The name of the plaintiffs was, however, upon the shop over the door.

**HELD**—that the plaintiffs had a right, though they had been guilty of a breach of sect 41 of the Companies Act, 1862, to an injunction to restrain the use by another person of the name of "Talmey & Co." so as to be calculated to deceive.

**Wright v. Horton** (1887) 12 App. Cas. 371; 56 L. J. Ch. 873; 36 W. R. 17, 56 L. T. 782—H. L. (E.) followed.

**PEARKS, GUNSTON AND TEE, LD. v. THOMPSON,**  
[**TALMEY & CO.,** (1901) 17 T. L. R. 250; 18 R. P. C. 185—Farwell, J.]

**91. Passing off—Action to Restrain—"Globe Furnishing Company"—Use of Name in Ireland—Fraud—Proof—Design to Mislead Public—Injunction Damages—Delay in bringing Action—Stay of Six Weeks.]**—In 1888 the plaintiff bought a business in Liverpool, in which he had since carried on the trade of supplying house,

**Deception—Continued.**

furniture. His business was not, as a rule, merely carried on across the counter, but was largely by correspondence, and he did a considerable amount of business with customers in other localities than Liverpool. He expended about £2,000 a year advertising his business under the title of the "Globe Furnishing Company," and his business was advertised in Ireland through the medium of English magazines and newspapers which circulated in Ireland. The plaintiff complained that in the year 1898 the defendant started a business in Dublin under the same identical name of the "Globe Furnishing Company." The plaintiff brought an action against the defendant to restrain him from carrying on business under that name or under any other name calculated to mislead the public into the belief that the business of the defendant was the business of the plaintiff.

**HELD**—that it was not incumbent on the plaintiff to prove that the defendant adopted the name with a design to mislead the public or to appropriate to himself the benefit of the costly advertisements; that the injunction must be granted, but no inquiry as to damages; and that, inasmuch as there had been considerable delay in bringing the action, the defendant ought to be allowed six weeks for making such alterations and arrangements as might be necessary to carry out the order made.

**GRANT, TRADING AS THE "GLOBE FURNISHING COMPANY," v. LEVITT, (1901) 18 R. P. C. 361—Porter, M. R. (Ir.)**

**92. Name Attached to Premises—"Castle Brewery, Edinburgh"**—*Picture of Edinburgh Castle—Heraldic Castle—Addition of Firm's Name—Sufficient Distinction.*—The complainers, since 1875, carried on business as brewers, and their premises were known as the "Castle Brewery," the name being derived from the proximity of Edinburgh Castle. They had no registered trade mark. On the circumference of their label were printed the words "Cooper and McLeod, Edinburgh," and "Castle Brewery," and in its centre, and occupying a prominent part of the label was a picture of Edinburgh Castle.

The respondents, since 1872, carried on business as distillers in Maryhill, Glasgow. In 1890 they established a brewery there. They used their registered trade mark for the purposes of both businesses. On their label were the words "Castle Brewery, Glasgow," and "G. and J. MacLachlan," and in the centre a heraldic castle with the motto "Fortis et fidus." This was adopted because it was the arms of the MacLachlans. The respondents, desirous of securing the benefit of brewing in Edinburgh, built a brewery at Duddingston, and, in 1900, they opened it, and commenced business there under the name of the "Castle Brewery, Edinburgh," in order that their beer should share in the reputation of Edinburgh beer. On the complainers objecting they agreed to add the word "MacLachlan." There was no proof that the respondents' beer had been mistaken for the complainers' or their trade interfered with.

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**HELD**—that the complainers had no right to object to the use of the words "Castle Brewery"; that they created a sufficient distinction by prefixing their name in a prominent manner, and that the complainers had not established their case.

**COOPER AND McLEOD v. G. AND J. MACLACHLAN, [(1901) 18 R. P. C. 380—Court of Session.]**

**93. Passing off—Action to Restrain—Foreign Company—Registration of Company in England with Similar Name—English Market—Liability of Signatories—Injunction.**—The plaintiffs were a well-known firm of manufacturers of motor cars. Their reputation was European, including in that term England. Till December, 1900, they had no agency in England, yet they sold indirectly, in the sense that a company bought their cars and imported them into England, and individuals went over to Paris and bought cars there and imported them into England, so that England was one of their markets. So far as regards the great majority of the cars formerly made by the plaintiff company, they could not be imported into England without the licence of the English patentees. The defendants, on 29th March, 1900, registered a company in England under the name of Panhard-Levassor Motor Company, Ltd.

**HELD**—that the Court would interfere to protect a foreign trader who has a market in England from having the benefit of his name annexed by a trader in England who assumes that name without any sort of justification.

**Collins v. Brown ((1857) 3 K. & J. 423)** followed.

**HELD ALSO**—that the defendant company had the fraudulent intention of annexing the benefit of the plaintiff's name; that the persons who had formed that company and caused it to be registered were guilty of a fraudulent conspiracy to carry into effect that which the company, an entity without body or soul, had attempted to do, and were liable in damages accordingly; that injunctions must be granted to restrain the defendants from using any name colourably resembling the name of the plaintiffs, and to restrain the defendants from allowing themselves to remain registered under their present name.

**LA SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD-LEVASSOR MOTOR CO., LD., [1901] 2 Ch. 513; 70 L. J. Ch. 738; 50 W. R. 74; 85 L. T. 20; 17 T. L. R. 680; 18 R. P. C. 405—Farwell, J.**

**95. Name attached to Premises—"Black Swan Distillery"**—*Sale of Premises—Sale of Goodwill and Trade Mark—User of Name and Sign by Purchaser of Premises—Probability of Deception.*—As a general rule the owner of land or buildings of any kind may affix to it any name he pleases. But the Court would interfere if a particular name were affixed with the view of making a dishonest reputation, which would cause damage to another, or even if, without any dishonest intention, the user were such as actually, or probably, to mislead.

**Deception—Continued.**

For more than fifty years prior to July, 1897, A. & Co. had carried on at the "Black Swan Distillery" the business of rectifying distillers and wine merchants. A. & Co. were the owners of a registered trade mark in respect of wines and spirits, liqueurs and cordials, the principal feature of which was a black swan, and the business done was large. On the 1st July, 1897, the then owner of the business assigned to the plaintiffs the goodwill and trade mark, and when the assignment was completed all distillery plant was removed from the premises and no distilling or spirit rectifying had since been carried on there.

The defendant was a spirit merchant carrying on a considerable business, and had in April, 1897, purchased the premises, and he put forward the name "Black Swan Distillery" and the effigy of a black swan in connection with his business. It was admitted by the plaintiffs' witnesses that the defendant had a reputation of his own as a dealer in Scotch whisky. Any reputation attaching to the Black Swan distillery was gained with reference to gin, and not with reference to whisky, and in gin the defendant did not deal. There was evidence that the defendant took an interest in the historic nature of the site. There was no evidence that any one had actually been misled by any of the acts of the defendant. The plaintiffs brought an action to restrain the defendant from representing that he was carrying on the business formerly carried on by A. & Co.

**HELD**—that *a priori* it was improbable that the defendant should wish to disturb the plaintiffs in the benefit of any goodwill which attached to the comparatively small business in Scotch whisky which was carried on by A. & Co., and that on the whole the Court, believing that the defendant had acted honestly, the plaintiffs had failed to make out that the acts of the defendant were calculated to mislead.

J. AND W. NICHOLSON & Co., LD. v. BUCHANAN,  
[1902] 19 R. P. C. 321—Stirling, J.

**98. Passing off—Action to Restrain—Goods of Same Class—Probable Deception—Injunction too Large—Injunction Modified.**—It may be that a trade is of such a nature that the products of the trade will become almost indissolubly connected with the business carried on by a particular manufacturer who, it may be, created the particular trade; but still, even though that may be so, and even though such fact is to be taken into consideration in an action for an injunction, an order cannot be made restraining a man altogether from carrying on in his own name a particular trade. The order must be limited to restraining him from carrying on such trade, so identified with the plaintiffs' business, without taking the steps which any honest man ought to wish to take to prevent his goods being confounded with the plaintiffs' goods whose goods are so much identified with the particular trade.

The plaintiffs, J. and J. Cash, Ltd., as the successors in business of J. and J. Cash, had established a business well known for the sale

of, amongst other things "Cash's Frillings" and "Cash's Woven Names and Initials" and if any one offered for sale or bought "Cash's Frillings" or "Cash's Woven Names and Initials" it was absolutely understood in the trade that what was sold or bought was frillings manufactured by the plaintiffs' firm. Joseph Cash, the defendant, registered a company, "Joseph Cash, Ltd." for the purpose of carrying on a similar business to that of the plaintiffs in Coventry. The plaintiffs sought to restrain him from so doing.

**HELD**—that the defendant must be restrained from selling any frillings or woven names or initials not manufactured by the plaintiffs as "Cash's Frillings" or "Cash's Woven Names or Initials," and from carrying on the business of a manufacturer or seller of frillings or woven names or initials under the name of "Joseph Cash & Co." while not in partnership with any other person, and from carrying on any such business either in the name of "Cash" or under any style in which the name of "Cash" appears without taking reasonable precautions to clearly distinguish the business carried on and the frillings and woven names and initials manufactured or sold by the defendants from the business carried on and the frillings and woven names and initials manufactured by the plaintiffs.

Injunction granted by Kekewich, J. ((1901) 84 L. T. 349; 18 R. P. C. 213), modified.

J. AND J. CASH, LD. v. CASH, ((1902) 50 W. R. [289; 86 L. T. 211; 18 T. L. R. 299; 19 R. P. C. 181])—C. A.

**97. Passing off—Purchase of Business from a Person bearing same Name as Plaintiff—Different kind of Business—Fraudulent Intention—Form of Interlocutory Injunction.**—The plaintiff was the proprietor of the well-known "Holloway's" Pills. The defendant, who had, some years ago, bought a drysalter's business from a man named Holloway, began to use that name in connection with pills.

An interlocutory injunction was granted restraining him from passing off his pills as the plaintiffs', and from using the name Holloway in connection with pills.

HOLLOWAY v. CLENT, (1903) 20 R. P. C. 525—  
[Eady, J.]

**98. Passing off—Purchase of Business for Purpose of Using Name in order to Obtain Another's Trade—Fraud—Injunction.**—The plaintiffs had acquired a great reputation for "Morrall's Needles" and "Mogg's Needles." The defendant, who traded under the name of T. Hessin & Co., purchased a business from J. Y. Morrall and a business from W. Mogg. The total price of the two businesses was only £75, and the purchases were a mere pretext or colourable device for giving to the defendant some appearance of right to use the names Morrall and Mogg, in order that he might obtain trade intended for the plaintiffs and be enabled to pass off goods as and for the plaintiffs, as was proved to have been done in one instance.

**HELD**—that an injunction must be granted to restrain the defendant from carrying on any

**Deception—Continued.**

business as a needle manufacturer under the name or style of "J. Y. Morrall" and "W. Mogg & Co.," or either of them, or under any other name or style so arranged or combined, as, by colourable imitation or otherwise, to be calculated to represent or lead to the belief that the defendant was carrying on the plaintiffs' business.

Decision of Eady, J. (19 R. P. C. 537), affirmed.

ABEL MORRALL, LTD. v. T. HESSIN & Co.,  
[1903] 20 R. P. C. 429—C.A.

**99. Passing off—Name of a Machine—Accessories for use in connection therewith.]**—The Neostyle Company are the manufacturers of a duplicating machine, and the Court found as a fact that the word "Neostyle" had become identified in England with their machines; the company had registered the word "Neostyle" in Class 39 as a trade mark for paper, stationery, &c., but it had been removed from the register. They now sought to restrain the defendants from applying the word "Neostyle" to their stationery, &c., and passing it off as manufactured by the plaintiffs.

HELD—that the action failed, for so far as accessories to the duplicating machines were concerned the plaintiffs had acquired no exclusive right to the word "Neostyle", therefore the defendants might sell paper for use on the Neostyle machines, and so describe it, so long as they did not suggest that it was paper manufactured by the plaintiffs.

Decision of Byrne, J. (21 R. P. C. 185), affirmed.

NEOSTYLE MANUFACTURING CO., LD. v.  
[ELLAM'S DUPLICATOR CO., (1904) 21 R. P. C.  
589—C.A.]

**100. Passing off—Beer Bottlers—Name Embossed upon Beer Bottles—No Evidence of Deception.]**—The plaintiffs and defendants, bottlers, but not brewers, of beer, &c., had their respective names embossed upon their own bottles. Prior to the formation in March, 1902, of a bottle "exchange" it was customary for bottlers to use any bottles that came into their possession; the object of the "exchange" was to stop this practice, and return all empty bottles to their owners.

In December, 1902, the plaintiffs found seventeen of their bottles in a shop, bearing the name of a brewer but not of a bottle, though in fact they had been filled by the defendants.

HELD—that the plaintiffs had failed to prove that the use of their bottles by the defendants was under the circumstance calculated to deceive the trade or the public; and that their claim for an interdict failed.

WOOLLEY & SON v. MORRISON, (1904) 21 R. P. C.  
[67, 349—Lord Ordinary and Ct. of Sess.]

**101. Infringement—Word "Shamrock"—Sprig of Shamrock—Goods of same description.]**—The plaintiff had registered in Class 47 two trade marks for use on powders sold for washing purposes: one consisted of the word "Sham-

rock," and the other of a sprig of three leaves of shamrock.

The defendant, the manager of the Shamrock Company, sold powder for similar purposes, the packets bearing the word "Shamrock" and being decorated with single leaves of the plant.

HELD—that the defendant had committed an infringement.

FINLAY v. SHAMROCK CO., (1905) 22 R. P. C.  
[301—M. R. II.]

**102. Assignment of Business to Company—Goodwill and Exclusive Right to Use of Name.]**—The defendant, who claimed to have been descended from an ancestor of the name of Pomeroy, and who carried on business under the name of Mrs. Pomeroy, assigned the business to a company with the goodwill and exclusive right to use the name of Mrs. Pomeroy as part of the name of the company, and to represent the company as carrying on the business in continuation of the firm of Mrs. Pomeroy.

HELD—that the defendant must be restrained from carrying on a similar business under the name of Pomeroy or Mrs. Pomeroy or any other style of which the name Pomeroy formed part.

MRS. POMEROY, LD. v. SCALÉ, No. 1, (1905) 23  
[T. L. R. 170—Parker, J.]

**103. Sale of Business and Goodwill—Right of Individual Partner to Trade in her own name.]**—The defendant, whose married name was Scalé, carried on business as "Mrs. Pomeroy," a name which she had adopted and by which she was known. She sold her business, including the goodwill, to a company called "Mrs. Pomeroy, Ltd.," and, that company having gone into liquidation, the liquidator sold the business to the plaintiffs, who were another company with the same name. The defendant carried on business under the name of Mrs. Jeanette Pomeroy, but in her advertisements she stated that she was no longer connected with Mrs. Pomeroy, Ltd. The plaintiffs applied for an interlocutory injunction to restrain her from carrying on the business under the name of Mrs. Pomeroy.

HELD—that, under the circumstances, the plaintiffs were not entitled to an interlocutory injunction.

MRS. POMEROY, LD. v. SCALÉ, No. 2, (1906) 22  
[T. L. R. 795—Buckley, J.]

(See, however, the judgment of Parker, J., at the trial, No. 102, *supra*.)

**104. Unfair Use of Defendant's Real Name—Use of Middle Name.]**—A defendant, whose name was Joseph Rodgers Simpson, traded as Joseph Rodgers Simpson & Son, and placed upon his knives a crown above the word Rodgers, in the same position as the crown upon the plaintiff's knives.

HELD—that he had made use of the fact that his second name was Rodgers in such a way as to induce people to believe that cutlery sold by him had been made by the plaintiffs, Joseph Rodgers & Sons, Ltd.

**Deception—Continued.**

JOSEPH RODGERS & SONS, LD. v. JOSEPH [RODGERS SIMPSON, (1906) 23 R. P. C. 297—Warrington, J

**105. Right of Individual to Transfer Name to Company—Injunction.**—A company, called John Cash & Sons, Ltd, carried on the business of cotton spinners, and John Harwood Cash was one of their managers. When he left the service of the company he, in conjunction with others, promoted and registered a company called Harwood Cash & Co., Ltd., with the object of carrying on a business similar to and at the same place as that carried on by the old company. The latter brought an action for an injunction to restrain the new company from carrying on their business under that name or under any name of which "Cash" formed a part without clearly distinguishing their business and goods from those of the old company.

**HELD**—that the new company had no legal right to the name of Cash, such a company not having the rights which an individual of that name would have, and that, as the use of the name might mislead, the old company were entitled to an injunction.

*Tussaud v. Tussaud* ((1890) 44 Ch. D. 678; 59 L. J. Ch. 631; 62 L. T. 633; 38 W. R. 503—Stirling, J.) discussed.

**THE FINE COTTON SPINNERS' AND DOUBLERS' [ASSOCIATION, LD., AND JOHN CASH & SONS, LD. v. HARWOOD CASH & CO., LD., [1907]** 2 Ch. 184; 76 L. J. Ch. 670; 97 L. T. 45; 23 T. L. R. 537; 24 R. P. C. 533—Joyce, J.

**106. Similar, but Not Identical Businesses** ]—In 1904 two brothers, R. and J. F. Dunlop, who had for some years been in partnership in a cycle and motor repairing business in Kilmarnock under the name of R. and J. F. Dunlop, formed a small company under the name of the Dunlop Motor Company for the purpose of selling on commission and repairing motors and motor cycles and parts thereof. The appellants, the Dunlop Pneumatic Tyre Company, the makers of a well-known tyre for cycles and motors called the "Dunlop" tyre, who also manufactured cycling and motoring accessories, took proceedings to have the respondents, the Dunlop Motor Company, interdicted from carrying on their business under any name containing the word "Dunlop." Both companies had power to make motor cars, but neither company had ever in fact made any motor cars. The Court of Session refused to grant interdict.

**HELD**—that there was no evidence to show that the use of the word "Dunlop" by the respondents would mislead any one to think that the two companies were one and the same.

Decision of Ct. of Sess. (8 F. 1146) affirmed.

**DUNLOP PNEUMATIC TYRE COMPANY v. DUNLOP MOTOR COMPANY, [1907]** A. C. 430; 76 L. J. Ch. 102; 97 L. T. 259; 28 T. L. R. 717; 24 R. P. C. 572—H. L. (Sc.).

See also No. 172.

**2. By Colourable Imitation of Name.**

**107. Bond fide Combination of Two Names—Deception—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20.**—The respondents had been established for some years, and were doing a large business in Manchester, where their brewery was, and in other towns. The appellants had their brewery in Macclesfield, and did some business in Manchester and elsewhere. The appellants purchased in 1897 the business of the North Cheshire Brewery Company, Ltd., and then chose their present name, and were incorporated and registered under that name.

**HELD**—that, assuming the *bona fides* of the appellants, the impression that any one would form on seeing the appellants' name and having the knowledge of the existence of the two companies, would be that the two companies had combined together, and that the respondents had ceased to carry on business as a separate company; that the appellants' new name was calculated to deceive; and that the appellants must be restrained by injunction in the usual terms.

The decision of the Court of Appeal ([1898] 1 Ch. 539; 67 L. J. Ch. 351; 46 W. R. 515; 78 L. T. 537; 14 T. L. R. 350) affirmed.

**NORTH CHESHIRE AND MANCHESTER BREWERY [Co., LD. v. THE MANCHESTER BREWERY CO., LD., [1899]** A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645; 15 T. L. R. 110—H. L. (E.)

**108. Passing off Goods—Old Mark used prior to August, 1875.**—The plaintiffs were manufacturers of cycle saddles, and were the registered owners of a trade mark consisting of the word "Brooks," being a trade mark used before the 13th August, 1875, when the Trade Marks Registration Act, 1875, came into operation. The defendants, the Norfolk Cycle Co., sold cycle saddles under the name of "Brooks" saddles. The defendant John Brookes had on his cycle saddles a sort of medallion on the side of the saddle marked "J. Brookes, St. Mary's Street, Birmingham," and with certain numbers in the interval. The plaintiffs' saddles were marked in a similar way.

**HELD**—that an injunction ought to go against the Norfolk Cycle Co. to restrain infringement.

**HELD ALSO**—that an injunction ought to go against John Brookes from stamping or otherwise marking on any cycle saddles not of the plaintiffs' manufacture the word "Brookes" or "J. Brookes," without clearly distinguishing the goods of the defendants' manufacture from those of the plaintiffs', and from selling or offering for sale any goods not of the plaintiffs' manufacture which are not so distinguished.

**BROOKS & CO, LD. v. THE NORFOLK CYCLE [Co. AND JOHN BROOKES, (1899)** 16 R. P. C. 523—Stirling, J.

**109. Passing off Goods—Using a Word registered as a Trade Mark—Word originally used to denote Patented Article.**—Plaintiffs were the owners of a patent under which a certain pattern of closet was made. About 1893 they arranged with the defendants that they were to

**Deception—Continued.**

have an exclusive licence to make closets of that pattern; and to make and supply to the plaintiffs such as the plaintiffs wanted. The closets supplied to the plaintiffs were called "Turret," and the others were called "Capstan," and the word "Capstan" was registered as a trade mark. That course of business went on down to 1898, and then the licence was put an end to. Since that time the defendants sold closets of a different kind as "Capstan No. 2."

**HELD**—that the defendants were not passing off their goods as goods constructed under the licence of the plaintiffs. The trade mark was not the name of the article that was dealt with, but the trade mark showed the origin from which the article came. It had always been used for that purpose.

**FREEMAN BROTHERS v. SHARPE BROTHERS & [Co., LD., (1899) 16 R. P. C. 205—North, J.]**

**110. Passing off—Action to Restrain—Disinjunction.**—The plaintiffs' meat extract for more than twenty years prior to 1897 had been known by the name of "Valentine," "Valentine's Extract," and "Valentine's Meat Juice," and there was nothing else in the market that ever had the name "Valentine" connected with meat juice or meat extract. The plaintiffs' goods had, in fact, come to be known by the name "Valentine." From the time that C. R. Valentine first thought of the trade in the year 1897, down to the formation of the defendant company—promoted by him—he was perfectly aware that the above names were great names in the market, where meat juice or meat extract was desired to be purchased, and he adopted "Valentine Extract Company" or himself traded in the name of "Valentine." Such words immediately misled people, who thought that the stuff that was being put on the market in the shape of globules contained "Valentine's Meat Juice."

**HELD**—that by the use of the words "Valentine Extract Company" the defendants were putting upon the market goods which would be liable to be passed off as the plaintiffs' goods, and that the plaintiffs were entitled to an injunction.

**Reddaway v. Banham** ([1896] A. C. 199; 65 L. J. Q. B. 381; 44 W. R. 638; 74 L. T. 289; 13 R. P. C. 218—H. L. (E)) followed.

Decision of Stirling, J. (48 W. R. 127; 16 T. L. R. 33; 17 R. P. C. 1), reversed.

**VALENTINE MEAT JUICE CO. v. VALENTINE [EXTRACT CO., LD., (1900) 83 L. T. 259; 16 T. L. R. 522; 17 R. P. C. 673—C. A.]**

**111. Companies—Registration—Name nearly resembling that by which a subsisting company is already registered—Calculated to Deceive—Evidence—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20.]**—The British Motor Syndicate, Ltd., being the owners of certain patents relating to the manufacture of motors known as the "Daimler" patents, executed in favour of the plaintiffs a non-exclusive licence to manufacture under those patents and make improvements on

those patents. The British Motor Syndicate, Ltd., was the predecessor in title to the defendants, and the defendants were entitled to the patents subject to the non-exclusive licence which they had granted to the plaintiffs, and to some licences granted to other people. The defendants proposed to register a company under the name of the Daimler Wagon Company, Ltd. The plaintiffs sought to restrain the defendants from so doing.

**HELD**—that the plaintiffs had not made out that the proposed name was one calculated to deceive by being confused with the plaintiffs' names and that the action failed.

**HELD ALSO**—that evidence was admissible for the purpose of ascertaining how the existing company had used its name, and what, by reason of its connecting that name with its goods, the public had come to attribute to that name.

**DAIMLER MOTOR CAR CO., LD. v. BRITISH [MOTOR TRACTION CO., LD., (1901) 18 R. P. C. 465—Buckley, J.]**

**112. Infringement—Injunction.**—The plaintiffs had for many years stamped their goods, such as tobacco pipes, cigar and cigarette holders, &c., with the letters "G. B. D.," plain cut and enclosed in an oval ring. This mark had been registered as a trade mark under the Act of 1875. The defendant in 1901 sold genuine "G. B. D." pipes, and also pipes with the letters "J. B. D.," also enclosed in an oval ring, which were larger than those of the plaintiffs, and were printed in gold. The plaintiffs brought an action for infringement.

**HELD**—that the pipes marked "J. B. D." were an infringement. The hearing being treated as the trial of the action, a perpetual injunction must be awarded; and the defendant must deliver up all pipes in his possession bearing the mark "J. B. D.," together with the stamp.

**RUCHON v. M'COLGAN, (1901) 18 R. P. C. 262—[Chatterton, V.-C. (Ir.)]**

**113. Passing off—Action to Restrain—"Ivory"—"Ivy"—Dissemblance of Get-up—Title to Name.**—The defendants and their predecessors in title had invented, in the year 1879, floating soap which was called by them "Ivory Soap," and which had a large sale in the United States of America and a limited sale here. From 1889 onward the plaintiff had manufactured "Ivy Soap." It had a large sale, and was very well known. The use of the word "Ivory" by the defendants was known to the plaintiff when he adopted the use of the word "Ivy."

**HELD**—that the plaintiff might have a right to use the word "Ivy" in connection with soap, but that would give him no title whatever to the word "Ivory"; and that the goods were got up in such a perfectly different manner that no person could possibly mistake one for the other.

Decision of Kekewich, J. ((1900) 17 R. P. C. 689) affirmed.

**GOODWIN v. IVORY SOAP CO., (1901) 18 R. P. C. 389—C. A.]**

**114. Passing off—Action to Restrain—News-papers—Difference in Appearance and Contents**

**Deception—Continued.**

—*Probable Deception.*—The plaintiffs were the proprietors of a paper published at Liverpool, the title of which was the *Evening Express*, and they claimed an injunction to restrain the defendants from publishing any newspaper by the name of the *North Express*. The question was, Would the publication at Liverpool by the defendant of his paper represent or lead to the belief that such paper was an edition of the *Evening Express*, or was owned, edited, or written by the owners, editor, or staff of that newspaper? The plaintiffs admitted that the trade would not be deceived, and that a person buying the defendant's paper would not think he was obtaining the plaintiffs', as they were different in appearance and contents. It was not challenged that the defendant was acting in good faith in selecting the title the *North Express*. Substantially the two papers were not competing papers.

**HELD**—that it must always be borne in mind that newspapers are intended for people who can read; that the titles of the two papers were different, and the papers themselves were not similar in appearance; that one paper was not likely to be mistaken for the other, except momentarily; that there was no implied representation that the defendant's newspaper had any connection whatever, proprietary or otherwise, with the plaintiffs' paper; and that the plaintiffs had not made out any title to the intervention of the Court

WILCOX v. PEARSON, (1902) 19 T. L. R. 220—

[Eady, J.]

**115. Company—Passing off—Action to restrain—Trade Description—Geographical Name—Fraud—Probability of Deception—Omission to Publish Name of Limited Company—Injunction—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 41, 42**—The plaintiffs, a limited company, carried on a large business as manufacturers of and dealers in boots and shoes. Those of English manufacture were sold in various shops in different parts, carried on under the name of the plaintiff company. In March, 1897, the plaintiffs opened a large shop in Regent Street, exclusively for the sale of American shoes, under the name of "The American Shoe Company," to distinguish it from their other shops for English goods. They did not at first also paint up the name of the plaintiff company on the outside of their place of business, but shortly after the shop was opened their attention was called to the omission by their solicitor, and since then they had kept painted up, under their trade name of "The American Shoe Company," the name of the Limited Company. Since 1897 the plaintiffs had opened eight other shops, including one at Richmond, for the exclusive sale of American shoes, at each shop using the trade name "The American Shoe Company," and also painting up underneath in smaller letters the name of the Limited Company. The plaintiffs' business in boots and shoes, under the style of "The American Shoe Company," was a very large and successful one, and their trade name and goods had acquired considerable reputation,

The defendants were three young women named C. who recently commenced business in High Street, Putney, as "The London American Shoe Company," and upon complaint by the plaintiffs they promised to discontinue using that name, but, notwithstanding the remonstrance of the plaintiffs, they adopted the name of "The British and American Shoe Company."

**HELD**—that, on the facts proved, and the proper inferences to be drawn from them, the defendants took the name "The British and American Shoe Company" fraudulently and not innocently; that, upon the evidence, the plaintiffs had established the probability of deception; that the defendants' business would be mistaken for a branch of the plaintiffs' business; that persons desiring and wishing to deal with the plaintiffs would thereby be led to deal with the defendants; that a customer walking into the defendants' shop and buying their American goods would do so in the belief that they were the plaintiffs' goods, and that the plaintiffs would not only thereby lose the custom intended for them, but would also suffer damage to their reputation; that it was essential for the plaintiffs' protection that any injunction granted should extend to the name "London American Shoe Company"; that the Companies Act, 1862, sects. 41 & 42, imposed certain penalties for non-compliance with its provisions; but the additional penalty of forfeiting its goodwill to any dishonest person who chose to steal it was not imposed by the statute, and that an injunction must be granted with costs.

*Pearks, Gunston, and Tee, Ltd. v. Thompson, Talmey & Co.* ([1901] 17 T. L. R. 250; 18 R. P. C. 185—Farwell, J., No 90, *supra*) followed.

*Wright v. Horton* (1887) 12 App. Cas. 371; 56 L. J. Ch. 373; 36 W. R. 17; 56 L. T. 782—H. L. (E.) applied.

**H. E. RANDALL, LD., v. BRITISH AND AMERICAN SHOE COMPANY**, [1902] 2 Ch. 354; 71 L. J. Ch. 683; 50 W. R. 697; 87 L. T. 442; 18 T. L. R. 611; 19 R. P. C. 393; 10 Manson, 109—Eady, J.

**116 Limited Company's Name—Probability of Deception—Delay—Injunction.**—In the year 1871 there was registered in England a company by the name of the "Army and Navy Co-operative Society, Limited." It carried on business ever since, and its offices were at 105, Victoria Street, Westminster. It had branches at Bombay and Calcutta, and it did business with South Africa to some extent. There was evidence that for a period of six months the trading amounted to £36,000. It had no branch, but it had agents in Cape Town, Port Elizabeth, and East London. Also, many years ago, there was formed in England a company by the name of the "Civil Service Co-operative Society, Ltd.," and that carried on business ever since. On the 24th of April, 1902, there was incorporated the defendant company, by the name of the "Army, Navy, and Civil Service Co-operative Society of South Africa, Ltd.," which took offices in Victoria Street, Westminster. The plaintiffs moved for an interlocutory injunction.

**HELD**—that there would be a confusion



**Deception—Continued.**

between the defendants and the plaintiffs in the matter of trade, and that there would be an interference with the plaintiffs' right of property in the expectation that customers who dealt with the plaintiffs might deal with the defendants, with the intention all the time of dealing with the plaintiffs; that the plaintiffs were entitled to an injunction; and that a delay of three months since the incorporation of the defendant company was sufficiently explained.

ARMY AND NAVY CO-OPERATIVE SOCIETY, LD.  
[v. ARMY, NAVY, AND CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LD.,  
(1902) 19 R. P. C. 575—O. A.]

**117. Infringement — "Secotine" — "Securine."]**

HELD—that the word "Securine" was a colourable imitation of the registered trade mark "Secotine," and that its use must be restrained by injunction.

MCCAW, STEVENSON AND ORR, LD. v. NICKOLS  
[& Co., (1904) 21 R. P. C. 15—Kekewich, J.]

**118. Infringement—Butter Substitute—"Cottolene"—"Cocosoline."]**—The plaintiffs were the owners of registered trade marks for a butter substitute prepared from cotton-seed oil, which they sold under the name of "cottolene," this word constituting their trade mark. In 1903 the defendants began to sell another butter substitute, prepared from cocoa nut oil, under the name of "cocosol" or "cocosoline."

In an action for infringement, the judge found that there had been no attempt at passing off, and that no real danger of confusion had been proved: both names were appropriate to, and aptly described, the products to which they were applied; and, as the defendant had acted honestly, there was no ground for granting an injunction.

N. K. FAIRBANK CO., v. COCOS BUTTER MANUFACTURING CO., (1904) 20 T. L. R. 53;  
21 R. P. C. 23—Eady, J.]

**119. Infringement — Passing off—Enamel—"Hub"—"Club."]**—M. manufactured an enamel for use on bicycles and registered a trade mark consisting of an "ace of clubs" with the word "Club" upon it; he applied this mark printed on labels to bottles of his "Club Black Enamel."

H, a rival trader, began to sell "Hub Black Enamel" in similar bottles with similar letterpress and an "ace of spades" label.

HELD—that H must be restrained from so doing on the ground both of infringement and passing off.

MUNDAY v. CAREY, (1905) 22 R. P. C. 273—  
[Kekewich, J.]

**120. Plasmon — Plasmonade — Injunction.]**

The plaintiffs, the International Plasmon, Ltd., sold various food preparations in the names of which the word Plasmon was used. The defendants, Plasmonade, Ltd., were selling tablets and powders for making a beverage under names which included the word Plasmonade.

The defendants had applied to register "Plasmonoid" as a trade mark in classes 3 and 44, and on the plaintiffs' opposition one such application had been refused and the other postponed.

The plaintiffs now brought an action in respect of the use of the word Plasmonade. The defendants contended that, owing to the difference in the nature of the goods and difference in get-up, no deception was probable.

HELD—that an interlocutory injunction ought to be granted.

INTERNATIONAL PLASMON, LD. v. PLASMONADE,  
[LD., (1905) 22 R. P. C. 543—Warrington, J.]

**121. Name Descriptive of Article and Process—Company—Registered Name—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20.]**—In considering whether the name of one company so nearly resembles that of another previously registered "as to be calculated to deceive" within the meaning of sect 20 of the Companies Act, 1862, the Court will apply principles very similar to those applicable in ordinary "passing off" cases.

A distinction must be drawn between cases in which the words complained of are words of common ordinary meaning and cases in which they are more or less "fancy" words or primarily do not relate to the article, but to the person who makes it.

The onus of proving that words commonly used as descriptive words have a secondary meaning is not easily discharged.

In 1901 one B. obtained a patent in respect of machinery to be used for cleaning carpets and the like by suction. B. called his protected machinery a "vacuum cleaner" and the process a "vacuum cleaning." In 1902 B. sold his patent to a company, registered in the same year, called the "Vacuum Cleaner Company, Limited." In 1903 the patent was assigned to the plaintiff company, which was registered in that year and called the "British Vacuum Cleaner Company, Limited," and was formed to take over the undertaking of the previous company. The plaintiff company formed and was interested in several other companies, each of which had as part of its name the words "vacuum cleaner," with a licence to use B.'s invention. In 1904 X. obtained a patent for cleaning by suction differing in material parts from B.'s invention. In 1906 the defendant company was registered as the "New Vacuum Cleaner Company, Limited," with the view of working a licence to use the invention patented by X.

In an action to restrain the defendant company from using the words "vacuum cleaner" so as to lead to the defendant company being taken for the plaintiff company or being supposed by the company to be connected with it, it was proved (a) that a large proportion of the plaintiff company's customers addressed letters to them as the Vacuum Cleaner Company, with or without the word "limited"; (b) that since the registration of that company the words "vacuum cleaner" had been associated with the machine made under B.'s patent and used by that company, and that those words and the words

**Deception—Continued.**

"vacuum cleaning" had been understood by the public to be a particular kind of cleaning and a particular process; and that, while the plaintiff company had a monopoly of a cleaner and a process of that sort, the public believed that the machine was the machine of the plaintiff company.

**HELD**—that the words "vacuum cleaner" had no secondary or subsidiary meaning; and that the plaintiff company was not entitled to have the defendant company restrained from using the words.

**HELD ALSO**—that the plaintiff company, by allowing subsidiary companies to be formed under names containing the words "vacuum cleaner" had admitted that another company with a name so containing those words would not necessarily be confused with the plaintiff company.

*Cellular Clothing Co. v. Maaton* ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809—H. L., No. 23, *supra*) applied.

*Reddaway v. Banham* ([1896] A. C. 199; 65 L. J. Q. B. 381—H. L.) distinguished.

**BRITISH VACUUM CLEANER CO. v. NEW VACUUM CLEANER CO.**, [1907] 2 Ch. 312; 76 L. J. Ch. 571; 97 L. T. 201; 23 T. L. R. 587; 14 Manson, 231; 24 R. P. C. 641—Parker, J

*See also* No. 61.

### 3. By Colourable Imitation of Label Design or Get Up.

**122. Passing off.**—A company, which had for some years sold an article by the name of "Sparkling Lime Wine," brought an action against a firm to restrain them from passing off their goods as and for the plaintiff company's goods, and moved for an interlocutory injunction. The plaintiff company did not claim any right to the exclusive use of the name "Sparkling Lime Wine" (which name the defendants were also using), and had, in applying for a trade mark containing these words, expressly disclaimed any such right, but alleged at the hearing of the motion that the defendants had imitated the get-up of the plaintiff company's goods. The plaintiff company and the defendants both put their respective names and trade marks on their goods.

**HELD**—by North, J., and on appeal by the Court of Appeal, that on the facts the plaintiff company had not established a probability of deception, and the motion and appeal were both dismissed, with costs.

**PACKHAM & CO., LD. v. STURGESS & CO.**, [1898] 15 R. P. C. 669—North, J. and C. A.

**123. Registered Design—Action for Infringement—Prior Publication—Novelty**—"Proprietor"—*Patents, &c., Act, 1883, s. 47.*—The plaintiffs, as owners of a registered design to be printed or woven on textile piece goods, brought an action for infringement. The defendants denied infringement, alleged that the plaintiffs were not the proprietors of the design, that it

was published prior to registration, and that there was no novelty.

**HELD**—that the plaintiffs were proprietors of the design, that it was not published prior to registration, and that it was a new and original design, and that the defendants had infringed.

**NEVILL v. BENNETT AND SONS**, (1898) 15 [R. P. C.—Palatine Court of Lancaster (Hall, V.-C.).

**124. Design—Copyright—"Pattern"—"New or Original"—Drawing Annexed to Certificate of Registration—Marking Goods—Patents, &c., Act, 1883 (46 & 47 Vict. c. 57), ss. 47, 51, 60—Design Rules, 1890, r. 9.**—In May, 1894, a design, No. 232,908, for coffin plates was registered by R., which was stated in his application for registration to be applicable for the "pattern." The design, as used by R., consisted of irregular hexagonal brass plates with leaf-shaped projections at the four outer corners, each of which contained a raised shell-pattern ornamentation, the centre of the plates being depressed below the level of the surrounding border. R. having sued certain persons for infringing his design, they applied to have it removed from the register, on three grounds: (1) that the design was not new or original, it having been anticipated by several designs common to the trade; (2) that, even if there was any novelty in the design as used, the drawing annexed to the certificate of registration did not show sufficiently the nature of the design, inasmuch as no section was given, and there was no indication that the centre of the plates was to be depressed below the level of the surrounding border beyond the fact that the boundary of the centre of the plate was defined by a double line, and (3) that sect. 51 of the Patents, &c., Act, 1883, had not been complied with.

**HELD**—as to (1) and (2) (*dubitante* Williams, L. J.), that it was to be inferred from the drawing of the design that it had a depressed centre; and that consequently it had not been anticipated, but that, even if that were not so, yet, treating the word "pattern" as including the shape and the ornamentation as well as the outline, according to the principles laid down in *Le May v. Welch* (23 Ch. D. 24) and *Re Clarke's Design* ((1896) 2 Ch. 38), there was in this design sufficient originality to entitle R. to keep it on the register.

**HELD**—by the whole Court, as to (3) that the mistake in the marking was not one which would readily catch the eye of a casual observer; and that, as it had been rectified by R. as soon as discovered, he had brought himself within the saving clause of sect. 51.

Decision of Kekewich, J., reversed as to (1), and affirmed as to (3).

**RE ROLLASON'S DESIGN**, (1898) 78 L. T. 511; [15 R. P. C. 231—C. A.

**125. Design—Pattern—Shape or Configuration—Ornament—Marking Goods—"All Proper Steps"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 47, 51.**—"Design" under the Patents, Designs, and Trade

**Deception—Continued.**

Marks Act, 1883, includes everything which ordinarily falls within the word, whether "pattern," "shape," "configuration," or "ornament"; and a design registered as "applicable for the pattern," is not to be confined to the pattern only to the exclusion of other elements in it.

Where an accidental mistake has been made in the die with which registered goods are marked, the proprietor will be held to have taken "all proper steps" to ensure the marking, within sect. 51 of the Act, if he has given proper instructions to the workmen who made the die, even though the mistake may not have been detected for some time.

Judgment of the Court of Appeal ([1899] 1 Ch. 237; 67 L. J. Ch. 100; 77 L. T. 605; 14 R. P. C. 909; 14 T. L. R. 71) affirmed.

HEATH v. ROLLASON, [1898] A. C. 499; 67 L. T. Ch. 565; 79 L. T. 1; 15 R. P. C. 441; 14 T. L. R. 478—H. L. (E.).

**126. Trade name—Passing off—Name descriptive of goods.**—P. & Co. of Sydney, in 1890, began to sell, and continued to sell, a preparation of oats as "Flaked Oatmeal," and registered a trade mark in New South Wales containing those words, which they claimed to be the designation of their goods in the market. G. & Co., in 1894, applied to register in New South Wales a trade mark containing the words "Flaked Oatmeal," but were refused in consequence of P. & Co.'s registration. They then put upon the market a preparation of oats under the title of "G.'s Flaked Oatmeal." P. & Co. commenced a suit against them to restrain them from selling any preparation not being the plaintiffs' as "Flaked Oatmeal." The get-up of the plaintiffs' packets and the defendants' packets were very different, and the defendants' name appeared in large letters on their packets. It was held, at the trial, that the defendants had sufficiently distinguished their preparation from the plaintiffs', so that it was not calculated to deceive the public; and the suit was dismissed, with costs. The plaintiffs appealed.

HELD—that the plaintiffs had not proved that the term "Flaked Oatmeal" was identified with the plaintiffs' manufacture, and that the defendants had done no more than they had a right to do in taking appropriate words of ordinary description to indicate their preparation, and that their acts were not calculated to pass off their manufacture as that of the plaintiffs, and it was not proved in point of fact to have done so.

PARSONS & CO. v. GILLESPIE & CO., [1898] [A. C. 239; 67 L. J. P. C. 21; 15 R. P. C. 57; 14 T. L. R. 142—P. C.]

**127. Action to Restrain Passing off Defendants' Goods as the Plaintiffs'—Change by Defendants of their Label—Close approximation to Plaintiffs' Label.**—J. & J. C. for many years sold mustard in tins bearing a distinctive label. F. & Co., sold mustard in similar tins bearing a label somewhat similar in colours, type, letterpress and arrangements, to J. & J. C.'s label, to which J. & J. C. raised no objection. In 1897,

F. & Co. changed their label for one having a much closer resemblance to J. & J. C.'s label. J. & J. C. thereupon brought an action against F. & Co. to restrain the use of this new label, and moved for an interlocutory injunction. Affidavits of traders were filed by both sides on the question of the probability of deception.

HELD—that the approximation of the defendants' new label to the plaintiffs' label was close; that, treating it as a matter to be judged simply by the eye, there was a reasonable probability that at the trial a case of deception would be made out, and that an injunction ought to be granted until the trial to restrain the defendants from using the labels complained of, or any other label which would lead the public to believe that the defendants' goods were the goods of the plaintiffs. Subsequently, by consent, a perpetual injunction was granted in the above terms, and the defendants were ordered to pay £20 damages and the costs of the action.

COLMAN (J. & J.), LD. v. FARROW & CO., (1898) [15 R. P. C. 198—Stirling, J.]

**128. Action for Infringement and Passing off—Probability of Deception established.**—H. & S. took over in 1891 the business of the Lion Soap Company, and subsequently sold "Red Lion Soap," "Golden Lion Soap," and "Lion Carbolic Soap," the first in large quantities. They were the owners of several registered trade marks, one bearing the word "Lion," and the others comprising the device of a lion, but they did not use any of their trade marks as such upon their soap wrappers. Their soaps became known as "Lion Soaps." K, a limited company, who dealt in arms and ammunition, and had registered and used for such goods the trade mark of a lion's head, began to sell soaps in four different wrappers, unlike H. and S.'s wrappers, but having thereon the representation of a lion's head in several places, and in some cases with the words "Trade Mark" attached. K's name was prominent on their wrappers. An action was brought by H. & S. against K. to restrain them from infringing the plaintiffs' trade marks, and to restrain them from selling soap in wrappers or boxes bearing the device of a lion or a lion's head, and from using the device of a lion and the word lion in the course of their trade in soap.

HELD—that the plaintiffs had not established a case of infringement of trade mark, but were entitled to an injunction to restrain the defendants from selling, or offering for sale, soap in the wrappers complained of or so as to induce the belief that the defendants' soaps are manufactured by the plaintiffs.

HODSON & SIMPSON v. KYNOCK, LD., (1898) 15 [R. P. C. 465—Romer, J.]

**129. Passing off Goods—Design Different as a whole—Failure to Deceive—Injunction.**—If the defendant's design or combination of devices, although suggested by, and in some important respects similar to, that of the plaintiffs, is yet different when regarded as a whole, the plaintiffs are not entitled to an

**Deception—Continued.**

injunction to restrain the defendant from infringing their registered trade marks.

Where there is no proof that the defendant intended to do more than use the wrapper complained of, and the wrapper does not in fact deceive, and is not calculated to deceive, there is no ground for granting an injunction against the defendant who uses it. No injunction can properly be granted to restrain a man from doing that which, if done, will not infringe the plaintiffs' rights.

*Reddaway v. Banham* ([1896] A. C. 199; 65 L. J. Q. B. 381; 44 W. R. 638; 74 L. T. 289; 13 R. P. C. 218) explained.

*LEVER BROTHERS, LD. v. BEDINGFIELD*, (1899) [80 L. T. 100; 16 R. P. C. 3—C. A.

**130. Passing off—Action to Restrain—Imitation—Assumption by the Court—Effect of Invitation—Word “Patent”—Effect of Disclaimer—Unfair Representation.**—In a question of passing off goods the imitation that was really relied upon was the particular form which the stenciling of the Royal Arms on the plaintiffs' goods had assumed, and it was said that, in order to get the benefit of the plaintiffs' reputation and name in certain markets the defendants had designedly and improperly imitated the imperfect representation of the Royal Arms

**HELD**—that the Court must consider the case on the assumption that there were only the defendants' goods, and that the man who was looking at them had only a memory of what the plaintiffs' mark was; and the Court must also remember that from the point of view of passing off, it had not only to consider what might be the effect of the goods coming to the hands of people who were thoroughly acquainted with the whole subject, but also to consider what might be the effect of goods, marked as the defendants marked them, getting into the hands of people who might make a representation in respect of them.

Per Rigby, L.J.—that the word “Patent” on the trade mark, accompanied by an entire throwing over of the patent, was itself a representation made to the public which was unfair, and disabled the plaintiffs from suing on the trade mark altogether.

Decision of Kekewich, J. (17 R. P. C. 148), affirmed.

*THOMAS HUBBUCK & SON, LD. v. WILLIAM [BROWN, SONS & Co.]*, (1900) 17 R. P. C. 638—C. A.

**131. Passing off—Action to Restrain—Onus on Plaintiff**—In order that the plaintiff may succeed in an action for passing off goods he must make out that the defendant's goods are calculated to be mistaken for the plaintiff's, and where the goods of the plaintiff and the goods of the defendant unquestionably resemble each other, but where the features in which they resemble each other are common to the trade, the plaintiff must make out not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are

like his by reason of something peculiar to him, and by reason of the defendant having some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have the features common to the trade. Unless the plaintiff can bring his case up to that, he fails.

A trader who is going to put special goods upon the market is entitled to look at his neighbour's goods for the purpose of seeing what is the most attractive form, what is the best form likely to attract customers, so long as he takes care to distinguish his goods from the prior goods

Decision of Byrne, J. ((1899) 16 R. P. C. 283), reversed.

Decision of C. A. (1890) 17 R. P. C. 48) affirmed.

*PAYTON & Co., LD. v. SNELLING, LAMPARD & [Co., LD.]*, [1901] A. C. 308; 70 L. J. 644; 85 L. T. 287; 17 R. P. C. 628—H. L. (E.).

**133. Passing off—Action to restrain—Get-up common to Trade—Distinctive Features—Get-up calculated to Deceive.**—When the plaintiff's get-up of goods consists of two really different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common features, what has to be considered is not whether the defendant's get-up is like the plaintiff's as regards the common features, but whether that which specially distinguishes the plaintiff's has been taken by the defendant. A defendant may take it more or less. It is very seldom that he copies it. Of course he does not do that, but if he so nearly takes it that when you look at it as a whole you can say that the defendant's goods are calculated to be taken for the plaintiff's goods when properly looked at—if you can say that—then the plaintiff is entitled to succeed. But if you cannot say that, and if the resemblance consists only in that which is common to the trade, to hold that the plaintiff is entitled to succeed would give a monopoly of the common features.

Decision of Kekewich, J. ((1899) 16 R. P. C. 424), reversed.

*PAYTON & Co., LD. v. TITUS WARD & Co., LD.*, [1900] 17 R. P. C. 58—C. A.

**134. Passing off Goods—Action to Restrain—Lead Pencils—Question of Fact—Evidence—Duty of Court of Appeal—Distinction between Cases Depending upon Rights of Property, Rights given by Trade Marks Act, and Question of Fraudulent or Deceitful Making-up.**—In this action, brought by the plaintiffs to restrain the defendants from selling goods alleged to have been made up in imitation of the plaintiff's goods—lead pencils—it was said that the defendants had infringed the total make-up, including their colour, type, and certain words.

**HELD**—that this was a question of fact, and there was ample evidence before the learned judge in the Court below upon which he might come to the conclusion that, to an ordinary purchaser, the make-up of the defendants'

**Deception—Continued.**

pencils was not such as to be mistaken for the plaintiffs', either as a whole or by reason of the imitation of anything in which the plaintiffs had a special property.

HELD ALSO—that though an appeal was a rehearing, the Court of Appeal ought not to differ from the Court below on such a question unless they felt that the weight of the evidence told very strongly indeed against the conclusion to which he has come.

*Seemle*, there may be a distinction drawn between the cases which depend upon rights of property or rights given under the Trade Marks Act, and questions which depend upon the fraudulent or deceitful making-up of goods to represent those of another man.

Appeal from decision of Cozens-Hardy, J. ([1900] 17 R. P. C. 321), dismissed.

WOLFF & SON v. NOPITSCH AND OTHERS, (1901) [18 R. P. C. 27—C. A.

**135. Infringement—Passing off Goods—No User of Distinctive Mark.]**—The plaintiff sought to restrain the defendants from infringing his registered trade mark, viz., "S. Griffiths," with three or a less number of stars and "I X L". The defendants used the term "E. Griffiths" with stars and no "I X L". The stars were admitted to be common to the trade, and they were expressly disclaimed in the registration of the trade mark.

HELD—that as "I X L" was the distinctive mark apart from the name of "Griffiths" and was not used by the defendants, the plaintiff's case thereon wholly failed.

HELD ALSO—that as regards the passing off the defendants, who had bought the small business of E. Griffiths, did not hold themselves out as the manufacturers of the "I X L" trap, and that was the thing by which they were distinguished. It was not pretended that the defendants or E. Griffiths ever sold the "I X L" trap, that would have been an infringement of the trade mark. There was nothing done calculated to deceive, and the plaintiff's case entirely broke down.

MARSHALL v. SIDEBOTHAM, (1901) 18 R. P. C. [43—Kekewich, J.

**136. Infringement—Passing off Goods—Get-up of Goods—Deception—Evidence.]**—The plaintiffs brought an action against the defendants for infringement of their registered trade mark and for passing off the defendant's goods as those of the plaintiffs'. The plaintiffs' trade mark had no description on it, but was a moose head, and that of the defendants was the head of a different kind of deer—probably a red deer.

HELD—that the faces, horns, heads, and ears of the two kinds of deer were as different as could be in two animals, and there was no infringement of the trade mark.

The shape of the tins, the colour of the tins, and the representation of a salmon were common to plaintiffs and defendants, but on the plaintiffs' tins there was a "moose head" enclosed in a circle with a yellow ground, with a blue band

immediately outside it, and a further yellow-barred circumference outside that and the words "Moose Head Brand," whereas the defendants' tins had an entirely different deer head enclosed in a circle with no band at all.

HELD—that (1) there was no deception to the eye of the Court in the distinctive particulars; (2) there was no evidence that induced the Court to think that its eye was wrong; (3) the plaintiffs had, therefore, failed to make out that the use of the Deerhead Brand was calculated to deceive intelligent persons buying the Moose-head Brand.

*London General Omnibus Co. v. Lavell* ([1901] 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R. P. C. 74—C. A., No. 137, *infra*) followed.

ALASKA PACKERS' ASSOCIATION v. CROOKS & Co., [1901] 18 R. P. C. 129—Kekewich, J.

**137.—Passing off—Action to Restrain—Omnibuses—Inspection by Judge—Evidence—Costs—R. S. C. 1883, Ord. 50, r. 4.]**—The plaintiffs alleged that the get-up of the defendant's omnibuses represented and led to the belief that they were the plaintiffs', and brought an action for an injunction to restrain the defendant from running any omnibus painted and lettered in such a manner as to form a colourable imitation of the painting and lettering of the plaintiffs' omnibuses. The judgment of the Court below proceeded upon the theory that the plaintiffs were entitled to succeed on the simple proof of colour and design of their own omnibus, and on the learned judge viewing the defendants' omnibus and the plaintiffs' and comparing them together:—

HELD—that an inspection under rule 4 of Ord. 50, was for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence, and that some evidence ought to have been given to justify the learned Judge in coming to the conclusion he did, beyond the mere view; evidence, for instance, of the custom or practice of habits of persons who were riders in the omnibuses and matters which it may be important for them to observe. The plaintiffs having had an opportunity of giving what evidence they liked, the action was dismissed with costs.

*North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* ([1899] A. C. 83; 68 L. J. Ch. 74, 79 L. T. 645; 15 T. L. R. 110—H. L. (E.), No. 107, *supra*) considered.

LONDON GENERAL OMNIBUS CO., LD. v. LAVELL, [1901] 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R. P. C. 74—C. A.

**138. Passing off—Action to Restrain—Show-cards—Deception—Interlocutory Injunction.]**—For two years the plaintiffs had been selling a comb—a hair-mounting device—of a particular pattern on a show-card, with four heads on it. There was no patent, no registered design, and no copyright. The defendants, who had a legal right to make the identical comb, adopted the identical arrangement of comb, hair, shape of heads and position of hands in designing their card, with four heads and a comb on it.

**Deception—Continued.**

**HELD**—that the defendants had deliberately adopted the special and particular device, which had been connected solely with the plaintiffs' goods, in order to get the advantage of a show-card which had been known for two years to be the plaintiffs' show-card, and that an interlocutory injunction to restrain such an act should be granted until trial.

PARKER AND SMITH v. SATCHWELL & Co., LD.,  
[1901] 17 R. P. C. 713—C. A.

**139. Passing off—Action to Restrain—Name indicating Manufacture—Liqueur**—"Crème de Menthe Glaciale"—*Bottles with Label of one Manufacturer stuck over Name of another Manufacturer—Guilty Knowledge.*—The plaintiffs were makers of a liqueur known as "Crème de Menthe Glaciale," and they sold it in bottles shaped somewhat peculiarly, but common for such liqueurs, with a label upon them bearing those words, and underneath that label a rectangular slip with the word "Cusenier" in plain letters. The second plaintiffs were their agents in this country. S. was the managing director of the agents, and he asked at the saloon bar of the Gaiety Theatre (controlled by the defendants) for a glass of Cusenier's "Crème de Menthe," and the bottle was brought and the liqueur was poured out and tasted by S. S. then asked the barmaid to sell him the bottle with the rest of the liqueur in it, which she did. The bottle bore the label of another maker, *Perrier & Co.* with the Cusenier white rectangular label stuck over the word "Perrier." The liqueur was not Cusenier's "Crème de Menthe" liqueur. The plaintiffs brought an action for an injunction to restrain the defendants from selling liqueurs not manufactured by Cuseniers as "Cusenier's Crème de Menthe."

**HELD**—that the defendants, whether with the guilty knowledge of the directors or not, had passed off as a liqueur of Cusenier's that which was not the liqueur of Cusenier's; and that therefore the plaintiffs were entitled to judgment and to the injunction, and a nominal sum for damages and costs.

E. CUSENIER FILS, AINÉ, ET COMPAGNIE AND  
[GEORGE IDLE CHAPMAN & Co, LD. v.  
GAIETY BARS AND RESTAURANT Co., LD.,  
[1902] 19 R. P. C. 357—Buckley, J.

**140. Passing off—Action to Restrain—Get-up of Goods—Injunction in General Terms in Default of Defence—Motion to Commit—Particular Article not within Injunction—Evidence.**—The plaintiff, a manufacturer of laundry blue, commenced an action against the defendant, trading as a firm, to restrain him from selling or offering for sale any laundry blue (not being of the plaintiff's manufacture) in imitation of the plaintiff's "Oval Blue." A statement of defence was delivered, but was subsequently withdrawn. The plaintiff obtained an injunction which was in the most general terms: To restrain the defendant from "selling or offering for sale any laundry blue (not being the plaintiff's manufacture) so got up or arranged for sale as to induce the belief or enable others to represent

that the laundry blue so sold or offered for sale, is of the plaintiff's manufacture, or in any manner representing blue not of the plaintiff's manufacture to be 'Oval Blue,' or blue of the plaintiff's manufacture." Subsequently the defendant sold his business to N. and entered into N.'s employment as a traveller, and in this capacity sold "Bobby Blue" made up, as the plaintiff alleged, in substantially the same manner as the "Bobby Blue" referred to in the statement of claim. The plaintiff then moved to commit the defendant.

**HELD** (by Farwell, J.)—that what the judgment decided was, that the defendant, admitting that he had made up articles with the fraudulent intent, and with the effectual result of actually deceiving, he was restrained in general terms from passing off such articles, and that whether any particular article did or did not come within the terms of that judgment must depend upon a consideration of the particular article, and no evidence had been adduced as to that.

**HELD** on appeal, by Stirling, L. J. (Vaughan Williams, L. J., dissenting)—that the decision of Farwell, J., 86 L. T. 495, was right.

RIPLEY v. JOHN ARTHUR & Co. [1902], 86  
[L. T. 735; 19 R. P. C. 448—C. A.

**141. Passing off—Action to Restrain—Cigar Boxes and Cigars—Distinctive Shape—Injunction.**—The plaintiffs made and sold cigars in a box, of a shape not uncommon, having on it a device on a sheet of paper, which was stuck on, of a bull-dog, labelled "Bull-dog, superior," and there was a picture of a bull-dog. The top of the box was stamped "Bull-dog Superiores, R. J. E. & Co.," and the word "Bull-dog" was put transversely and obliquely on two sides of the box. The defendant made and sold cigars in a box, of a shape identical with that of the plaintiffs, having on it a pictorial device on a sheet of paper pasted on, bearing the words "Ye Turnbull," and having the picture of a bull which had been thrown by a man, described as a Viking, who was holding it by its horns. On the top of the box was the stencilled figure of a bull, again thrown on the ground, in practically the same way as the pictorial representation, and over the bull were written the words "Ye Turnbull." On two sides of the box were the words "Turnbull" stencilled obliquely across the sides of the box. The plaintiffs made their cigars in a shape which was called "bull-nosed" or "flat-ended," and was "cylindrical" throughout. The defendants had adopted the plaintiffs' shape of cigar.

**HELD**—that there was no possibility of deception as regards the box; that the defendant was enclosing in the box a cigar which was capable of being mistaken, and likely to be mistaken when it was taken out of the box; and that the plaintiffs were entitled to an injunction against selling or offering for sale or dealing with any cigars made in the distinctive shape adopted by the plaintiffs without clearly distinguishing such cigars from the cigars made by the plaintiffs.

R. J. ELLIOTT & Co., LD. v. HODGSON, [1902]  
[19 R. P. C. 518—Buckley, J.

**Deception—Continued.**

**142. Passing off—Action to Restrain—Fraudulent Imitation of Plaintiffs' Labels—Offer to Consent to Injunction and pay Costs up to Date—Injunction with Costs.**—The plaintiffs, distillers of whisky, brought an action against the defendant for an injunction to restrain the defendant from selling as the plaintiffs' "Three Star" whisky bottles of whisky which did not contain whisky of the plaintiffs' manufacture, seven years old. The plaintiffs offered prior to the action to consent to an injunction and pay the costs incurred up to date.

**HELD**—that the evidence showed that on two occasions the defendant had bottles of whisky in his establishment bearing a label made in imitation of the plaintiffs' "Three Star" label, and that he told the purchasers, or his assistant told them, that they contained Jameson's "Three Star" seven-year-old whisky, and that there must be the usual injunction with costs, as the case did not come within any of the cases in which the defendant had been excused from costs.

**JOHN JAMESON & SON, LD. v. ISAAC CLARKE,**  
[(1902) 19 R. P. C. 255—Chatterton, V.-C. (Ir.).]

**143. Passing off Goods—Action to Restrain—Name Indicating Manufacture—False Representation—Selling Brandy not Plaintiffs' Make in Plaintiffs' Bottles with Plaintiffs' Label thereon—Injunction.**—The plaintiffs had for many years been manufacturers of brandy, which they sold in bottles to the trade; their brandy was of superior quality and commanded high prices. All their brandy was manufactured at Cognac, and labelled with their trade marks. Two gentlemen went to the defendant's place of business—a restaurant—and both asked for "Hennessy's Three-Star Brandy" and purchased the bottle with the remainder of the brandy that was in it, which bottle bore one of the plaintiffs' genuine labels, and out of which they had been served with two glasses. They submitted the brandy to two experts—Sir Charles Cameron and Professor Adeney—for analysis, who were both able to state as the result of their analyses, that the brandy supplied by the defendant was not "Hennessy's Three-Star Brandy." Another gentleman of considerable eminence deposed that the brandy supplied was not the same as "Hennessy's Three-Star Brandy," either in specific gravity, aroma, colour, or flavour.

**HELD**—that the defendant sold two glasses of brandy and subsequently the residue of the bottle as "Hennessy's Three-Star Brandy; that such brandy was not "Hennessy's Three-Star Brandy"; and that therefore there was a false representation on the part of the defendant; and there must be an injunction to restrain the defendant from infringing the plaintiffs' trade mark and their trade name.

**HENNESSYS & CO. v. NEARY,** (1902) 19 R. P. C.  
[36—Chatterton, V.-C. (Ir.).]

**144. Action for Infringement—Labels—Reasonable Probability of Deception—Absence of Intentional Fraud—Undertaking by Defendants**

**—Costs**—The plaintiffs were tobacconists, who sought to restrain the defendants, who were also tobacconists, from infringing their registered trade mark. The plaintiffs registered one of their trade marks in 1876, the recumbent figure of a sphinx facing towards the left on a sort of pedestal. It had no word "Sphinx" upon it. In 1888 they registered the same sphinx with the word "Sphinx" on the pedestal. In 1889 the defendants had a sketch prepared for a label that contained on the face of it a recumbent figure of a most undoubted sphinx, facing to the right instead of to the left. Before action the defendants undertook to print no more of the same. The defendants afterwards used a label and a show-card representing typical Egyptian scenery, in which an animal, said to be a sphinx, figured in combination with other elements.

**HELD**—that the defendants were to be acquitted of any intentional fraud; that it was exceedingly doubtful whether the defendants' animal was meant to be a sphinx at all, and that no person could really reasonably mistake the so-called sphinx of the defendants for the sphinx of the plaintiffs; that there was no reasonable probability of deceit; that the defendants could not be given costs as they had brought the action upon themselves, and had only themselves to thank for it; and that there would be no order as to costs on the defendants undertaking to discontinue what was complained of.

**LAMBERT & BUTLER, LD. v. T. P. R. GOOD-**  
**BODY,** (1902) 18 T. L. R. 394; 19 R. P. C. 377  
—Farwell, J.

**145. Infringement—Meaning of "Distinctive Device"—Mark in Common Use in the Trade—Non-User as a Trade Mark—Bona fide Intention to Use—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), s. 10.**—In the case of an old trade mark the word "distinctive" means that as an historical fact it does distinguish the owner's goods, as being manufactured or selected by him, from the goods of other people. In the case of a new mark it means that it is capable of so distinguishing his goods, and this depends upon (1) the nature of the mark itself, and (2) the state of affairs in the trade at the time of its adoption.

A trade mark consisting of the head and shoulders of the picture known as Gainsborough's "Duchess of Devonshire" was registered by the plaintiffs in January, 1892, in Class 38, for "hats, bonnets, and similar head coverings." They now complained that the defendant, who also carried on a millinery business, had affixed to his premises, while in the course of erection, a board with a painted reproduction of the picture; and further that he had exhibited the same mark upon posters and advertisements in connection with his business, and also upon his millinery boxes and notepaper. The defendant replied that not only had he himself for seven years past used representations of the Duchess in various ways in connection with his business as a milliner, but that the picture in question had, from the year 1876, been in common use as an

**Deception—Continued.**

ornamentation upon boxes, papers, circulars, &c., used by milliners in their business. The evidence showed that this was the fact; and also that the plaintiffs had never used the trade mark on the actual goods supplied by them, but merely on labels affixed to the boxes in which the goods were delivered to customers, and on bills, receipts, &c.

**HELD**—that in 1892, when the trade mark was registered, it was not "distinctive," or capable of distinguishing the goods of the plaintiff as his manufacture or selection from the goods of all other persons; that it was not, therefore, capable of registration, and that it must be expunged from the register.

But it could not have been expunged for "non-user," for (*semble*) in order to justify the removal of a trade mark on that ground it must be shown either (*a*) that at the date of registration there was no *bona fide* intention to use it, and that it has never in fact been used; or (*b*) if there was a *bona fide* intention to use, and actual user for a short time, there has been actual abandonment over a long period of time.

LOUISE & CO, LD. v. GAINSBOROUGH, (1903)  
[87 L. T. 591; 19 T. L. R. 99, 20 R. P. C. 61  
—Farwell, J.]

**147. Infringement—Passing off—Action to Restrain—Names indicating Manufacture—Parts of Labels common to Trade—Parts deliberately Copied—Calculated to Deceive**—The plaintiffs were the registered owners of trade marks consisting of certain labels. These labels were printed in gold on white paper. Labels with gold letters on a white ground were common labels in the trade. Vine-leaves encircled the label, the defendants' being a copy of the plaintiffs'. Wreaths of vine-leaves were common to the trade. The plaintiffs' label had at the top of it an heraldic bar with an arm and a battle-axe. The defendants had nothing of that kind in their label, but filled up that space by a grouping of vine-leaves somewhat different from any grouping of vine-leaves on either of the labels elsewhere. Encircled by the vine-leaves the plaintiffs had "Jas. Hennessy & Co. Cognac," and the defendants had "Jules Chateau & Cie. Cognac." The plaintiffs brought an action to restrain the defendants from infringing their trade marks and from "passing off" their goods as the plaintiffs'.

Kekewich, J., held—that the labels of the defendants standing alone, without fraud, were not calculated to deceive, and that there was no infringement and no "passing off."

**ON APPEAL**—admitted that there was an infringement of trade mark, and order varied accordingly in that respect.

Decision of Kekewich, J. (19 R. P. C. 333), varied by consent.

HENNESSY & CO. v. DOMPE, (1903) 20 R. P. C.  
[175—C. A.]

**148. Passing off—Purchase of Business—No Express Assignment of Goodwill—Right to Use Patterns—Name of Goods—Name of Works**]

—In 1886 the plaintiff bought from R's executors the stock-in-trade and patterns of an implement maker, and also took a lease of the works; but the goodwill was not expressly mentioned. R., and, in former years, his firm R. & C., had made a particular type of reaping machine to which they had applied the name "Crown" and affixed an appropriate device. The plaintiff continued to make these machines, and also called his works the "Crown" works.

In 1898, on his lease coming to an end, the plaintiff moved the business to C., and there continued to manufacture the same machines under the same name.

In 1900 R.'s son set up a similar business in his father's old works.

**HELD**—that the plaintiff in fact acquired the goodwill of R.'s business, and that the determination of the lease had not put an end to his rights; also that the name and device of a crown had become distinctive of the plaintiff's goods. And that he was entitled to an injunction restraining R's son from advertising "Crown" reaping machines, or from describing himself as "late R. & C. established 1875," but that the latter was entitled to call his works the "Crown" works, the plaintiff having himself given them that name.

RICKERBY v. REAY, (1903) 20 R. P. C. 380—  
[Byrne, J.]

**149. Passing off—Red Bands on Cigars—"Marcella"—"Purnella"—"Red Band Cigars."**—The plaintiffs had since 1888 sold cigars with the word "Marcella" printed on a narrow red band, and they complained of the defendants selling cigars with a somewhat narrower red band bearing the word "Purnella"; they alleged that their cigars were known to the public as "Red Band Cigars."

**HELD**—(1) that red bands of all widths were common and open to the trade; (2) that the word "Purnella" sufficiently distinguished the defendants' goods; and (3) that, even if the plaintiffs had used a narrower red band to a greater extent than any other manufacturer, they had acquired thereby no exclusive right thereto, and that, therefore, the plaintiffs failed in their "passing-off" action.

Decision of Joyce, J. (21 R. P. C. 368), affirmed.

IMPERIAL TOBACCO CO., LD. v. PURNELL & CO.,  
[(1904) 21 R. P. C. 598—C. A.]

**150. No Proof of Fraud or Deception.**—D, a whisky importer, devised and registered a square label of a cream colour with a gold border and strip of blue at the foot. Upon a diagonal band was his signature, and in the two triangular spaces were the words, "D's Perfection" and "Old Scotch Whisky," all the lettering being black.

M., who had no knowledge of D's label, designed an oblong label of a white colour. Upon a diagonal band was his firm's name, and in the two triangular spaces were the words, "M's Extra Special Scotch Whisky," and "Edinburgh, Birmingham and London," the lettering being black.



**Deception—Continued.**

No attempt was made to prove any actual deception.

**HELD**—that there was no such resemblance between the two labels as could deceive or mislead anyone.

**DAWSON v. STEWART**, (1905) 22 R. P. C. 250—  
[Ct. of Sess.]

**151. Imitation of Advertisement.**—No trader is justified in taking the peculiar symbol, device, or mark by which another trader distinguishes his goods on the market, and so attracting custom to himself from his rival.

The appellants sold their goods in boxes, with the name of the article printed in a particular manner on a "scroll." The respondents sold precisely similar goods under the same name, also printed on a similar scroll, with the addition of their initials "C. B." There was no evidence that any customers were in fact deceived, and after the commencement of the action the respondents discontinued the use of the scroll.

**HELD** (reversing the judgment of the Court below, Lord Robertson dissenting)—that the appellants were entitled to an injunction to restrain the respondents from using the scroll in connection with their goods, and to an account of profits derived by the respondents from the sale of goods in boxes distinguished by the scroll.

Decision of C. A. (89 L. T. 56; 19 T. L. R. 604; 20 R. P. C. 649) reversed.

**WEINGARTEN BROS. v. BAYER & Co.**, (1905) 92 [L. T. 511; 21 T. L. R. 418; 22 R. P. C. 341—  
H. L.]

**152. Points of Resemblance common to the Trade—False Statements as to Medals and Awards—Costs.**—For fifteen years the plaintiffs had sold three varieties of dried materials for making soup, and they claimed that their goods had become known and were distinguished from all similar goods by their mode of packing and "get-up," i.e., packets of a certain size, shape, and printing, ultimately enclosed in steel boxes of a peculiar kind.

In 1903 the defendants, who were pickle manufacturers, began to sell prepared soups in similar packets and boxes; but their name "Gillard's" appeared in the same place as "Edwards" did on the plaintiffs' goods. The wrappers used by the defendants contained statements alleged to be inaccurate as to medals and awards in the same position as accurate statements did on the plaintiffs' wrappers.

**HELD**—(1) that the get-up of the plaintiffs' goods was not distinctive of goods of their make; (2) that the defendants' goods only resembled the plaintiffs' in points common to the trade; and (3) that no actual deception had been proved, nor were the defendants' goods calculated to deceive purchasers; and (4) that the defendants could not be deprived of costs on account of inaccurate statements as to medals and awards.

Decision of Kekewich, J. (21 R. P. C. 589), reversed on last point only.

**KING & Co., LD. v. GILLARD & Co, LD.**, (1905)  
[22 R. P. C. 327—C. A.]

**153. Label on Bottles—Medallion on Labels—Probability of Deception.**—The plaintiffs sold soda water in bottles with a chocolate-coloured label round the neck, the label having a white border and a red medallion in the centre. "S's soda water" was printed thereon in white letters.

The defendants sold soda water in bottles bearing a somewhat similar label with "G's soda water" in white letters, but the centre medallion differed.

**HELD**—that the defendants could not be presumed to have acted fraudulently, and that their labels were in fact not calculated to deceive.

**SCHWEPPE, LD. v. GIBBENS**, (1905) 22 R. P. C. [113—C. A.]

**154. Mode of Advertising—Similarity of Advertising—No Injury to Plaintiff's Property.**—A person by copying the attractive features of newspaper advertisements of his rival (such advertisements not being registered as copyright or designs) does not thereby injure any property of that rival, and incurs no legal liability.

So held, where the defendant had copied an advertisement consisting of stereotyped letter-press surrounded by pictures of objects, which were offered as premiums to purchasers, slightly altering the conditions applicable to such premiums, and substituting his own firm name for that of the original advertiser.

**WERTHEIMER v. STEWART, COOPER & Co.**, (1906)  
[23 R. P. C. 481—Kekewich, J.]

**155. Label—Alleged Infringement of Trade Mark—Alleged Passing off—Separate Causes of Action.**—Where a plaintiff complains of the use of a label, which he alleges to be an infringement of his trade mark and also to amount to "passing off," he is not alleging separate causes of action. If, therefore, the defendant submits and gives an undertaking not to use the label or otherwise infringe the trade mark, the plaintiff, after accepting such undertaking, cannot proceed on his claim for "passing off."

**VERNON & SONS v. BUCHANAN'S FLOUR MILLS**,  
[LD., (1906) 23 R. P. C. 17—Farwell, J.]

**156. Degree of Resemblance—Probability of Deception—Question for Court.**—The labels used by plaintiff and defendant in an infringement action were before the Court. The plaintiff called no witnesses to prove that persons had been or were likely to be deceived by the similarity between the labels. The defendant called witnesses to deny the probability of deception.

**HELD**—that the plaintiff might rely merely on the similarity of the labels, and that the Court upon inspection and comparison would say whether the defendant's label was calculated to mislead an unwary customer.

**HENESSEY & Co. v. KEATING**, (1907) 24 R. P. C. [485—M. R. Ir.]

See also Nos, 64, 81, 104.

**Deception—Continued.****III. Conduct facilitating deception.**

**157. Infringement—Labels—Printing Counterfeit Labels—Assisting Fraudulent Purpose—Injunction—Costs.**—A label was got up so as closely to resemble the genuine label of the plaintiffs, distillers of whisky, and bore their trade marks; it was a label that manifestly might be used for fraudulent purposes, and it had been printed for and sold to H., a retail dealer, by the defendants, a firm of printers, without taking any precaution whatever. The plaintiffs were not communicated with, and asked whether they had any objection to the order given by H. being carried out. H. sold some bottles of whisky bearing the counterfeit labels.

**HELD**—that there had been an infringement; that the labels were calculated to be used for a fraudulent purpose; that it was a plain and palpable fraud; and that a perpetual injunction against the defendants with costs would be granted.

**JAMESON (JOHN) & SON, LD v JOHNSTON (R S.) & Co., LD., (1901) 18 R. P. C. 259—**  
Porter, M. R. Ir.

**158. Infringement—Bottles—Trade Mark engraved on Syphons—Bottle Exchange—Members using Syphons belonging to other Members.**—The three complainers and the respondents were aerated water manufacturers, and also members of a bottle exchange. By the rules of this exchange when (as often happened) they received from customers empty syphons engraved with the trade mark of another member it was their duty to return such syphons to the owners.

Instead of so doing, the respondents filled syphons bearing the complainers' marks with their own aerated water, and sent them out in fulfilment of an order for their water.

**HELD**—that they must be interdicted from so doing.

*Seemle*, even if the customers had sent the complainers' syphons to the respondents, asking to have them filled with the latter's aerated waters, a compliance with such request would have rendered the respondents liable to an interdict as being connivers at an illegal use of the complainers' marks, and a conversion of their property.

**BARR & CO., G. AND C. MOORE v. MAIR AND [DOUGAL, (1904) 21 R. P. C. 665—Ct. of Sess.]**

**159. Infringement—Bottles Stamped with Plaintiffs' Name—Defendants' Using Such Bottles but Putting Their Own Label Thereon—No Fraud or Deception—Injunction—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (2) (c).**—Even where there is no intention to deceive, a person who intentionally uses another's trade mark is not protected by the words of sect. 2 (2) (c) of the Merchandise Marks Act, 1887, on the ground "that otherwise he had acted innocently."

The plaintiffs, mineral water manufacturers,

registered their name as a trade mark to be stamped upon their bottles. A number of such bottles came into the possession of the defendants, who were also manufacturers of mineral waters, and the defendants placed upon these bottles their own paper labels and filled them with their own waters. No fraud was intended, but it was suggested that a fraudulent retailer might remove the paper label, and so deceive the public.

**HELD**—that as the defendants insisted upon their right to continue the practice, an injunction must be granted with costs.

Decision of M. R. (Ir.) (20 R. P. C. 663) affirmed.

**THWAITES & CO. v MCEVILLY, CANTRELL AND [COCHRANE v. MURPHY AND BRADSHAW, [1904] 21 R. P. C. 897—C A. (Ir.).]**

**160. No Actual Deception—Enabling Retailers to Commit Fraud.**—In 1883 Rodgers Bros. established a business of edged tool manufacturers; in 1889 the surviving partner sold it to the defendants. In 1902 the defendants began to manufacture cutlery. They sold their goods labelled with the words "Rodgers Bros, Sheffield manufacturers of celebrated cutlery, tools, &c." No actual deception was proved.

**HELD**—that the name "Rodgers" was universally known as denoting the plaintiff's goods, that the defendants used it for the purpose of enabling retailers to commit fraud, and with the intention of deceiving, and that an injunction must be granted.

**JOSEPH RODGERS & SONS, LD. v HEARNshaw [AND ANOTHER, [1906] 23 R. C. P. 349—**  
Buckley, J.

**IV. MISREPRESENTATIONS BY ADVERTISEMENT, Etc.**

**161. Passing off Goods—Action to Restrain—Words "Trade Mark" Referring to Words Not Registered as a Trade Mark—Injunction—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 62, 76, 77, 103.**—A trader may still acquire the right to a trade mark within the Kingdom by user, and the effect of the part of the Patents, Designs and Trade Marks Act, 1883, which relates to trade marks is not to provide that no one shall have a trade mark unless he register it in accordance with the Act, but only that a person using such a trade mark shall not be entitled to sue in respect of it unless he has registered it.

An offence under sect 105 of the said Act consists not in applying to any article sold a trade mark, but in representing that that trade mark is registered.

The plaintiffs used the words "Sen Sen" above the words "Trade Mark."

**HELD**—that the words "Sen Sen Trade Mark" did not necessarily carry with them the implication that the trade mark had been registered, and that the plaintiffs had not been guilty of such a misrepresentation as to deprive them of the right to an injunction to restrain the defendant from selling colourable imitations of

**Misrepresentations by Advertisement—Contd.**

the plaintiffs' goods calculated to lead to the belief that such preparations are the plaintiffs' manufacture.

*Lewis v. Goodbody* ([1892] 67 L. T. 194—Kekewich, J.) discussed.

**SEN SEN CO. AND OTHERS v. BRITTEN**, [1899]  
[1 Ch. 692; 68 L. J. Ch. 250; 47 W. R. 358;  
80 L. T. 278, 15 T. L. R. 238; 16 R. P. C. 137  
—Stirling, J.]

**162. Unfair Use of Testimonials—Cause of Action—Interlocutory Injunction**—A manufacturer of patented medical apparatus had received favourable notices and comments in the medical and other press, which a rival manufacturer of later and similar apparatus had copied, in modified forms, into several pamphlets by which he advertised his goods.

**HELD**—that there was no evidence that the defendant's goods were passed off for the plaintiffs', and that the application for an interlocutory injunction to restrain the issue of such pamphlets containing the testimonials must be refused.

*Franks v. Weaver* ((1847) 10 Beav. 297; 8 L. T. (O.S.) 510) distinguished.

*Batty v. Hill* (1863) 1 H. & M. 246) followed.

**TALLERMAN v. DOWSING RADIANT HEAT CO.**,  
[1900] 1 Ch. 1; 68 L. J. Ch. 618; 48 W. R.  
146—Stirling, J.]

Appeal not heard on terms, [1900] 1 Ch. 9,  
69 L. J. Ch. 46—C. A.]

**163. Passing off—Action to Restrain—Wine—“Big Tree Brand” Wine—Liability of Company for Misrepresentations of Servants—Injunction**—The plaintiffs were entitled to the use of the words “Big Tree Brand” as describing Californian wine imported or bottled by them. The plaintiffs for some time prior to 1900 supplied the defendants with their “Big Tree Brand” wine, and the defendants sold it in their restaurants as “Big Tree Brand” wine. Since 1900 the plaintiffs ceased to supply the defendant with their “Big Tree Brand” wine, but the waiters of the defendants, contrary to orders, represented and passed off wine not imported or bottled by the plaintiffs as “Big Tree Brand” wine.

**HELD**—that the defendants were responsible for the misrepresentations of their waiters, and that the plaintiffs were entitled to an injunction.

**GRIERSON, OLDHAM & CO., LD. v. BIRMINGHAM [HOTEL AND RESTAURANT CO., LD.]**, (1901)  
18 R. P. C. 158—Buckley, J.]

**164. Passing off Goods—Action to Restrain—Name Indicating Manufacture—Circulation of Circulars Calculated to Deceive Purchasers.**—The plaintiffs were manufacturers of machine belting, and since 1892 had continued to carry on the business which for many years previously had been carried on by Mr. Frank Reddaway. They manufactured belting known as “Camel-hair Belting.” The defendant was the representative in England of Mr. Conrad Scholtz of Hamburg, a manufacturer of every kind of

textile belting. It was proved that “Camel-hair Belting” meant in the trade, as well before 1891 as since, and up to the time of the trial, the belting of the plaintiffs and their predecessors in trade and nothing else. The plaintiffs claimed to restrain the defendant from using the words “Camel-hair Belting” with reference to goods sold by him in a manner calculated to deceive, or without clearly distinguishing his belting from the belting of the plaintiffs.

**HELD**—that the defendants' circulars were calculated to lead to the belief that the goods advertised in them and sold by the defendant were manufactured by the plaintiffs, and that the circulars did not clearly distinguish the goods sold by the defendant from the goods manufactured by the plaintiffs; and that an injunction must be granted to re-train the further circulation of the circulars in general terms following the language of the judgment of the House of Lords in *Reddaway v. Banham*, [1896] A. C. 199; 65 L. J. Q. B. 381; 44 W. R. 638; 74 L. T. 289; 13 R. P. C. 218—H. L. (E).]

**F. REDDAWAY & CO., LD. v. AHLERS**, (1902)  
[19 R. P. C. 12—Early, J.]

**165. Unauthorised Use of Name of Newspaper—Inducing the Public to Think that Others are Partners or Connected with the Sale of Goods—Exposing those Others to Litigation—Reasonable Probability of—Interim Injunction.**—The defendant devised a scheme for selling a kind of cycle, which he called “The Times Bicycles.” Having regard to his circulars, advertisements, and the general conduct of the business carried on by him in reference to these cycles, it was clear that he intended to induce people to think that the proprietors of *The Times* newspaper were the vendors, for whom a person in Chancery Lane was the manager of the department, or that they were partners, or in some way pecuniarily and with responsibility connected with the sale of the bicycles.

**HELD**—that there was such a reasonable probability of the proprietors of *The Times* newspaper being exposed to litigation, and possibly of being made responsible, had they not taken the steps to disconnect their names from the advertisements and circulars that were issued by the defendant, that an injunction ought to be granted to restrain the defendant, his managers, servants and agents, until the trial or further order, from representing that the cycles offered by him for sale are in fact offered for sale by the proprietors of *The Times* newspaper, or representing that he is carrying on business as a department of or in connection with *The Times* newspaper, or in any way holding out *The Times* newspaper, or the proprietors thereof, to be the owners of his business.

*Routh v. Webster* ((1847) 10 Beav. 561) applied.

**WALTER v. ASHTON**, [1902] 2 Ch. 282; 71 L. J.  
[Ch. 839; 87 L. T. 196, 18 T. L. R. 445; 51  
W. R. 131—Byrne, J.]

**166. Passing off—Action to Restrain—Advertisement—Posters.**—Both plaintiffs and defendants were manufacturers of soap. The

**Misrepresentations by Advertisement—Contd.**

plaintiffs' trade mark was registered in 1880 in Class 47 for common soaps and other articles, and in 1881 in Class 48 for toilet and other perfumed soaps. The plaintiffs alleged that by the use of their trade mark and by advertisement their soap had become known and was ordered under the name of "Ship Brand" or other names including the word "ship," and they complained of the use by the defendants of a large poster on which there was a ship having on one of its sails a Geneva cross. This poster bore the words, "The only Royal Warrants for Disinfectants, Jeyes' Fluid, Powder, Soaps," in large letters, and the Geneva cross was part of the defendants' trade mark, which consisted of a picture of a hospital nurse with such a cross on her arm. It was not shown that there had been any actual deception, and the plaintiffs did not impute any fraudulent intent to the defendants. The plaintiffs moved for an interlocutory injunction to restrain the defendants from in any manner using the device of a ship.

**HELD** (by Joyce, J.)—that the use of the vessel in the poster would not probably lead to mistakes among persons of ordinary intelligence or common sense, and that the injunction must be refused.

*Settled* on appeal, the defendants agreeing to discontinue all reference on the poster to either soap or powder, and to use it only for fluid.

**PRICE'S PATENT CANDLE CO., LD. v. JEYES' [SANITARY COMPOUNDS CO., LD., (1902) 19 R. P. C. 17—C. A.]**

**167. Passing off—"Camel-hair Belting"—Prefixing Name of a Firm or of a Brand—Whether sufficient to distinguish—Acquiescence**—The defendants admitted that they put on the market goods marked, or described as "Phoenix Brand Camel-hair Belting" and "Stevenson's Camel-hair Belting"; and they also admitted that the words "Camel hair Belting" by themselves had acquired a secondary meaning as denoting belting made by the plaintiffs.

**HELD**—that the general conduct of the defendants and the misrepresentations made by them in their various circulars pointed to a dishonest intention, and that the Court could not say that the prefixes were sufficient to distinguish their belting from that of the plaintiffs.

As the plaintiffs had stood by for four years no damages were awarded for past infringements, but an injunction was granted.

**REDDAWAY v. STEVENSON AND OTHERS, (1903) [20 R. P. C. 276—Lancaster Palatine Court (Hall, V.-C.).]**

**168. Passing Off—"Truefitt" "Hairdresser"—"Hair Specialist"—Evidence of "Trap" Orders.**—Where a trap has been successful, pointed attention should be called to the conversation in order to fix the incident upon a person's memory.

See per Farwell, J.—*Ripley v. Griffiths* (19 R. P. C. at p. 597).

At some date before 1819 F. Truefitt founded a hair-dressing business; his widow, and son Walter, carried it on down to 1900, adding to it the business of a "hair specialist." The defendant then bought the combined businesses with the right to use the name "Truefitt," or "Walter Truefitt."

In 1819 F. Truefitt, a relative of the original Truefitt, set up a hair-dressing business in the same locality: his son, H. P. Truefitt, continued it, and added the business of a hair specialist. These businesses were now owned by the plaintiff, who brought an action for an injunction to restrain the defendant from actual "passing off," and also from carrying on the business of a hair-dresser, or hair-specialist, without clearly distinguishing it from that of the plaintiffs.

**HELD**—that the plaintiffs, on the above facts, could only succeed if they proved actual misrepresentations by the defendants as to the identity of the two businesses; this they attempted to do by means of "trap" conversations.

**HELD**—that the evidence was not satisfactory, and that the action must be dismissed.

**H. P. TRUEFIT, LD. AND ANOTHER v. C. J. EDNEY, (1903) 20 R. P. C. 321—Byrne, J.]**

**169. Passing off—Advertisements—"Singer" Sewing Machines—"Singer System."**—The plaintiffs were the manufacturers of the well-known Singer sewing machine, and they complained of certain advertisements issued by the defendants as being calculated to mislead.

The defendants did not manufacture, and did not place the word "Singer" on the machines supplied by them, but they issued advertisements with the word "Singer" in large and prominent letters, preceded by "latest improved," and followed by "system" both in smaller type.

Evidence was given by persons who had actually been misled by the advertisements; but the defendants contended that "Singer system" had a well-known meaning as including machines other than those actually made by the plaintiffs.

**HELD**—that ordinary purchasers knew nothing of the "Singer system", that the advertisements were intended and calculated to mislead, and that an injunction and inquiry as to damages must be granted.

**SINGER MANUFACTURING CO. v. BRITISH [EMPIRE MANUFACTURING CO., LD., (1903) 20 R. P. C. 313—Kekewich, J.]**

**170. Passing Off—"N. from C. & Co."—Death of N.—Widow using same title—Injunction refused**—N., who for several years had acted as manager to C & Co., set up in business for himself under the style "N. from C & Co." He died within nine months, and his widow carried on the business, using the same style upon billheads, wagons, &c., as her husband had done.

**HELD**—that C. & Co. were not entitled to an injunction to restrain her from so doing.

**RICKETT, COCKERELL & CO., LD. v. NEVILL, [(1904) 21 R. P. C. 394—Kekewich, J.]**

**Misrepresentations by Advertisement—Contd.**

171. *Trade Name used in Fraudulent Trade—Secondary Meaning.*—In America the word "bean" is occasionally used for a pill. In England one S. in 1887, a pill vendor, registered the words "Bile Beans" as a trade mark; but no other person had used the word until 1899, when the complainers, having acquired S.'s rights, advertised largely, stating falsely in their advertisements that the basis of their Bile Beans was an Australian herb discovered by Charles Forde, an eminent scientist: they called their pills "Charles Forde's Bile Beans."

In 1904 D. began to sell "D's Bile Beans."

HELD—that the complainer's trade was a fraudulent one and that no Court of Equity would help to protect it or any name used in connection with it:

(2) that the complainers had acquired no exclusive right to the words "Bile Beans"; and also

(3) that D. sufficiently distinguished his goods by their get-up.

BILE BEAN CO. v. DAVIDSON, (1905) 22 R. P. C. [553—Ct of Sess.

172. *"Mappin and Webb"—"Mappin."*—The plaintiffs, "Mappin and Webb, Ltd." had succeeded to two old businesses of "Mappin Bros." and "Mappin and Webb." B. was alleged to have bought the Sheffield business of one T. Mappin, trading as "Mappin & Sons." He made articles marked "Mappin & Sons," and the defendants, London retailers, sold them with price tickets lettered "Mappin's A1 quality"; their salesman had represented such goods to be the same as those of the plaintiffs.

Separate proceedings were being taken against B.

HELD—that the defendants must be restrained from passing off goods not made by the plaintiffs as and for their goods.

MAPPIN AND WEBB, LD v. LEAPMAN, (1905) [22 R. P. C. 398—Farwell, J.

173. *Trade Circular—Ex-Manager to well-known Firm.*—M., formerly managing director of H. & Co., who carried on business as artesian well engineers, started business on his own account as M. & Co.

He issued a trade circular headed "Artesian Tube Wells," under the style of M. & Co., and mentioned numerous contracts as having been personally supervised and executed by "our Mr. M.," or "under his directorship."

HELD—that an interdict should be granted, as the circular was likely to cause persons to believe that the contracts referred to had been executed by M. & Co., and not (as was the fact) by H. & Co. while M. was their director.

HENDERSON & SON v. MUNRO & CO, (1905) [7 F. 636—Ct of Sess.

174. *"Apollinaris salts"—Salts not obtained from Actual Apollinaris Water.*—The plaintiffs had the sole right to sell in the United Kingdom Apollinaris water, the product of a particular

German spring. The defendants, who were chemists in England, sold preparations which they described in their catalogue as "Salts for the production of natural mineral waters prepared according to the most reliable analyses of the respective waters." Then followed a list of waters headed by Apollinaris, per lb. 2s. 6d. Salts obtained from actual Apollinaris water are not sold commercially. The defendants, in fulfilling orders for their salts, described them as "Apollinaris salts," and gave directions for dissolving the salts in a certain quantity of water. In an action to restrain the defendants from selling salts not obtained from actual Apollinaris water as and for salts obtained from such water or as capable of being made up into such water without distinguishing such salts from salts actually obtained from Apollinaris water.

HELD—that the defendants did not pass off their salts as and for salts obtained from actual Apollinaris water, but merely represented that their salts would produce waters having the constituents of that water; and that, as there was no holding out of the manufactured water as real Apollinaris water, the defendants by what they had done did not cause or enable the purchasers of the salts to do that which they were not entitled to do.

Decision of Warrington, J. (1906) 22 T. L. R. 638, affirmed.

THE APOLLINARIS CO, LD. AND ANOTHER v. [DUCKWORTH & Co., (1907) 22 T. L. R. 744; 23 R. P. C. 540—C. A.

**V. FALSE TRADE DESCRIPTION: MERCHANDISE MARKS ACT, 1887.**

175. *Statutory Offence—Private Prosecution—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, s. 2, sub-s. (2).)*—The registered owner of a trade mark may, with the consent of the Procurator-fiscal, maintain a prosecution under sect. 2 sub-s. (2) of the Merchandise Marks Act, 1887.

BURNS v. TURNER, (1898) 25 R. Just. Cas 38; [35 Sc. L. R. 265—High Court of Judiciary, Sc.

176. *Trade description untrue in fact—Article supplied as good as article described—No intent to deceive buyer—Materiality of false description.*—A trade description applied to goods which is untrue in point of fact as a description of the goods to which it is applied, is a "false trade description" within the meaning of sect 3 of the Merchandise Marks Act, 1887, although the goods supplied are as good as they would have been if they had corresponded with the description, and although there was no intention to deceive the buyer or induce him to buy goods which he would not have bought but for such description.

The respondents sold a packet of cigarettes to which a printed label had been affixed bearing the words "guaranteed hand-made." As a matter of fact the cigarettes were not hand-made, but were machine-made, though they were as good for ordinary purposes as hand-made cigarettes. In affixing the label to the cigarettes the respondents had no intention to deceive the

**False Trade Description—Continued**

buyer or induce him to purchase goods he would not otherwise have bought, but they acted merely for the purpose of economy in using a stock of old labels, which had already been printed before they ceased to make their cigarettes by hand. The price for cigarettes made by hand would have been somewhat more than if they had been made by machine, but the buyer did not pay the larger price.

**HELD**—that, as the label was untrue in point of fact as a description of the goods, it was a false trade description within the meaning of the Act.

**KIRSCHENBOIM v. SALMON & GLUCKSTEIN, LTD.**, [1898] 2 Q. B. 19; 62 J. P. 439; 67 L. J. Q. B. 601; 78 L. T. 658; 14 T. L. R. 395, 46 W. R. 573, 19 Cox C. C. 127—Div. Ct.

**177. Application of—Invoice—Liability of Principal for Acts of Agent.**—The respondent called at one of the appellant's places and asked for an English ham. The salesman pointed to several hams and said they were Scotch, and were 8½d a pound. The respondent said he would take one, and the salesman passed it inside, and said, "Weigh up Scotch ham, 8½d."

The respondent before paying asked for an account with "Scotch ham" on it. It was first given him without, but the words were subsequently added. The assistants then admitted it was an American ham.

The appellant had sent out to all the managers of his shops the following notice: "Most important—Please instruct your assistants most explicitly that the hams described in the list as 'Breakfast hams' must not be sold under any specific name of place or origin—that is to say, they must not be described as Bristol, Bath, Wiltshire or any such title, but simply as 'breakfast hams'."

The magistrates were of opinion that the appellant was guilty of an offence against the Act, for that he did unlawfully sell to the respondent an American ham to which a false trade description, to wit, "Scotch ham," was applied, and that he had not taken all reasonable precautions against committing an offence against the Act.

**HELD** (affirming the decision of the magistrates)—(1) that there was sufficient trade description to satisfy the Act in the invoice, (2) that whether or no the appellant had taken all means to stop these representations was a matter of fact for the magistrates; and (3) that the effect of the Act was to make the master a principal liable criminally for the acts of his agents or servants where the conduct constituting the offence was pursued by them within the scope or in the course of their employment, except that the master can be relieved where he can prove that he acted in good faith and had done all that was reasonably possible to prevent offences against the Act.

**COPPEN v. MOORE**, [1898] 2 Q. B. 306; 62 J. P. 453; 67 L. J. Q. B. 689; 78 L. T. 520; 14 T. L. R. 414; 46 W. R. 620—Div. Ct.

**178. Selling Goods with forged Trade Mark—"Acted Innocently"**—*Merchandise Marks Act, 1887* (50 & 51 Vict. c. 28), s. 2, sub-s. 2.—Auctioneers sold a particular lot of china goods, to which forged trade marks were applied, but told the purchasers at the sale that there was a doubt as to the genuineness of the articles sold in the particular lot, and that they did not guarantee it, but sold the articles for what they were worth.

**HELD**—that the Merchandise Marks Act, 1887, s. 2, sub-s. 2, allowed the auctioneers to show that they had "acted innocently," and that their action was *bona fide*, and they could not be convicted under the sub-section.

**CHRISTIE, MANSON & WOODS v. COOPER**, [1900] 2 Q. B. 522; 69 L. J. Q. B. 708; 64 J. P. 692; 49 W. R. 46; 83 L. T. 54; 16 T. L. R. 422—Div. Ct.

**179. Application to Goods—Salesman's Conduct.**—The appellant at the respondents' shop asked for two half pounds of tea. The tea was lying in packets on the counter. One of the respondents' salesmen took two packets, wrapped them in paper, and handed them to the appellant, who paid for them. Nothing was said by the salesman. Each packet was stamped in ink as follows: "The weight of this package, including the wrapper, is half lb." There was no evidence that this was specifically brought to the knowledge of the appellant at the time of sale. Each packet contained less than half a pound of tea, though the weight of each, including the wrapper, exceeded half a pound.

**HELD**—that the conduct of the respondents' salesman was not an application to the goods of a false "trade description" of their weight within the meaning of sect. 2, sub-s. 2, of the Merchandise Marks Act, 1887.

**LANGLEY v. BOMBAY TEA CO.**, [1900] 2 Q. B. 460; 69 L. J. Q. B. 752; 49 W. R. 27, 83 L. T. 175, 15 T. L. R. 441—Div. Ct., and see No. 185, *infra*, and under **WEIGHTS AND MEASURES**.

**180. Oral Explanation—Custom of Trade.**—By the Merchandise Marks Act, 1887, s. 3, sub-s. 1, the expression "trade description" means "any description, statement or other indication, direct or indirect" as to any of a variety of matters relating to the goods sold, including an indication "(b) as to the place or country in which any goods were made or produced;" and the sub-section goes on: "and the use of any figure, word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of the Act."

**HELD**—that the concluding paragraph is intended to apply to cases in which apart from the custom of the trade, there is nothing to convey to the mind of the purchaser that the figure, word or mark is intended by the vendor to have the particular meaning which is complained of, and that it has no application to a case in which the vendor by oral explanation, made at the time of the sale intends to convey

**False Trade Description—Continued.**

to the mind of the purchaser, that it is intended to have that particular meaning

CAMERON v. WIGGINS, [1901] 1 Q. B. 1, 70 [L. J. Q. B. 15; 49 W. R. 237; 83 L. T. 428. 19 Cox C. C. 580—Div. Ct.]

**181.—Unfinished Parts of a Watch Imported—“English Lever.”**—The appellants sold a watch described as an “English lever,” at £2 15s. As a matter of fact certain parts of the watch mainsprings, hairsprings and screws, about 8d. in value, were imported in a rough state from abroad. The price of these parts when finished in England was about 4s. 3d. The watch was finished and fitted in England. The magistrate convicted the appellants on the ground that the imported parts were of foreign origin and of such importance that a trade description which failed to indicate them was a false description in a material respect, and that the operations of finishing and fitting in this country were not of such a character as to destroy the characteristics of the foreign country in which they were made and produced.

**HELD**—that if the magistrate had come to this conclusion as matter of fact on the evidence and had simply stated the case to determine whether there was anything in point of law to prevent him coming to such conclusion upon the evidence, his decision would not be disturbed by the Court; but that if he decided upon the view that the inclusion of certain parts partly manufactured abroad compelled him as a matter of law to hold that “English” was a false description, his decision could not be supported; and that the case should be remitted to him so that the point of doubt might be clearly settled.

WILLIAMSON v. TIERNEY, 65 J. P. 70; 83 L. T. 592; 17 T. L. R. 174—Div. Ct.

The magistrate, having convicted the appellants under the Merchandise Marks Act, 1887, upon the above case being remitted to him, stated that he found as a fact, upon the evidence before him, that the watch would not be regarded as an “English” watch in the watch trade by reason of certain material parts being of foreign manufacture.

**HELD**—that the question was one of fact, and no appeal lay.

WILLIAMSON v. TIERNEY, [1901] 17 T. L. R. 424—Div. Ct.

**182. Application to Goods—Intent to Deceive**—Where a charge is made under sect. 2, sub-sects. (2), (6), of the Merchandise Marks Act, 1887, the facts that the goods actually sold were of as good a quality as they would have been if they had corresponded with the description, or that the seller had no intention to deceive or defraud the buyer are immaterial, and afford no defence when the false description is deliberately affixed to the goods.

Kirshenboim v. Salmon & Glückstein ([1898] 2 Q. B. 19; 67 L. J. Q. B. 601; 62 J. P. 439; 46 W. R. 573; 78 L. T. 658—Div. Ct., No. 176, *supra*) followed.

REG v. PHILLIPS, (1901) 65 J. P. 41—

[McConnell, Q.C., London Qr. Sess.]

**183. “Natural” Mineral Waters—Salt added to Prevent Deterioration—Carbonic Acid Gas reintroduced to restore Water to Original Condition**—Apollinaris water is taken from a spring at a depth of some 60 feet below the surface; and, before being bottled, is kept for some days in a tank. It was contended that when bottled it was not a “natural” water, because (1) some of the iron in it is precipitated in the tank; (2) one part of salt is added to a thousand of water to prevent the action of the water on the cork generating sulphuretted hydrogen, which would render it unfit for drinking; (3) carbonic acid gas from the same spring is reintroduced in order to replace the gas lost while the water stands in the tank, and so to restore as nearly as possible the original degree of effervescence.

The magistrate found that the word “natural” as applied to mineral waters had no special signification; and he dismissed the summons on the ground that the water when supplied to the public was virtually the same as when drawn from the spring.

**HELD**—that there was no ground for reversing his decision, for the salt had no effect except as a preservative; and the iron would be precipitated in the bottle, if not in the tank, so its removal was only the removal of an impurity; whilst the gas was the natural gas restored.

DAVENPORT v. THE APOLLINARIS CO., LD. [(1903) 67 J. P. 323; 89 L. T. 19; 19 T. L. R. 526; 20 Cox C. C. 502—Div. Ct.]

**184. Kilderkin—Barrel containing less than 18 Gallons**—The appellants were summoned for unlawfully applying a certain false trade description, namely, “1 kilderkin” to a cask of beer, false as to measure and gauge thereof, contrary to the Merchandise Marks Act, 1887. The respondent ordered from the appellants, who are brewers, one kilderkin of ale, and was supplied by the respondents with a cask, together with an invoice, which was as follows: “Wear Brewery, Sunderland, Mr. R. Gibson—Rainton—Bought of North Eastern Breweries, Ltd., October 21st, 1903 Kils 1. Mild ale B. M. Per brl., 48s.—11.” The cask was afterwards ascertained to hold one pint less than the 18 gallons, the proper measure of a kilderkin.

**HELD**—that the appellants were rightly convicted of an offence under the Merchandise Marks Act, 1887, s. 2.

NORTH EASTERN BREWERIES, LD. v. GIBSON [(1904) 68 J. P. 356; 91 L. T. 78; 20 T. L. R. 496; 20 Cox C. C. 706—Div. Ct.]

**185. Sale of Tea—“Quarter Pound Gross Weight”—Tea and Paper weighed together—Ticket placed in packet with Tea—Printing on ticket**—The respondent bought from the appellants, who were tea merchants, one quarter pound of tea. The packet was already wrapped in silver paper and tied up with string. The shopman put a ticket under the string, wrapped

**False Trade Description—Continued.**

the whole parcel in brown paper, and delivered it to the respondent. On the silver paper was printed the words "Star Tea Co.'s blend, quarter pound gross weight." On one side of the ticket was printed "Star Tea Co., Ltd.  $\frac{1}{4}$  lb. 2s 8d. tea ticket. 22 Park Street, Walsall L. 1986," and on the other side a notice to the effect that every purchaser of quarter pound of tea and upwards was given some useful article or check, in exchange for a number of which a valuable present would be given by the appellants. The respondent was not shown the silver paper, nor was it handed to him to read before it was wrapped in brown paper, nor was his attention called to the words printed on it. There were only  $3\frac{1}{4}$  ounces of tea in the packet.

HELD—that the ticket constituted a false trade description within the meaning of the Merchandise Marks Act, 1887, s. 2 (1) (d).

STAR TEA CO. v. WHITWORTH, (1904) 68 J. P. 443. 91 L. T. 87. 20 T. L. R. 539, 20 Cox C. C. 658—Div. Ct.

And see No 179, *supra*.

**186. Material of which Goods are composed—Description true chemically, but false as a trade description.]**—Where trade usage confines a generic name to one species of that genus, it may be a false trade description to apply the name to another species. The defendant sold a mixture composed of crystallised carbonate of soda and nearly 50 per cent of crystallised sulphate of soda, under the description "soda crystals." Both crystallised carbonate of soda and crystallised sulphate of soda could accurately be called "soda crystals" chemically; but it was proved that in the trade the term "soda crystals" was not applied to crystallised sulphate of soda at all, nor was it usually applied to crystallised carbonate of soda containing more than 2 per cent. of sulphate of soda.

HELD (Darling, J., dissenting)—that this was a false trade description.

HELD, by Darling, J.—that the description "soda crystals" being a true description chemically, could not be a "false trade description" within the Merchandise Act, 1887.

FOWLER v. CRIPPS, [1906] 1 K. B. 16; 75 L. J. [K. B. 72; 70 J. P. 21; 54 W. R. 299; 93 L. T. 808; 22 T. L. R. 73—Div. Ct.

**187. "Tarragona Port"—Blended Wine.]**—The respondents sold to the appellant for 1s. an imperial quart bottle of wine, bearing a label on which was printed in large letters "Stower's Tarragona Port," followed by the words "blended with wine produced from finest foreign grapes" in small letters. Tarragona port is a wine made in the province of Tarragona, in Spain, from fresh grapes grown in that province, and is a wine having a distinct taste, bouquet, and smell. Of the contents of the bottle one-third (in bulk) consisted of a special kind of high-priced Tarragona port called "Mistella," which is a very heavy wine, not fit for drinking by itself, and imported for the

purpose of being blended with other wines. The remaining two-thirds of the contents of the bottle were composed of a wine purchased by the respondents and made from "grape must." "Grape must" is made in Greece, and consists of the concentrated juice of fresh grapes grown in Greece. It is concentrated by the evaporation of about three-fourths of the natural water contained in the grape juice. When concentrated it is exported under the control of the Greek Government, and imported by a limited liability company into England, where a Greek in their employment converts the "grape must" into wine by adding a ferment and water to an amount corresponding to the amount previously removed by evaporation. The wine so produced is a light wine, not of high quality.

The respondents were prosecuted for unlawfully selling goods to which a false trade description was applied contrary to sect. 2 (2) of the Merchandise Marks Act, 1887. The magistrate dismissed the information.

HELD—that it was impossible to say that the magistrate was bound to come to the conclusion that the label was a false trade description within the meaning of the sub-section.

HOOPER v. RIDDLE & Co., [(1906) 70 J. P. 417; 95 L. T. 424—Div. Ct.

**VI. PRACTICE****1. In General**

**188. Application to Register—Appeal from Comptroller—Evidence.]**—On an appeal referred to the Court from a decision of the Comptroller-General on an application to register a trade mark, a statutory declaration used before the Comptroller must be verified by an affidavit made by the declarant himself in order to be admissible in evidence before the Court.

KINGSFORD & SON; RE TRADE MARK, APPLICATION OF, (1898) 15 R. P. C. 197—North, J.

**189. Passing off Goods—Balance of Convenience and Inconvenience.]**—Where the get-up of the defendants' tins of salmon was such as to deceive an unwary customer, who might readily take the defendants' brand instead of the plaintiffs' and the similarity was far too great not to say there was no "passing off," an interlocutory injunction was granted by Kekewich, J., on the ground of the balance of convenience and inconvenience. On appeal the injunction was discharged on the defendants undertaking without prejudice to any question only to sell the balance of tins *ex a certain ship*, and to keep an account of their sales, and not to sell any other tins bearing the labels complained of by the plaintiffs until the trial of the action.

ALASKA PACKERS' ASSOCIATION v. CROOKS & Co., (1899) 16 R. P. C. 503—C. A.

**190. Passing off Goods—Use of Name—Setting aside Verdict—Reasonable Verdict.]**—The Court will not set a verdict aside merely because the jury might have given it the other way. If there is a question of fact left to the jury, and they have reasonably answered it, then verdict cannot be disturbed.



**Practice—Continued.**

GAMAGE, LD. v. RANDALL, LD., (1899) 16 R. P. C. 185—C. A.

**191. Passing off—Action to Restrain—“Magnolia Anti-friction Metal”**—*Effect of Findings of Jury—New Trial*].—The defendants were a limited company formed for the purpose of carrying on the business of manufacturers and vendors of anti-friction and white metal in the City of London. In order to distinguish the anti-friction metal manufactured by the plaintiffs from other anti-friction metals, of which there were a great number, the plaintiffs alleged that they adopted the trade mark of the “Magnolia Flower”—registered—and always described and sold their metal under the name of “Magnolia Anti-Friction Metal,” which had become widely known under that designation, or that of “Magnolia Metal,” and had come to mean the anti-friction metal of the plaintiffs’ manufacture, and no other. The plaintiffs stated that the defendants, in order to deceive the public, and to pass off their metal as and for metal of the plaintiffs’ manufacture, had advertised and sold their anti-friction metal as “Magnolia Anti-friction Metal” or “Magnolia Metal,” or “Magnolia Anti-friction Metal—Tandem C. Brand.”

On the trial the jury found (1) that until November, 1896, “Magnolia” meant the manufacture of the plaintiffs; (2) that the metal made by the defendants was not practically and commercially the same as that made by the plaintiffs; (3) that the defendants did not use the name so as to pass off their metal as the actual metal of the plaintiffs, though they did use the name so as to pass off their metal as similar to that manufactured by the plaintiffs. Judgment was given for the plaintiffs.

**HELD**—that the verdict of the jury was absolutely destructive of the plaintiffs’ case, and not against the weight of evidence, and that no case for a new trial had been made out.

**MAGNOLIA METAL CO. AND OTHERS v. TANDEM [SMELTING SYNDICATE, LD., (1900) 17 R. P. C. 477—H. L. (E)]**

**192. Passing off Goods—Action to Restrain—Counterclaim—Threats—Malice—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 32—R. S. C. Ord. 25, r. 4.**—An application by the plaintiff was made under Ord. 25, r. 4, to strike out a counterclaim alleging threats and injury therefrom on the ground that it disclosed no reasonable cause of action. The action was to restrain infringement of a trade mark and the passing off of goods.

**HELD**—that the counterclaim must be struck out as there was no allegation of malice in it, and that no leave could be given to amend by alleging malice, as the bringing of the action was in itself conclusive to show that the plaintiff did not make the allegations maliciously, but that he was making them in defence of that which he claimed to be his legal right, and which he was seeking to enforce in the very action to which the counterclaim was pleaded.

**Halsey v. Brotherhood ((1881) 19 Ch. D. 386; 51 L. J. Ch. 233; 30 W. R. 279; 45 L. T. 640—C. A.)** followed.

**Decision of Farwell, J. ((1901) 86 L. T. 495; 18 R. P. C. 82), affirmed.**

**RIPLEY v. ARTHUR, (1902), 86 L. T. 735; 19 [R. P. C. 443 (Vaughan Williams, L.J., dissenting)—C. A.]**

**193. Infringement—Motion to Claim Additional Relief—Offer by Defendants—Costs.**—The plaintiffs issued a writ in which they sought to restrain the defendants from infringing their registered trade mark and other incidental relief. The plaintiffs gave notice of motion for an interlocutory injunction, which, after following the writ, proceeded to add to it a claim to restrain the defendants from circulating or issuing circulars, advertisements, or notices representing or inducing people to believe that the defendants were manufacturers of “Cogent” cycles. The defendants offered terms to make an end of the action.

**HELD**—that the added claim was entirely outside the writ and evidence filed in the action, that the action of the plaintiffs was misconceived; and that the plaintiffs ought to have accepted, and the defendants must abide by, the offer to pay the costs down to and including the writ, but the defendants must get the costs of the action, the plaintiffs to pay them, and there would be a set-off.

**CLARKE AND OTHERS v. EXECUTORS OF THOMAS [HUDSON, (1901) 18 R. P. C. 310—Farwell, J.]**

**194. Passing off—Particulars of Statement of Claim.**—The plaintiffs sold cigars printed with the word “Maicella” on a narrow red band, and they complained of the defendants selling cigars with a similar red band bearing the name “Purnella,” on the ground that their own cigars had come to be known to the public as “Red Band Cigars,” or “Red Banders.”

The plaintiffs were ordered to give particulars of the dates when the cigars were first known by such names, and of the names of persons upon whom the defendants’ cigars had been passed off as those of the plaintiffs.

**IMPERIAL TOBACCO CO., LD. v. PURNELL & CO., [(1903) 20 R. P. C. 718—Kekewich, J.]**

**195. Passing off—Form of Consignment Note—Infringement of Copyright in—Use of, in order to Facilitate Passing off—Interlocutory Injunction.**—L. Van Oppen, the defendant, was for four years in the service of Van Oppen & Co., who are carriers. On leaving them in 1901 he set up a carrier’s business under the name of L. Van Oppen, shortly afterwards changed to L. Van Oppen & Co. The consignment note adopted by him for use in his business was almost an exact copy of that used by the original firm of Van Oppen & Co.

Van Oppen & Co. claimed an injunction to restrain the defendant from (1) infringing their copyright in the consignment note, and (2) passing off his business as connected with theirs.

An interlocutory injunction was granted until trial substantially in the terms of the relief asked; but with regard to the use of the trade name L. Van Oppen & Co., it was held that the

**Practice—Continued.**

plaintiffs' delay in proceeding disentitled them to interlocutory relief.

VAN OPPEN & CO., LD. v. L. VAN OPPEN, (1903)  
[20 R. P. C. 617—Eady, J.]

**196 Infringement—Motion to rectify—Order for Particulars of Defence**—The plaintiffs, who owned the trade mark "Aquascutum," registered in 1902 for waterproof coats, brought an action for infringement against the defendants, who were selling "Aquascutum" coats. In their defence the defendants alleged that (1) the word "Aquascutum" was first used in the tailoring trade some time previously to 1857; it was then used in conjunction with the name "coat" or "wrapper"; and (2) that since 1857 "Aquascutum coats" had been commonly made. They also moved to expunge the trade mark from the register.

**HELD**—that both in the action and motion, they must give particulars as to (1) the date prior to 1857 when they allege the words to have been first used in the trade; (2) the shape of the coat or wrapper to which they allege that the word was applied; and (3) not less than three firms who had since 1857 made coats or wrappers under that name; such order not precluding them from adducing further evidence at the trial.

AQUASCUTUM, LD. v. MOORE AND SCANTLEBURY, (1903) 20 R. P. C. 640—Kekewich, J.

**197 Passing off—Evidence—Specification of Instances—Right to prove other instances to rebut Defence.**—In an action against the defendant for passing off a fluid of his own manufacture as the plaintiffs' article "Parazone," the plaintiffs specified two persons to whom, when asked for parazone, he had supplied his own fluid. The defendant admitted that the word "parazone" denoted exclusively the plaintiffs' fluid, but pleaded inadvertence in the two specific instances, alleging that his "invariable answer" to persons asking for parazone was that he could supply a bleaching fluid of his own.

**HELD**—that the plaintiffs, after proving their two specified instances, might prove others in answer to the defence set up by the defendant.

PARAZONE CO., LD. v. JOHNSTON GIBSON, (1904) 21 R. P. C. 817—Lord Ordinary.

**198. Passing off—Laches—Plaintiffs successful—Laches of Plaintiffs—No Order for Delivery up of Goods**—Although the plaintiffs in a "passing off" action may be successful, yet, if they have been guilty of serious delay in taking proceedings, an order will not be made for the delivery up by the defendants of offending goods.

COUNTY CHEMICAL CO., LD. v. FRANKENBURG, (1904) 21 R. P. C. 722—Lord Alverstone, C. J.  
See also Nos. 111, 181.

**2 Costs**

**199. Action for Injunction—Negotiations for settlement—Insufficient offer by Defendant—**

**Excessive Claim by Plaintiff**—In 1890 H. registered a trade mark. In 1896 P., who had infringed the said trade mark without knowing of H.'s registration or user of it, communicated with H., asking for the date of registration and disclaiming any intention to infringe. Negotiations ensued between the parties, in which P. was ready to give the undertaking asked for by H., subject to a condition that H. should not advertise it. H. was ready to agree to such condition on P. agreeing to disclose the names of his customers to whom he had supplied the goods. P. would not so agree, and the negotiations fell through. H. issued a writ asking for an injunction, damages or an account of profit and costs. P., by his defence, offered an undertaking, but made no offer as to costs. At the trial it was admitted that H. was not entitled to damages or an account of profits.

**HELD**—that H. was entitled to an injunction, and the costs of the action so far as it sought relief by way of injunction, but that the defendant was entitled to the costs of the action so far as it asked for damages or an account, such costs to be set off.

HIPKINS AND SONS v. PLANT, (1898) 15 R. P. C. 294—Byrne, J.

**200. Passing off Goods—Action to Restrain—Defendants Consenting to Judgment—Taking Order in Chambers or in Open Court—Costs**—The plaintiff company brought an action against the defendant company for an injunction to restrain the defendants from selling belting, which was not the plaintiffs', under the name of "Gandy," that being the name under which the belting of the plaintiffs was sold, and being part of their trade marks. Minutes were agreed upon, but the defendants raised the point whether the plaintiffs ought to take the order in chambers or in open Court.

**HELD**—that in this case, without laying down any general rule, the plaintiffs were justified in taking an order in open Court, and that on the defendants consenting to judgment the costs of the motion should be allowed as well as the costs of the action up to the date of the judgment, the costs of taking the account directed being reserved.

GANDY BELT MANUFACTURING CO., LD. v. FLEMING, BIRKLY & GOODALL, LD., (1901)  
18 R. P. C. 276—Byrne, J.

**201. Passing off Goods—Injunction—Breach—Sale during Defendant's Absence without his Knowledge—Motion for Attachment**—The defendant was sent an order for a great gross of "Peninsular" button fasteners (the plaintiffs') with a postal order for 2s. 9d. enclosed. The defendant was away travelling, and the order was executed by his son, a boy of about eighteen, who was left in charge, and he, in answer to the order, sent a box of "Standard" fasteners. The plaintiffs asked for the committal or attachment of the defendant, as he had been restrained from passing off his goods as and for the goods of the plaintiffs.

**HELD**—that the motion was wrong; but that the defendant was civilly liable for the act of

**Practice—Continued.**

his son; and therefore it was not a case for costs.

**PARKER MANUFACTURING CO., LD. v. COOPER,** [(1901) 18 R. P. C. 319—Cozens-Hardy, J.]

**202. Mark on Salesman's Basket—Grower sending Baskets to other Tradesmen—Infringement of Trade Mark—Conversion—Damages.]—**A Covent Garden salesman registered his name as a trade mark, and put it upon his baskets. These baskets he sent out to growers for them to pack their produce in, and debited them in respect of each basket with a sum less than its value in order to ensure its return.

The defendant's servant contrary to his orders sent some of the plaintiff's baskets full of produce to another salesman.

**HELD**—that there had been no sale of the baskets to the defendant, and that therefore he was liable for their conversion; and that he was also liable for infringement of trade mark.

That in each case the damages must be nominal; but that the defendant must pay the costs, as he had insisted before action upon his ownership of, and right to sell the baskets.

**MONRO v. HUNTER,** (1904) 21 R. P. C. 296—[Channell, J.]

**203. Name, Address and Device on Cricket Bats—Defendant wrongfully using word "Registered"—Effect as regards Costs of Action.]—**Upon the hearing of a passing-off action in connection with cricket bats, the judge found as a fact that the markings (name, address and device) on the bats made by the defendants were so distinct from those used by plaintiffs that no sensible person would be deceived by them.

It appeared, however, that whereas the plaintiff's device was rightly called "registered" the defendant had not yet registered his device, though he had taken steps to do so, nevertheless he used the word "registered" under his device.

**HELD**—sufficient grounds for refusing to allow him costs of the action although successful.

**WARSOP & SONS, LD. v. WARSOP,** (1904) 21 [R. P. C. 481—Kekewich, J.]

**204. Passing-off Action—Motion to Expunge—Appeal—Instructions for brief—Fees to three Counsel.]—**A passing-off action by the plaintiffs and a motion by defendants to expunge the trade mark of the plaintiffs were heard together, and both resulted in favour of the plaintiffs.

An appeal by the defendants as to the motion alone was dismissed.

On taxation the Master allowed in the action 150 guineas for "instructions for brief," and on the motion 50 guineas: he likewise allowed the fees of three counsel upon the action, motion, and appeal.

**HELD**—that the case was a proper one for three counsel and that the Master's allowances were all justified.

**IN RE BURROUGHS, WELLCOME & CO.'S TRADE MARK,** (1905) 22 R. P. C. 164—Warrington, J.

See also Nos. 31, 60, 73, 79, 152, 193.

**(3) Trifling offences.**

**205. Passing off—Action to Restrain—Tobacco—Isolated Instance—Injunction—Damages.]—**The plaintiffs, tobacco manufacturers, brought an action against the defendant—a shopkeeper—claiming an injunction restraining the defendant from selling tobacco not of the plaintiffs' manufacture under the name of "Mitcham" shag or "Mitcham" tobacco. Only one case of passing off was proved, viz., one ounce of tobacco, value unknown, on a single day, without any suggestion that anything of the kind had occurred before, and every possible suggestion that it was not likely to occur again.

**HELD**—that an injunction ought not to be granted, and that the Court could not condescend to go into such trifling litigation, and judgment must be given for the defendant with costs.

**Leahy v. Glover** ((1891) 10 R. P. C. 141) followed.

**ROUTER & CO. v. SMITH,** (1901) 18 R. P. C. 49 [—Kekewich, J.]

**206. Action to Restrain—Name indicating Manufacture or Guarantee—User of Name for some Years—Plaintiff's Knowledge—Interlocutory Injunction.]—**The plaintiffs brought an action against the defendants to restrain them from passing off pads for typewriters under the name of "Yost pads." The plaintiffs sold, but did not manufacture, "Yost pads." The defendants used the term "Palmer Yost pads" or "Palmer's ink pads for Yost typewriters." In 1897 the plaintiffs knew that the defendants were manufacturing and selling pads of some name or other, and whether the plaintiffs knew it or not, this had been going on since 1897. There was no patent.

**HELD**—that by reason of the use of the name by the defendants for the length of time, and the means of knowledge by the plaintiffs, and their knowledge in fact, no case had been made for an interlocutory injunction.

**YOST TYPEWRITER CO., LD. v. TYPEWRITER [EXCHANGE CO.,** (1902) 19 R. P. C. 422—Buckley, J.]

**207. Infringement—Printer Selling Labels in Imitation of Plaintiff's Trade Mark—Only One Sale—Right to Sell Insisted on—Injunction with Costs.]—**The defendants, who were printers, sold to a purchaser one lot only of labels, which were held to be a colourable imitation of the plaintiff's trade mark.

They insisted on their right to do the same thing again, and on these grounds an injunction was granted with costs.

**DE KUYPER & SONS v. W. AND G. BAIRD, LD.,** [(1903) 20 R. P. C. 581—M.R. (Ir.).]

**208. Passing Off—One case only on the part of an Assistant—No Fraud and no Intention to Repeat—No Damage proved—Action dismissed with Costs.]—**In a passing-off action the plaintiffs proved that on one isolated occasion a shop assistant of the defendants, when asked for the plaintiffs' "Primrose soap," sold a bar of the defendants' "Imperial soap," saying incorrectly that it was manufactured by the plaintiffs.

**Practice—Continued.**

No intention to deceive was proved, nor any damage to the plaintiffs.

**HELD**—that this one isolated case, which might be due to a mistake, did not constitute a ground of action.

**KNIGHT & SONS v. CRISP & Co.**, (1904) 21 R. P. C. 670—Warrington, J.

**209. Passing off—Absence of Fraud on part of Defendant personally—Liability for occasional acts of Servant—Right to Injunction**—*Semble*, where a master has adopted all reasonable measures to prevent his servants selling his wares as those of another person, an interdict ought not to be granted because his servants by inadvertence or carelessness break his orders in a few instances.

**MONTGOMERIE & Co v. YOUNG**, (1904) 21 R. P. C. 235—Ct. of Sess.

**VII. MISCELLANEOUS CASES.**

**CONSTRUCTION OF AGREEMENT: ESTOPPEL; "MARKING BEFORE SALE"; "ORIGINAL DESIGN"; JURISDICTION; CONSTRUCTION OF INJUNCTION; MEANING OF "REGISTERED"; FRAUDULENT INTENT**

**210 Patents, &c., Act, 1883, Sect. 105.**—Using word "Registered" in reference to a trade mark not registered in the United Kingdom although registered in a foreign country.

**MAC SYMONS' STORES, LD v SHUTTLEWORTH**, [(1898) 15 R P C 748—Div. Ct]

**211 Using Word "Registered" in Reference to a Trade Mark not Registered in United Kingdom, although Registered in a Foreign Country**—The defendants, who were merchants in Belfast, sold a box of baking powder, bearing a label with the words "Trade Mark—Royal—Registered"; and on the obverse side were the words "Manufactured by Royal Baking Powder Company, New York." The trade mark had been for many years, and at the time of the sale was, registered in the United States, and had also been for some years registered in England, but seven weeks previous to the sale it had been expunged from the Register in this country. The defendants were prosecuted at Petty Sessions under sect 105 of the Patents, &c. Act 1883, for describing the trade mark as registered: and the magistrates being of opinion that the word "Registered" on the label did not necessarily imply that the trade mark was registered in the United Kingdom, and that being coupled with the words "Manufactured by Royal Baking Powder Company, New York," it might mean registered in the United States, they dismissed the summons: but stated a case for opinion of the Court as to whether the Act had been infringed or not.

**HELD**—that the use of the word "Registered" amounted to a representation that the trade mark was registered in the United Kingdom, which was not affected by the words describing where the article was manufactured, and that the magistrates ought to have convicted.

**WRIGHT, CROSSLEY & Co. v WILLIAM DOBBIN & Co.**, (1898) 15 R. P. C. 21—Q B D. (1r.).

**212. "Brazilian Silver"—Injunction—Distinguishing Goods—Maker's Servant Respondent.**—The defendants were restrained by injunction from using the words "Brazilian Silver" as descriptive of, or in connection with, nickel-silver goods not of the plaintiffs' manufacture, without clearly distinguishing such goods from the goods of the plaintiffs' manufacture. Subsequently the defendants kept the old name, the "Brazilian Silver," and then they added at the beginning, "F. Whitehouse's Brazilian Silver."

**HELD**—that the defendants had not done what was necessary for the purpose of complying with the order.

**HELD ALSO**—that the servant of the master should not have been proceeded against

**DANIEL & ARTER v WHITEHOUSE & EVERALL**, [(1899) 16 R. P. C. 71—North, J.]

**213. Interests of Public—Utility—Novelty or Originality—State of Knowledge Apart from Special Evidence—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict c 57), ss. 47, 51, 60.**—The Patents, Designs and Trade Marks Act, 1883, creates a monopoly against the interests of the public, presumably in the interests of the public, in order that they may benefit by the originality of designs, and by the astuteness of inventors who make good designs.

In considering the question of design the question of utility has no bearing.

As a design must be, by sect. 47, a "new or original design, not previously published in the United Kingdom," the state of knowledge—apart from specific evidence—at the time of registration, and in what respects the design was new or original, may be taken into account when considering whether any variations from the registered design, which appear in the alleged infringement, are substantial or immaterial.

The real article to which the design has been applied should be stamped.

**RE MORTON'S DESIGN**, (1900) 17 R. P. C. 117—[Farwell, J]

**214. Fraudulent Intention—Setting a Trap—Burden of Proof—Time for Taking Proceedings**—The plaintiffs were manufacturers of ladder tape, which is used in connection with Venetian blinds for supporting them. They manufactured and sold three qualities, one of which they desired to be known, and which was usually known in the market specifically as "Carrs" and was marked Carrs'. The others had other marks. The defendants carried on business as drapers and haberdashers. The action was brought originally for an injunction in both, or one or other, of certain forms. A part of the injunction originally asked for had reference to a supposed selling of second quality. The plaintiffs sent persons to the defendants' shop to buy, and they bought, ladder tapes in order to catch the defendants if they were doing anything wrong. The defendants contended that it was necessary for the plaintiffs to show fraudulent intention.

**Miscellaneous Cases—Continued.**

**HELD**—that the circumstance that there was no fraudulent intention in the use of the marks did not deprive the plaintiffs of their right to the exclusive use of the names.

*Cellular Clothing Co. v. Maxton and Murray* ([1899] A. C. 326; 68 L. J. P. C. 72; 80 L. T. 809; 16 R. P. C. 397—H. L. (Sc), No. 23, *supra*) followed.

**HELD ALSO**—that it is wise on the part of the person setting a trap to send a written order, as there can be no ambiguity then about what is asked for; that the burden was on the plaintiffs to make good their case and they had not done so; and that proceedings were not taken by the plaintiffs, as they should have been, at the earliest possible moment, though this did not affect the right of the plaintiffs to an injunction on their making out their case.

*CARR & SONS v. CRISP & Co., LD.* (1902) [19 R. P. C. 497—Byrne, J.]

**215. Marking before Sale—Marking one Component Part—Patents, Designs and Trade Marks Act, 1883** (46 & 47 Vict. c. 57), s. 51—The requirements as to marking before sale every article to which a registered design is applied is sufficiently complied with if the mark appears on some component part without which the article cannot be regarded as a complete article.

*INGRAM & KEMP, LD. v. EDWARDS BROS.*, (1904) 21 R. P. C. 463—Wills, J.

**216. Jurisdiction—Action for Infringement—Contesting Validity of Trade Mark—Trade Mark Acts, 1883** (46 & 47 Vict. c. 57), ss. 62, 81, 90, 117; and 1888 (51 & 52 Vict. c. 50), ss. 18, 26)—*County Courts Act, 1888* (51 & 52 Vict. c. 43), s. 56.—The plaintiff brought an action in a County Court for infringement of a registered trade mark, and claimed an injunction. The defendant gave notice that he intended to contest the validity of the trade mark and to apply to the High Court to have it expunged from the register.

**HELD**—that the County Court Judge had no jurisdiction to try the action.

Decision of the Divisional Court ([1904] 2 K. B. 693; 73 L. J. K. B. 901; 53 W. R. 218; 91 L. T. 529; 20 T. L. R. 651; 21 R. P. C. 718) reversed.

*Bow v. HART*, [1905] 1 K. B. 592; 74 L. J. K. B. [341; 53 W. R. 372; 92 L. T. 181; 21 T. L. R. 251; 22 R. P. C. 222—C. A.]

**217. Estoppel — Infringement — Plaintiff's Name as a Mark—Sale of Goods bearing Name—Such Goods originally consigned to Plaintiffs but rejected by them**—Wine in casks labelled "Burgoyne, London," was shipped on approval to the plaintiffs, whose registered trade mark for wine was "Burgoyne." The plaintiffs rejected the wine and resold it in casks by auction on account of the growers.

The defendants bought it at the auction, and resold it in bottles as "Burgoyne's superior Australian Burgundy."

The plaintiffs claimed an injunction restraining the defendants from so selling the wine.

**HELD**—that by reason of the plaintiffs' conduct the defendants were justified in believing that the wine was "Burgoyne's" wine, and that therefore the plaintiffs were not entitled to any relief.

Decision of Warrington, J. (21 R. P. C. 550), reversed.

*BURGOYNE & Co., LD. v. GODFREE & Co.* (1905) [22 R. P. C. 168—C. A.]

**218. Construction of Agreement—Fownes' Gloves—Breach of Covenant.**—The plaintiffs were an old established firm of glovers trading as Fownes Bros. & Co., and the expression "Fownes' gloves" was held to be well known as denoting only gloves made by them.

Before 1889, F and A. Fownes had a retail glove business at Liverpool and a small factory at W. The defendant having bought these, resold the factory to the plaintiffs, and covenanted not to use the name of Fownes as a manufacturer or wholesale dealer, limiting its use to his retail business.

He claimed the right to describe any gloves sold retail in his shop as "Fownes' gloves."

**HELD**—that the expression denoted gloves made by the plaintiffs, and that the defendant had no right to apply it to gloves not supplied to him by them.

*RIGDEN AND OTHERS v. JONES*, (1905) 22 [R. P. C. 417—Eady, J.]

**219. Construction of Agreement—"Goupil Gallery"—Sale of Premises—Business not Sold.**—The plaintiffs had been the owners of the "Goupil Gallery," where they carried on the business of dealers in pictures and works of art. They sold the premises to the defendant, their manager: they did not actually sell the business to him, but entered into an agency agreement with him, by which he was to be their only agent in England.

**HELD**—that on the facts of the case and upon the construction of the agreement as a whole the defendant was entitled to continue to use the name "Goupil Gallery."

Decision of Parker, J. (97 L. T. 301; 23 T. L. R. 681; 24 R. P. C. 665) affirmed.

*BOUSSOD, VALADON & Co. v. MARCHANT*, (1907) [24 T. L. R. 111—C. A.]

## TRAMWAYS AND LIGHT RAILWAYS.

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### I. BYE-LAWS.

1. *Excess Fare—Passenger Travelling too Far—Refusal to Pay Fare—No Intention to*

**Bye-Laws—Continued.**

*Defraud.*—The appellant was summoned for unlawfully refusing to pay the fare legally demandable for his journey on a light railway. The appellant, accompanied by his nephew, took two tickets to N. H., the fare being 5d., and requested the conductor to set him down at the Queen's Hotel, which is a place where cars stop on request. The conductor forgot to stop, and the appellant was carried 200 or 250 yards past his destination. The appellant did not leave the car, and on being spoken to said he was going to remain on the car as a protest, and afterwards that he was going to the office of the company to lodge a complaint. He refused to pay the extra fare after passing N. H. or to give his name and address, which he said he would only give to the manager. An inspector accompanied the appellant to the office, where he gave his name and address and lodged his complaint. He was summoned for refusing to pay the excess fare under a bye-law which provided that "Each passenger shall upon demand pay to the conductor or other duly authorised officer of the company the fare legally demandable for the journey."

HELD—that the bye-law was good, and that the appellant could be convicted, though there was no intention to defraud.

TUFFLEY v. TATE, (1907) 71 J. P. 21; 96 L. T. [24; 5 L. G. R. 448—Div. Ct.

2. *Obscene Language used by Passenger—Town Police Clauses Act, 1847* (10 & 11 Vict. c. 89), s. 28—*Tramways Act, 1870* (33 & 34 Vict. c. 78), s. 46.]—Where an authority, or body of persons, have been given a statutory power to make bye-laws for the preventing of nuisances, they have also power to declare that particular things, if capable of being nuisances, are, when done in their district, nuisances.

The Tramways Act, 1870, s. 46, enables the promoters of a tramway—subject to the control of the Board of Trade—to make regulations "for preventing the commission of any nuisance in or upon any carriage, or in or against any premises belonging to them," and "for regulating the travelling in or upon any carriage belonging to them," provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect. The British Tramways and Carriage Company, Limited, made a bye-law that "No person shall swear or use offensive or obscene language whilst in or upon any carriage, or willfully interfere with the comfort of any passenger."

HELD—that the bye-law was valid and not *ultra vires*, though it did not contain any such words as "to the annoyance of passengers"; and that the Towns Police Clauses Act, 1847, does not intend to deal with or affect the power to make bye-laws under special circumstances, and dealing with particular places.

*Strickland v. Hayes* ([1896] 1 Q. B. 290; 65 L. J. M. C. 65; 60 J. P. 164; 44 W. R. 398; 74 L. T. 137; 18 Cox C. C. 244—Div. Ct.) commented on.

GENTEL v. RAPPS, [1902] 1 K. B. 160; 7 L. J. K. B. [105; 66 J. P. 117; 50 W. R. 216; 85 L. T. 683; 18 T. L. R. 72; 20 Cox C. C. 104—Div. Ct.

3. *Producing Ticket on Demand—Bonâ fide Loss of Ticket—Demand to Deliver up Ticket or Pay his Fare.*—A bye-law of a tramway company provided: "Each passenger shall show his ticket if and when required to do so to the conductor or any duly authorised servant of the company, and shall also when required to do so either deliver up his ticket or pay the fare legally demandable for the distance travelled by such passenger." The respondent, on entering the car, paid his fare and received a ticket. In the course of the journey he lost it. On being asked to produce his ticket by the inspector he was unable to do so, though the conductor admitted he had paid for and received one. The respondent was then asked to produce his ticket, or pay the fare or leave the car, but failed to comply with any of these requests. He was summoned for a breach of the bye-law.

HELD—that the bye-law was reasonable, and the respondent had infringed it.

HUNT v. GREEN, (1907) 71 J. P. 18; 96 L. T. [23; 23 T. L. R. 19; 5 L. G. R. 67—Div. Ct.

4. *Ticket—Condition printed on Back of Ticket—Refusal to Accept—Refusal to Deliver up—Offence.*—The appellant, a passenger on one of the trams owned by the Corporation of S., paid his fare, but refused to accept a ticket on account of a condition printed on the back of it, limiting the liability of the corporation in case of an accident to the passenger. The conductor apparently thought that the appellant took the ticket, but between them it fell to the floor. Later on an inspector asked the appellant for his ticket, who pointed it out to him lying on the floor, but refused to take it up or deliver it up to the inspector. The appellant was summoned for contravention of a bye-law, which provided that "Each passenger when tickets are issued shall as and when requested to do so show his ticket to the conductor or other servant of the corporation acting in performance of his duty, and shall also, when requested to do so by the conductor or other servant of the corporation acting in the performance of his duty deliver up his ticket or, in case of failure to produce such ticket, pay the fare legally demandable for the distance travelled over by such passenger."

HELD—that the appellant had not been guilty of any offence under the bye-law.

WILSON v. FEARNLEY, (1905) 69 J. P. 165; 92 [L. T. 647; 3 L. G. R. 470—Div. Ct.

5. *Ticket taken between certain points—Right of Passenger to Alight between such points and continue Journey by another tramcar—Tramways Act, 1870* (33 & 34 Vict. c. 78), s. 46.]—The respondent was summoned for that he being a passenger on a certain tramcar did not pay upon demand the fare legally demandable. The respondent had started from a particular point upon a tramway system, paying a fare which would

**Bye-Laws—Continued.**

have entitled him to travel to another point. He alighted at an intermediate place, walked a certain distance, and then got on to another tramcar, and claimed to be entitled to complete the length of the journey he had paid for by this second car.

**HELD**—that the passenger was not entitled to do so, and could be rightly convicted of having travelled on the second tramcar without paying his fare.

**BASTABLE v. METCALFE**, [1906] 2 K. B. 288; [75 L. J. K. B. 670; 70 J. P. 343; 4 L. G. R. 1073—Div. Ct.]

**II. CONSTRUCTION AND MAINTENANCE.**

*And see* **COMPULSORY PURCHASE**, Nos. 25, 26.

**6. Alteration of Telegraph Wires—Electrical Working—Crossing Railway—Power to Raise Railway Telegraph Wires—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 30.**—Sect. 30 of the Tramways Act, 1870, provides that promoters of a tramway may "where and as far as it is necessary, or may appear expedient for the purpose of preventing frequent interruption of the traffic by repairs" alter the position of telegraph wires.

**HELD**—That the words in italics qualify only the words "as may be expedient," and that promoters may alter the position of wires where necessary for the construction of a tramway; and further that the duty of substituting other wires implies a power to enter on land for the purpose of so doing.

The section, therefore, enables a tramway company, which works its tramways by electrical power on the overhead trolley system, to enter upon the land of a railway company where the tramway crosses the railway line by a bridge, and alter the position of the railway company's telegraph wires so as to enable the tramway company to comply with the Board of Trade regulations, made under the special Act, that the tramway wire must be 21 feet above the surface of the road and must have a protecting wire 2 ft. above the power wire where the tramway crosses the railway bridge.

**RHONDDA URBAN DISTRICT COUNCIL, ACTING [BY THE RHONDDA TRAMWAYS CO., LD. v. TAFF VALE RY. CO.]**, (1907) 21 T. L. R. 168—Bray, J.

**7. Arbitration under Light Railways Act—Costs—What Statute Governs—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24, Sch. I. (i.)—Light Railways Act, 1896 (59 & 60 Vict. c. 48), ss. 12 (1), 13 (1), (3)**—Although an order authorising the construction of a light railway incorporates the Lands Clauses Acts, the provisions of the Arbitration Act (and not of the Lands Clauses Acts) apply to arbitrations arising out of the construction of the railway. Therefore the costs of the reference and award are in the discretion of the arbitrator.

**BAXTER v. MIDLAND RY.** (1905), 69 J. P. 389; [93 L. T. 538; 21 T. L. R. 708—Lawrence, J.]

**8. Difference between Road Authority and Promoters—Maintenance of Paving—Arbitration under Statute—Jurisdiction of High Court Ousted—Objection to Jurisdiction first taken on Appeal—Norwich Electric Tramways Act, 1897 (60 & 61 Vict., c. ccliv.), s. 57 (5)—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 33.**—Sect. 57 of the Norwich Electric Tramways Act, 1897, provided that "if the company fail to keep in good condition to the satisfaction of the corporation . . . the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation may, if they think fit, themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company with the addition of five per centum on such expense."

The corporation executed certain work which they alleged fell within the above provision (which the defendants denied), and brought an action against the company to recover the expenses incurred by them in executing such work, and for a declaration as to their rights. Phillimore, J., gave judgment for the amount claimed, and made a declaration in favour of the corporation.

The company appealed, and upon the hearing of the appeal for the first time objected to the jurisdiction of the High Court to hear the case upon the ground that the difference between the parties fell within sect. 33 of the Tramways Act, 1870, and ought to be referred to an engineer, or other fit person, appointed by the Board of Trade under that section, and that, therefore, the jurisdiction of the High Court was ousted.

**HELD**—that the dispute fell within sect. 33 of the Tramways Act, 1870, and that, therefore, the court had no jurisdiction to entertain the action.

**NORWICH CORPORATION v. NORWICH ELECTRIC [TRAMWAYS CO., LD.]**, [1906] 2 K. B. 119, 75 L. J. K. B. 636; 70 J. P. 401; 54 W. R. 572; 95 L. T. 12, 22 T. L. R. 553; 4 L. G. R. 1114—C. A.

**9. Electric Traction—Laying Wires under Footways—Provisional Order—Injunction—Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 3, 26.**—The defendants were authorised by a provisional order, made by the Board of Trade, under the authority of the Tramways Act, 1870, and confirmed by the Tramways Orders Confirmation (No. 2) Act, 1896, to construct a tramway to be worked by electric traction, under a system to be approved by the Board of Trade. A system was approved which involved the laying of underground electric feeders.

**HELD**—that in the absence of any provisions in the provisional order or the Tramways Act, 1870, giving the defendants power to lay underground wires, they were not justified in laying the electric feeders under the footways of the streets along which the tramway ran.

**HYDE CORPORATION v. OLDHAM, ASHTON AND [HYDE ELECTRIC TRAMWAY, LD., AND**

**Construction and Maintenance—Continued.**

OTHERS (1900), 64 J. P. 596; 16 T. L. R. 492—C. A.

**10. Excess of Power—"Junction"—Newcastle-upon-Tyne Tramways and Improvement Act, 1899 (62 & 63 Vict. c. cclxv.), ss. 7, 12.]—**The plaintiffs, owners and occupiers of certain valuable property in the defendants' borough, being the corner premises between two streets, A and B, complained of what the defendants, in constructing certain tramways which they were authorised to make, had done in front of the plaintiff's premises, viz., laid down a tramway thirty-three yards long, joining a tramway in street A and a tramway in street B.

**HELD**—that the tramway in question was not constructed in accordance with the powers of the Act empowering the defendants to construct and work in their city certain tramways; and that there must be an injunction against the defendants compelling them to remove so much of the tramway as was not delineated upon the deposited plans.

WILKINSON AND MARSHALL v. NEWCASTLE-UPON-TYNE CORPORATION (1902), 18 T. L. R. 332—Joyce, J.

**11. Gas and Water Companies—Notice of intention to lay Tramway in Street—Counter Notice to alter position of Mains—Times for giving Notice—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 30, sub-s. 1; s. 31.]—**Where a tramway company gives a seven days' notice to a gas or water company, under sect. 30, sub-sect. 1, of the Tramways Act, 1870, of their intention to lay down a tramway in a street in which mains belonging to the gas or water company are laid, the gas or water company, if it thinks that the construction of the tramway as proposed would endanger the mains is not bound to give the counter notice under the above section to the tramway company—namely, a notice to alter the position of the mains—before the expiration of the seven days prescribed in the original notice.

*Semble*, per Buckley, L.J.: The gas or water company can only give the counter notice under sect. 30, sub-sect. 1, before the execution of the work.

THE HASTINGS TRAMWAYS COMPANY v. THE [HASTINGS AND ST. LEONARDS GAS COMPANY AND ANOTHER, [1906] 2 Ch. 578; 70 J. P. 540; 23 T. L. R. 4; 76 L. J. Ch. 60; 95 L. T. 684; 5 L. G. R. 142—C. A.

**12. Interference with Gas Mains and Pipes—Arbitration—Powers of Arbitrator—Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 30, 32, 33.]—**In an arbitration between a gas company and a tramway company upon the question of interference by the tramway company with gas mains and pipes, the arbitrator has jurisdiction, if he thinks it necessary, to order the tramway company to lower existing mains, so that service pipes therefrom can be carried horizontally across the road below the bed of the tramway, and also to order them to move

gas mains in a lateral direction, so that access may be obtained to them in the future, without having to break up the bed of the tramway for the purpose.

IN RE AN ARBITRATION BETWEEN THE ILFORD [GAS CO. AND THE ILFORD URBAN DISTRICT COUNCIL (1903), 67 J. P. 239; 88 L. T. 237; 1 L. G. R. 213—Div. Ct.

**13. Lease of Tramway by Corporation to Company—Agreement to keep Corporation free from all Expenses—Payment of Rates and Taxes.]—**The Corporation of Glasgow agreed to construct certain tramways, and to lease the undertaking to the company for a term of twenty-three years. The company agreed, *inter alia*, to pay to the corporation the expenses of borrowing, management, &c., and that "this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways."

By section 6 of the Valuation of Lands (Scotland) Act, 1854, it is enacted that a tenant whose name has been entered in the valuation roll as proprietor shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor, of such proportion of all assessments laid upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation. The company having primarily to pay, and having in fact paid, during the whole term of the lease, "owners' assessments, rates and taxes," claimed to be reimbursed by the corporation.

**HELD**—that these payments were expenses connected with the tramway, from which the company were bound by the terms of the above agreement to relieve the corporation, and that their action must fail.

GLASGOW CORPORATION v. GLASGOW TRAMWAY [AND OMNIBUS CO., LD., [1898] A. C. 631; 14 T. L. R. 516—H. L. (Sc).

**14. Power to Lay Extra Rails with Consent of Local Authority—Whether such Consent may be Refused Arbitrarily—Whether Refusal a Difference within sect. 33 of Tramways Act—Objection by Owners of Premises to Rail within 10½ feet of Footway—Whether Premises on one or both sides of the Road—What are "Premises" entitling Owner to Object—Lines laid in spite of Objections and Refusal of Consent—Trespass—Declaration—Removal—Damages—Tramway Act, 1870 (33 & 34 Vict. c. 78), ss. 9, 33—Bideford Westward Ho! and Appledore Railway Act, 1896 (59 Vict. c. xviii.).—**A company owning a tramway along a road had power under their special Act to lay a second set of rails with the consent of the local authority, provided that no rail should be laid within 10½ feet of the footway on either side of the road, if one-third of the owners and occupiers of premises abutting on the place where the rail was to be laid objected. They proposed to lay rails within 10½ feet of the footpath on the east side of the



**Construction and Maintenance—Continued.**

road; on that side a promenade abutted on the road, and the corporation, as owners of the soil of the promenade, objected, on the west side houses and shops abutted on the road, and all the owners and occupiers thereof objected: the local authority also refused their consent. Nevertheless, the company laid their rails.

**HELD**—that they had committed a trespass, and must pay as damages the cost (at any rate) of restoring the road.

*Quære*, whether the refusal of the local authority to consent, was a "difference" to be submitted to arbitration under sect. 33 of the Tramways Act, 1870; or whether, if it was groundless and arbitrary, the company might disregard it, but the objections were valid for (1) the esplanade was "premises" entitling the corporation, as its owners, to object, and (2) even if it were not, the owners of premises on the west side could object to a rail being laid within the prescribed distance of either footway.

**BIDEFORD URBAN DISTRICT COUNCIL v. BIDEFORD, WESTWARD HO! AND APPLEDORE RY. CO. AND BRITISH ELECTRIC TRACTION CO., LD.**, (1904) 68 J. P. 123—Farwell, J.

**15. Roads—Breaking up—Electric Trams—Connection with Generating Station—Statutory Powers—London United Tramways Act, 1901** (1 Edw. 7, c. cclx.), s. 27.]—By a private Act a tramways company obtained power to construct certain tramways to be worked by electricity. Section 27 of the Act provided that "The company may execute all such works on or in connection with the tramways and in over or under the streets roads or bridges in or over which the same are laid as may be necessary or expedient for working the tramways by mechanical power as aforesaid and may lay down construct erect and maintain on in under or over the surface or bed of any street road footway bidge river or place and may with the consent in writing of the owner and occupier of any house or building attach to such house or building such posts conductors wires tubes mains plates cables boxes and apparatus and may make and maintain such openings and ways in on or under any such surface or bed as may be necessary or convenient either for the working of the tramways or for connecting any portions of the tramways or for providing access to or forming connections with any generating station or other stations engines machinery or apparatus."

The company proposed, for the purpose of so working their tramways, to lay down a line of cables passing through (among other places) the borough of Wandsworth, to connect their tramways with a generating station in Chelsea belonging to another company.

The borough council moved to restrain the defendant company from breaking up any of the roads within their jurisdiction.

**HELD**—that the company was entitled, under the latter part of sect. 27 of their Act, which was in perfectly general terms, to execute works in these streets necessary or convenient for

forming a connection with the generating station and that the motion failed.

**WANDSWORTH BOROUGH COUNCIL v. LONDON [UNITED TRAMWAYS CO., LD.]**, (1905) 69 J. P. 340, 21 T. L. R. 529, 3 L. G. R. 836—Warrington, J.

**16. Roads—Breaking up—Electric Tram—Laying Cables in Street not on Route—London United Tramways Act, 1898** (61 & 62 Vict. c. cclvi.), s. 38.]—The provisions of sect. 39 of the London United Tramways Act, 1898, authorise the promoters to lay a cable in a street along which they are not intending to lay a line of tramways.

**BRENTFORD URBAN DISTRICT COUNCIL v. [LONDON UNITED TRAMWAYS CO., LD.]**, (1905) 3 L. G. R. 842, n.—Farwell, J.

**17. Roads—Maintenance of—Duty of Company—"Junction" of Paving and Surface]**—A tramway company were by their special Act to maintain in good condition "the junction of the paving laid and maintained by the company with the surface laid and maintained by" the local authority.

**HELD**—that the word "junction" was not to be construed literally, and that the company must maintain the even contour of the road where the two surfaces met.

**NORWICH CORPORATION v. NORWICH ELECTRIC TRAMWAYS CO.**, (1905) 91 L. T. 558—Phillimore, J.

**18. Road—Repair Undertaken by Road Authority—Transfer of Liability for Injuries Caused by Non-Repair—Tramway Act, 1870** (33 & 34 Vict. c. 78), ss. 28, 29.]—Where a tramway company enters into a contract with the road authority under sect. 29 of the Tramways Act, 1870, and the road authority undertakes the repair of that portion of the road on which the tramway is laid, the tramway company is exonerated from liability for injuries caused by non-repair, and the liability is transferred to the road authority.

**BARNETT v. POPLAR CORPORATION**, [1901] 2 [K. B. 319; 70 L. J. K. B. 698; 49 W. R. 574; 84 L. T. 845; 17 T. L. R. 461—Div. Ct.]

**19. Setts on a Tramway Line—Duty of the Company to Counteract Slipperiness—"Good Condition and Repair"—Liability for Neglect—Tramways Act, 1870** (33 & 34 Vict. c. 78), s. 28.]—By sect. 28 of the Tramways Act, 1870 a tramway company must "maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct and to their satisfaction," the roadway between their lines. This obligation extends beyond the mere laying of proper setts, and includes the keeping of the surface in good and proper condition for the benefit and safety of the public.

The respondent had been injured by his horse slipping upon the setts of a tramway company; it was proved that the setts had by use become dangerously slippery, and that the company had

**Construction and Maintenance—Continued.**

been directed by the road authority to scatter sand upon them, but had neglected to do so.

**HELD**—that it was the company's duty in some way to counteract the defective surface of the setts, and that they were liable for the respondent's injuries.

Decision of the C. A. (Ireland) affirmed.

**DUBLIN UNITED TRAMWAYS CO., LD. v. [MARTIN FITZGERALD, [1903] A. C. 99, 72 L. J. P. C. 52; 67 J. P. 229; 51 W. R. 321, 87 L. T. 532; 19 T. L. R. 78; 1 L. G. R. 386—H. L. (Ir.).**

**20. Works—Substantial Commencement of, within a Year—Evidence of—Cesser of Powers—Notice in Gazette—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 18.]**—The defendant corporation were, on the 6th August, 1900, empowered by Act of Parliament to construct in their borough certain tramways. The Corporation had adopted a scheme, prepared under their orders by their own engineers, for the construction of the tramways, and had negotiated for and completed the purchase of land for the erection of offices, generating station, and other works. They had laid plans and estimates before the Board of Trade, and had applied for and obtained the sanction of the Board of Trade to their raising a loan of £174,000 for the purpose of constructing the tramways. They had also entered into binding contracts for the supply of electric cars at a price of £28,020, and for the supply, the fixing, and installation of dynamos and electric machinery for working the tramways. These contracts provided that the work must be commenced immediately. The question arose whether the works which were authorised had been "substantially commenced" within one year from the 6th August, 1900. It was admitted that nothing had actually been done as part of the works of the tramways within the year.

**HELD**—that the notice of the Board of Trade in the *Gazette* that the works had not been substantially commenced, which is made by sect. 18 of the Tramways Act, 1870, conclusive evidence for the purpose of that section of non-completion, non-commencement, or suspension, is not the exclusive or only evidence which the Court can accept.

*In re Dudley and Kingswinford Tramways Co. ([1893] 8 R. 6; 63 L. J. Ch 108; 42 W. R. 126; 69 L. T. 711—Kekewich, J.)* disapproved.

**HELD ALSO**—that the "substantial commencement of the works" meant the execution of physical works, and that upon the evidence there had been no substantial commencement of the works within the specified time; and that an injunction to restrain the defendants from commencing or continuing to construct the tramways must be granted.

Decision of Eady, J. ([1902] 18 T. L. R. 661), reversed.

**ATTORNEY-GENERAL v. BOURNEMOUTH CORPORATION, [1902] 2 Ch. 714, 71 L. J. Ch 730; 87 L. T. 262; 18 T. L. R. 661; 51 W. R. 129—C. A.**

**III. PURCHASE BY LOCAL AUTHORITY.**

*And see PUBLIC AUTHORITIES, 17—19.*

**21. "All Lands, Buildings, Works, Materials, and Plant"—Tramways partly owned by Promoters, and partly leased to Them by Local Authority—Depôts used for entire System—Obligation to purchase all Depôts—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.]**—The claimants—a tramway company—were the lessees from the Manchester Corporation of a number of tramways in that city. They were also the owners of other lines in the city, and of lines running through about a dozen urban districts outside and around the city. They worked both the leased lines and their own lines as one undertaking, the two together forming, in fact, one system; and this was the only practicable way of working them. For the general purposes of the whole undertaking they acquired or built depôts (stables, &c.), in different places, and they purchased cars, horses, and plant, which were used indiscriminately over the whole system. The lease from the corporation of the lines in the city fell in, and the corporation, having in view the acquisition and working of the whole system by themselves, granted no renewal. In order to get possession of that part of the system which belonged to the tramway company, the corporation served the company with notice under sect. 43 of the Tramways Act, 1870, requiring the company to sell such part of the lines of the system as was within the city and belonged to the company; and at the same time they procured the different local authorities to serve similar notices with reference to those lines which were within the districts of those authorities. The scheme of the corporation was to acquire the whole of the lines, to find all the necessary money for the purchase, then to electrify the whole system and work it for their own profit and for the profit of the different districts. The parties were not able to agree upon the sum of money to be paid by the corporation and the different districts for the property to be acquired, and thereupon the matter was left to the decision of an arbitrator, "to fix one entire sum as the value of all the tramway's undertakings within the districts of the purchasing authorities, and to apportion such sum amongst the purchasing authorities, and to decide what property or things other than the permanent way of the tramways within their respective districts should be transferred to the respective purchasing authorities by the claimants in respect of the purchasing authorities' proportion of the purchase-money." The question arose whether the arbitrator, in making his award, was bound to exclude from his consideration some part of the properties in question, by reason of the fact that though the whole of such properties were used with the tramways then being acquired, they were also used for the purposes of the leased lines which were not being acquired.

The arbitrator awarded £496,000 to be reduced to £230,000, if his view of the law was incorrect.

**HELD**—that the finding of the arbitrator that all the depôts and plant were suitable to and used for every part of the system could not be

**Purchase by Local Authority—Continued.**

disturbed; that the opinion of the arbitrator that under the words of the statute he was bound to accede to the demands of the claimants ought not to be differed from; and that the whole undertaking was within each district for the purposes of sect. 43 of the Tramways Act, 1870.

MANCHESTER CARRIAGE AND TRAMWAY CO.  
[v. MANCHESTER CORPORATION AND OTHERS  
(1903) 67 J. P., 14; 87 L. T. 501; 18 T. L. R.  
779—Bigham, J.]

On appeal a compromise was arrived at, after two days' argument, on terms including a payment of £335,000 (19 T. L. R. 439—C. A.).

22. "*All lands, buildings, works, materials and plant*" suitable to and used for the purposes of the Undertaking—Purchase of Depot—Valuation of Undertaking—Parliamentary Costs—Costs of obtaining Powers to construct and work Undertaking—Costs of opposing Bills in Parliament—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.]—A tramway company were owners and lessees of a system of tramways running through the city of Manchester, the borough of Ashton-under-Lyne, and various urban districts. The corporation of Manchester and the councils of various urban districts through which the tramway system ran, served the company with notices under sect. 43 of the Tramways Act 1870, requiring them to sell the lines owned by them within those districts. In an arbitration held to settle the sums to be paid the arbitrator decided that a depot in Ashton-under-Lyne should be taken by the purchasing authorities, and his decision was upheld by Bigham, J. (67 J. P. 14). The purchasing authorities appealed from that decision, and in the Court of Appeal the judgment of Bigham, J., was set aside by consent of the parties upon terms which were not disclosed. Subsequently the corporation of Ashton-under-Lyne served the company with notices under sect. 43 of the Tramways Act, 1870, requiring them to sell the lines within the borough. In an arbitration held in consequence of those notices the company contended that the corporation of Ashton-under-Lyne were bound to purchase the above-mentioned depot, and the arbitrator awarded that such depot should be purchased by the corporation.

HELD—that the corporation were bound to purchase the depot in question as being suitable to and used for the purposes of the undertaking within their district within the meaning of sect. 43 of the Tramways Act, 1870, notwithstanding the fact that in the previous proceedings it had been decided that such depot was suitable to and used for the purposes of the undertaking within other districts.

HELD ALSO—that in an arbitration to determine the amount to be paid by a local authority upon the purchase of a tramway undertaking under sect. 43 of the Tramways Act, 1870, the arbitrator must take into consideration the costs incurred by the undertakers in obtaining Parliamentary powers to construct and work the

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tramway, and that no allowance should be made for depreciation under that head. But that the arbitrator should not take into account costs incurred by the undertakers in opposing Bills in Parliament for the purpose of protecting their undertaking.

IN RE MANCHESTER CARRIAGE AND TRAMWAY CO., LD., AND ASHTON-UNDER-LYNE CORPORATION, [1905] 68 J. P. 576—Bigham, J.

23. *Authorised Tramway Running on Private Land into a Car Factory—Car Factory not suitable to and used by Company for Purposes of Undertaking within District—Agreement to take all of Car Factory or none—Payment for Easement of Tramway Running into Car Factory.*—Tramway No. 13, of the North Metropolitan Tramways Company, within the district of the Leyton Urban District Council, authorised by the North Metropolitan Tramways Act, 1870, passed for some distance over private land, and for at least sixty-two feet penetrated within the entrance gates of a large car factory erected on their land by the company, and for at least four feet eight inches under the roof and within the walls of the car factory. On the purchase by the council from the company of this and other tramways, and "all lands, buildings, works, materials and plant of the company suitable to and used by them for the purposes of their undertaking within such district" (that of the local authority) under sect. 31 of the said Act, which is very similar in its terms to sect. 43 of the Tramways Act, 1870, an arbitrator found that the car factory was not suitable to and used by the company for the purposes of their undertaking within the district, and he awarded and determined the value of the portion of the permanent way of tramway No. 13, which was upon the private land, including the entrance gates, but not including the value of any buildings, to be the sum of £125. It appeared that, upon a contention as to whether the car factory was severable or not, the council and the company had agreed that the council should either purchase the whole of the car factory or none at all.

HELD—that as part of tramway No. 13 ran into the car factory on to private land, the council must pay for not only the materials of the tramway, but also for some easement or some estate or interest in the soil upon which the tramway ran. That the agreement made between the council and the company did not, on that account, oblige the council to purchase the whole of the car factory, as the agreement was not made with reference to this easement or interest. As it did not appear that the arbitrator had not allowed for this easement or interest in the £125 awarded for that part of tramway No. 13, the award would not be remitted to him upon that point.

NORTH METROPOLITAN TRAMWAYS CO., LD. v. [LEYTON URBAN DISTRICT COUNCIL, [1907], 71 J. P. 536—Div. Ct.]

24. *Building "Suitable to and used for the purposes of" the Undertaking—Depot outside District of Local Authority—Liability to Pay for*

**Purchase by Local Authority—Continued.**

—“Then value”—*Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.*—Upon the purchase by a local authority of a tramway undertaking under sect. 43 of the *Tramways Act, 1870*, the purchasing authority are bound to take and pay for a depôt which is “suitable to and used for the purposes of” the undertaking within their district, although the depôt is situated outside their district. A finding that a depôt is used “with” and is suitable to an undertaking is sufficient to create this liability.

The words “within such district” in the section qualify the word “undertaking,” and not the words “lands, buildings, works, materials and plant of the promoters.”

“The then value” of the undertaking, etc., in the section means the value, at the date of the notice, to the promoters, and not the value to the purchasing authority.

The promoters are not under any obligation to make a good title to the adjuncts and accessories for which the purchasing authority has to pay; but defects in title may be taken into consideration by an arbitrator when fixing the amount to be paid.

Decision of the C. A. (69 J. P. 57; 21 T. L. R. 91; 3 L. G. R. 146) reversed.

IN RE MANCHESTER CARRIAGE AND TRAMWAY CO. AND SWINTON AND PENDLEBURY URBAN DISTRICT COUNCIL, [1906] A. C. 277; 75 L. J. K. B. 839; 70 J. P. 81; 93 L. T. 821; 22 T. L. R. 154; 4 L. G. R. 214—H. L. (E.).

**25. Contingency of Purchase under Local Act—Compulsory Purchase—Value—*Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.***—By the *Southampton Streets Tramways Act, 1877*, the company was empowered to construct and maintain tramways. The Act contained provisions under which the corporation might purchase the undertaking at any time after the expiration of eleven years and before the expiration of twenty-one years from the passing of the Act under the terms of the *Lands Clauses Acts*. Parts 2 and 3 of the *Tramways Act, 1870* (which include sect. 43), were incorporated with the Act. In the year 1897 (before the expiration of twenty-one years) the corporation obtained an Act which provided for the compulsory sale and purchase of the undertaking under the terms of the *Lands Clauses Acts*.

HELD—that the Act of 1897 did not destroy the contingency of purchase after the expiration of twenty-one years under sect. 43 of the *Tramways Act, 1870*, but that it provided for the sale of the interest the company possessed at the time it was passed, which was the right to carry on the undertaking subject to the contingency of purchase by the corporation after the expiration of twenty-one years under the provisions of sect. 43 of the *Tramways Act, 1870*.

Decision of Divisional Court (80 L. T. 236; 15 T. L. R. 217) affirmed.

IN RE AN ARBITRATION BETWEEN THE SOUTH-AMPTON TRAMWAYS CO. AND THE SOUTH-AMPTON CORPORATION, [1899] 63 J. P. 788; 81 L. T. 652; 16 T. L. R. 38—C. A.

**26. Notice to Purchase—Price Not Yet Agreed Upon—Right to Take Possession—Injunction—*Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.***

—A local authority who have given notice of their intention to purchase tramways under sect. 43 of the *Tramways Act, 1870*, have no right to take possession thereof until a price has been agreed upon and paid, and an injunction will be granted restraining them from so doing.

MANCHESTER CARRIAGE AND TRAMWAY CO. [v. MANCHESTER CORPORATION AND STRETFORD URBAN DISTRICT COUNCIL, [1903] 67 J. P. 17; 87 L. T. 678—Eady, J.

**27. Price—Basis of Valuation—*Dudley and District Light Railways Order, 1898.***—By an agreement entered into between an electric traction company and the corporation of a borough, after reciting that the corporation had withdrawn their opposition to a *Light Railways Order* which the company were promoting upon the terms thereafter appearing, it was agreed that the company should construct railway No 5 under the Order, and should on the expiration of a period of four years from the making of the Order sell the railway to the corporation at a price to be settled, in case of difference by the Board of Trade (for which an arbitrator was subsequently substituted), and the Order authorised the corporation to purchase this railway at the time and in the manner prescribed by the agreement.

HELD—(Lord Collins dissenting) on the construction of the agreement and the Order, that the price must be fixed upon the basis of a valuation of the structural value of the railway regarded as a railway *in situ* capable of earning a profit, and not upon the basis of the value of the railway to the company as an income-earning concern.

Decision of C. A. (71 J. P. 140; 96 L. T. 340; 5 L. G. R. 367) reversed.

IN RE DUDLEY, &C., ELECTRIC TRACTION CO. [AND DUDLEY CORPORATION, (1907) 71 J. P. 481; 97 L. T. 556; 5 L. G. R. 1077—H. L. (E.).

**28. Private Act—*Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.***—The provisions of a public Act of Parliament can only be overridden or varied by clear and express enactment or clear implication in a private Act.

By the *Wallasey Tramways Act, 1878*, the appellants were authorised to construct and work certain tramways, partly within and partly without the respondents' district. The Act incorporated certain parts, including sect. 43 of the *Tramways Act, 1870*, “except where expressly varied by this Act.” By sect. 37 of the private Act the local board were empowered to purchase the tramways at any time within fifteen years from the passing of the Act on giving six calendar months' notice. Section 43 of the *Tramways Act, 1870*, provides that the local authority may, within six months after the expiration of a period of twenty-one years from the grant of the powers, by notice require the promoters to sell the undertaking to the local authority.

**Purchase by Local Authority—Continued.**

HELD—that there was nothing inconsistent between the two Acts, and there was nothing in the private Act to exclude the operation of sect. 45 of the public Act.

WALLASEY UNITED TRAMWAYS AND OMNIBUS CO. v. WALLASEY URBAN DISTRICT COUNCIL, (1901) 17 T. L. R. 152—H. L. (E.).

**29. Valuation of Tramway—"Then Value"**—*Contributions towards Street Widening which would be necessary in constructing a New Tramway—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43.*—A local authority served upon a tramway company a notice to purchase their undertaking under sect. 43 of the Tramways Act, 1870. At the time when the tramway was constructed the promoters of tramway undertakings were not required to contribute towards the cost of widening the streets through which the tramway passed, and the tramway in question was laid in unwidened streets. But at the date of the notice to purchase it was the practice to require such promoters, as a condition of obtaining Parliamentary powers, to contribute one-third of the cost of widening the streets through which the tramway passed.

HELD—that in assessing the "then value" of the tramway under sect. 43 of the Tramways Act, 1870, the arbitrator ought not to take into consideration the fact that the local authority would have to contribute towards street widenings if they constructed the tramway at the date of the notice to purchase.

IN RE LONDON, DEPTFORD AND GREENWICH [TRAMWAYS CO. AND LONDON COUNTY COUNCIL, [1905] 1 K. B. 316; 74 L. J. K. B. 143; 69 J. P. 98; 53 W. R. 411; 92 L. T. 124; 21 T. L. R. 172; 3 L. G. R. 103—Bray, J.

**IV. MISCELLANEOUS.**

And see HIGHWAYS, Nos. 129-131; RATES AND RATING.

**30. Agreement with Advertising Contractors—"Regular Running"—Electric Tramcar—Construction of Contract**—An advertising contractor entered into an agreement with the S. Corporation, whereby it was agreed that the corporation should permit the contractor for five years to use and enjoy the exclusive privilege of advertising on all the tramcars belonging to the corporation; that the contractors should pay the corporation certain specified annual rents for each and every "regular running" electric tramcar, such rents to be payable in advance upon the usual quarter days, and that the contractors should remove all advertisements from any vehicles which the corporation might direct to be repaired and reinstate them after the completion of such repairs, and that the contractors should not be entitled to any compensation in respect thereof.

The contractors contended that they were only liable to pay rent for vehicles which were regularly run, and not in respect of a vehicle while it was not running; and brought an action for an account of the number of regular running

vehicles and of the money paid by them to defendants

HELD—that "regular running" cars included any cars which were in the service of the undertaking as rolling stock for regular use at the commencement of the year the rent for which was in question, and which were intended for employment in the service as regular running cars; and that regular running was not incompatible with occasional withdrawals from use for repairs.

GRIFFITHS AND MILLINGTON, LD. v. SOUTH-AMPTON CORPORATION, (1906) 70 J. P. 179; 22 T. L. R. 301; 4 L. G. R. 316—Buckley, J.

**31. Electric Tramway—"Hackney carriage"—"Omnibus"—"Tramcar"—Rails laid in Street—Licence—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 37—Town Police Clauses Act, 1839 (52 & 53 Vict. c. 14), ss. 3, 4—Light Railways Act, 1896 (59 & 60 Vict. c. 48).**—A carriage of a light railway constructed under an order made under the Light Railways Act, 1896, and running on lines laid in the streets of the borough is not "an omnibus" within the meaning of sect. 3 of the Town Police Clauses Act, 1847, nor a "tramcar" within the meaning of the Town Police Clauses Act, 1889, but is subject only to the provisions of the statutes affecting light railways. Such a carriage does not, therefore, require a licence to ply for hire under sect. 37 of the Town Police Clauses Act, 1847.

YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC [TRAMWAYS, LD. v. ELLIS, [1906] 1 K. B. 396; 74 L. J. K. B. 172; 53 W. R. 303; 69 J. P. 67; 92 L. T. 202; 21 T. L. R. 163; 3 L. G. R. 139; 20 Cox C. C. 795—Div. Ct.

**32. Lease of Right to Advertise—Tramway Taken Over by Corporation under Act of Parliament—Voluntary Winding-up of Company—Right of Lessee to Prove in Winding-up—Compulsion of Law.**—By several leases the B. corporation leased to the B. tramway company the sole right of user of the tramways in B. belonging to the corporation. The company granted a licence to C. for a term of years of the sole right to advertise in their tramcars.

By the Bradford Corporation Act, 1901, the corporation took over the leases of the company on paying them compensation. The company petitioned against the Bill, but withdrew their opposition on certain clauses being inserted in the Bill.

The licensee claimed compensation in the winding-up of the company.

HELD—that under the circumstances, the Act afforded no defence to the licensee's claim, and that he was therefore entitled to prove in the winding-up.

RE BRADFORD TRAMWAYS CO., LD., (1904) 68 [J. P. 362—Buckley, J.

**33. Negligence—Electric Traction—Horse on Highway frightened by Approach of Car—Driver of Car Signalled to Stop—Duty of Driver of Car to Persons using Highway—Common Law**

**Miscellaneous—Continued.**

*Obligation.*]—The plaintiff's horse was frightened at the approach of an electric tramway car, and became restive, when the plaintiff held up his hand and shouted to the driver of the car to stop, until he could get past it. The plaintiff's horse and trap were not then upon the metals along which the tramcar was approaching. The driver of the car, in disregard of the plaintiff's signal and shouting, drove the car on without any stop or abatement of pace, whereupon the plaintiff's horse, when the car was close upon him, from fright swerved round, so that the trap came upon the tramway, and the tramcar ran into it, and the plaintiff was thrown out and injured.

HELD—that there was no pretence for the proposition that, because the defendant company were authorised to run tramways on the highway, their drivers were exempted from the common law obligation to take reasonable care not to injure persons lawfully using the highway; and that the verdict for the plaintiff must stand.

RATTEE v. NORWICH ELECTRIC TRAMWAY Co.,  
[(1902) 18 T. L. R. 562—C. A.]

**34. Obstruction—Tramline so near to Kerb that Vehicle cannot pass Tram—Alleged Right to drive Vehicle on Near Side of the Road—Wilful Obstruction—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 50.**]—The single lines of a tramway constructed under an Act of Parliament were at one place on a road—on an incline some 250 or 300 yards long—so placed that there was no room for a vehicle to pass between a tramcar and the kerb on one side of the road. At the top and at the bottom of the incline were loops which would enable a tram to pass another vehicle on that side of the road. There was ample room for a vehicle to pass a tramcar on the other side of the road. A dray coming down the incline proceeding on its near or left side of the highway met an electric tramcar which was lawfully running on the said lines, proceeding up the hill. As there was no room to pass, both vehicles stopped, and remained facing each other for fifty minutes, at the end of which time the tramcar backed to the loop at the bottom of the incline. The driver of the dray had been instructed by his employers not to cross over the tramlines on to his wrong side, to make way for tramcars. A summons was taken out under sect. 50 of the Tramways Act, 1870, against the drayman for wilfully obstructing the tramcar. The justices dismissed the summons, saying that they were of opinion that the drayman had not acted unlawfully in maintaining his right to drive on his left or customary driving side, and that consequently there had been no wilful obstruction on the part of the respondent.

HELD—that as there was a doubt as to whether the justices meant that the drayman had an absolute right to continue on his left-hand side or merely that, owing to the action of the tramcar driver, the drayman's obstruction was not wilful, the case must be remitted to the justices to decide whether there had been wilful obstruction on the part of the drayman, with the direction that the drayman had no absolute

right to maintain his course on the left, putting the tramcar driver to any amount of inconvenience, and the tramcar driver had no absolute right to make all other vehicles get out of his way, if, by acting reasonably, he could avoid inconvenience to them. The drivers of both vehicles must act reasonably.

HARTLEY v. CHADWICK, (1904) 68 J. P. 512—  
[Div. Ct.]

**35. "Stage Carriage"—Tramcar—Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120), s. 5—Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 13.**]—By sect. 5 of the Stage Carriages Act, 1832 (repealed by 32 & 33 Vict. c. 14, s. 39), it was provided that the term "stage carriage" shall not be deemed to extend to or include any carriage used or employed as aforesaid wholly upon any railway.

HELD—that the above provision had not the effect of preventing a tramcar being a "stage carriage" within sect. 13 of the Railway Passenger Duty Act, 1842; that the words "used or employed upon any railway" did not apply to a tramway; and that the word "railway" was there used in regard to what had since become so well known under that name.

BRIAN v. AYLWARD, (1902) 18 T. L. R. 371—  
[Div. Ct.]

**TRANSVAAL COLONY.**

See DEPENDENCIES AND COLONIES.

**TREASON.**

See CRIMINAL LAW AND PROCEDURE.

**TREASURE TROVE.**

See CROWN PRACTICE, 16.

**TRESPASS.**

And see BAILMENT, 7; BANKRUPTCY, 212; GAME, HIGHWAYS, 22, 23.

**1. Assault by Servant Acting in Course of Employment.**]—The servants of a railway company arrested a cabman for a breach of the peace committed within the precincts of a station, and took him to a neighbouring police office. In an action for damages by the cabman against the company an issue was allowed: "Whether the cabman was wrongfully and forcibly taken into custody and removed from the railway station to the police office by the servants of the railway company while acting in the course of their employment by the railway company."

WOOD v. NORTH BRITISH RY. Co., (1899) 1 F.  
[562, 36 S. L. R. 407.]

**Trespass—Continued.**

**2. Committal Order—Sums in fact paid on Account—Arrest for whole Sum.**—A party who merely states his case to a tribunal is not guilty of a trespass if that tribunal acts upon his statement, and in so doing makes some mistake.

*Carratt v. Morley* ((1841) 1 Q. B. 18) followed.

Where a valid committal order is issued upon a plaintiff's request and he merely tells the proper official to do his duty, he is under no liability to the defendant if the latter is arrested for the whole sum, whereas he has in fact paid a portion without the knowledge of the plaintiff. It is for the defendant to satisfy the official that he has discharged himself from liability under an order good upon the face of it.

*SAUNDERS v. SWANSEA FINANCE CO., LD., AND [ANOTHER]*, (1905) 21 T. L. R. 317—C.A.

**3. False Imprisonment—Governor of Gaol—Detention of Prisoner by Warders after Acquittal—Liability of Governor for Acts of Warder—Prison Act, 1865 (28 & 29 Vict. c. 126), s. 58.**—A prisoner, who had been on bail, was acquitted of a charge of felony at Quarter Sessions and ordered to be discharged. He was then taken by the warders who were in charge of the prisoner to the cells below the Court and detained there by them for a short time until they had ascertained from him certain particulars. The governor of the gaol was not present at his trial, nor was the detention effected by his orders. In an action against the governor for false imprisonment,

**HELD**—that the governor was responsible for the illegal acts of the warders in so detaining the acquitted prisoner.

*MEE v. CRUICKSHANK*, (1902) 86 L. T. 708; 18 [T. L. R. 271; 20 Cox C. C. 210; 66 J. P. 89—Wills, J., Manchester Assizes.

**4. False Imprisonment—No actual Violence—No belief of any Legal Authority—Indictable Offence.**—Mere false imprisonment without any belief in the existence of a legal right to detain is an indictable offence, although no actual assault or battery take place.

So held in a case where a surgeon was called to attend a woman in the early stages of labour, but not likely to need his services for some hours, and the door was locked to prevent his leaving the house until the child was born.

*REX v. LINSBERG*, (1905) 69 J. P. 107—Common [Serjeant, C. C. Ct.

**5. Parent and Child—Injunction to Restrain a Son from Entering Father's House.**—The Court will not, except in very grave circumstances, grant an injunction to restrain a son from entering his father's house, the result of which would be to sever the connection which ought to exist between parent and child

*WATERHOUSE v. WATERHOUSE*, (1906) 94 L. T. [133; 22 T. L. R. 195—Buckley, J.

**6. Parent and Child—Restraining Son from Entering Mother's House.**

The decision in *Waterhouse v. Waterhouse* ((1906) 94 L. T. 133; 22 T. L. R. 195) does not mean that in a grave case the Court will not restrain a son from entering his mother's house.

*STEVENS v. STEVENS* (1907) 24 T. L. R. 20—[Coleridge, J.

**7. Signing Charge Sheet—Evidence of Authority to Detain in Custody.**—Where a person has been arrested upon a criminal charge and is in custody the mere fact that the prosecutor, who has not authorised the arrest, signs the charge sheet is not evidence to go to a jury that he authorised the continued detention of the person charged in custody.

*SEWELL v. NATIONAL TELEPHONE CO., LD.*, [1907] 1 K. B. 557; 76 L. J. K. B. 196; 96 L. T. 483; 23 T. L. R. 226—C. A.

**TRIAL.**

See CRIMINAL LAW AND PROCEDURE;  
PRACTICE AND PROCEDURE.

**TRINIDAD.**

See DEPENDENCIES AND COLONIES.

**TROVER AND CONVERSION.**

And see AGENCY No 8.

**1. Article Pledged—Knowledge of pawnor—Statute of Limitations—Action against Executor.**—In Sept., 1889, the plaintiff pledged a piano with the husband of the defendant. The same year he converted it to the knowledge of the plaintiff. In March, 1897, he died, and the plaintiff then tendered the money to the present defendant, his executrix and widow, and demanded the return of the piano.

**HELD**—that the defendant could not be liable, and that, as she never had possession of or any property in the piano, no action of conversion would lie against her.

*HINCHCLIFFE v. SHARPE*, (1898) 77 L. T. 714—[Div Ct.

**2. County Court Execution—Sale of Goods—Goods the Property of Third Person—No Claim to Goods before Sale—Liability of High Bailiff—County Courts Act, 1888 (51 & 52 Vict c 43), ss 154-159.**—Goods were seized by the high bailiff in execution of a judgment recovered in the County Court, and were sold and possession delivered to the purchasers and the proceeds paid into Court. The goods were in fact not the property of the judgment debtor, but had been let to him by the claimants under a hire-purchase agreement, which provided that if the goods were taken in execution the claimants

**Trover and Conversion—Continued.**

might without previous notice terminate the hiring and retake possession. The claimants did not know of the seizure until after the goods had been sold and possession delivered to the purchasers, when they served notice upon the high bailiff that the goods belonged to them, and they claimed damages from him for conversion.

**Held**—that as at the time of the sale the claimants were entitled under the above clause to take possession of the goods, the sale was an act of conversion as against them for which they could maintain trover against the high bailiff.

**JULKS v. HAYWARD: PACKSFF FURNISHING CO., CLAIMANTS.** 1905; 2 K B 160; 71 L. J. K. B. 717, 53 W. R. 686, 92 L. T. 692, 21 T. L. R. 527—Div. Ct.

**3. Goods Tortiously dealt with—Application for Proceeds—Receipt of Part of Proceeds—Election to affirm Transaction—Waiver of Tort.**

—The plaintiff, a fur-skin dyer, was in the habit of using in his business large quantities of sawdust. When the sawdust had been fully used for the purposes of his trade, it became waste sawdust, and was treated accordingly. Soltan, the plaintiff's servant, made an arrangement with the defendant with reference to the fully used sawdust, and he also sold to the defendant sawdust some of which had been only partly used, and some entirely unused. It was alleged by the plaintiff that the sawdust so improperly dealt with was of the value of £5,000. Plaintiff's suspicions were aroused, and on February 5th, 1898, Soltan was given into custody on a charge of larceny and embezzlement, and on March 1st he was convicted. Before his conviction an action was brought by the plaintiff against Soltan, which, so far as the pleadings were concerned, did not go further than the writ. The writ was indorsed with a claim for conversion, and in the alternative with a claim for money had and received. The defendant, when he received the sawdust, knew that Soltan was dealing with it in an improper manner. The plaintiff ascertained that there was a balance of £1,500 to the credit of Soltan at the Birkbeck Bank, that the proceeds of the sale of the sawdust were paid into Soltan's account at the bank, and that £1,500 at the least of that account could be specifically traced as the proceeds of the sale of the sawdust by Soltan to the defendant. Plaintiff obtained an interim injunction to restrain Soltan from drawing out that sum and the bank from parting with it until the trial of the action. The plaintiff then commenced an action against the defendant Reed claiming damages for the conversion calculated upon the true value of the sawdust improperly dealt with. An arrangement was then made between the plaintiff and Soltan that the sum of £1,125, part of the £1,500 at the bank, together with interest accrued due thereon, should be paid out to the plaintiff in full settlement of all claims against Soltan, but without prejudice to the plaintiff's claim against the defendant Reed. The agreement was drawn

up in the form of an order of the Court, which on the face of it was a consent order.

**Held**—that the plaintiff had not so acted that he must be taken as having conclusively elected to affirm the sale of the sawdust by Soltan to the defendant and to treat it as a valid sale, or so as to be estopped from maintaining the action against Reed.

The cases of *Talpy v. Sanders* ((1818) 5 C. B. 886; 17 L. J. C. P. 219, 12 Jur 483), *Morris v. Robinson* ((1821) 3 B. & C. 196, 5 Dowl. & Ry. 31, 27 R. R. 322), and *Burn v. Morris* ((1831) 1 Tyrw. 185; 2 Cr. & M. 579, 3 L. J. (N.S.) Ex. 193) establish two propositions—viz. —

First, that an application for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction, and

Secondly, that the receipt of part of the proceeds is not conclusive proof of election.

**RICE v. REED** [1900] 1 Q B 51; 69 L. J. Q B. 33, 81 L. T. 110—C. A.

**4. Stolen Goods—Acquittal of Accused—Demand from Police Officer by True Owner—Accused—Delivery to Accused by Police Officer acting under Instructions from his Superior Officer.**—A gig, the property of the plaintiff, disappeared and was found in the possession of B. B. was prosecuted for stealing the gig, and was acquitted. The gig had been removed by the police to the police-station. Both the plaintiff and B. demanded possession of the gig from the defendant, who was the sergeant in charge at the police-station. The defendant, acting under instructions from his superior officer, an inspector, refused the demand of the plaintiff, and delivered the gig to B.

**Held**—that the defendant though acting as a subordinate, was liable in trover, as he was a party to a dealing with the plaintiff's property, and acted at his peril.

*Hollins v. Fowler* ((1875) L. R. 7 H. L. 757; 44 L. J. Q B. 169; 33 L. T. (N.S.) 73) followed.

**WINTER v. BANKS AND ANOTHER**, (1901) 65 [J. P. 168, 11 W. R. 574; 81 L. T. 504; 17 T. L. R. 446, 19 Cox C. C. 687—Div. Ct.

**5. Warehouseman—Delivery Order signed when incomplete—Improperly filled up—Stoppel—Delivery Order signed when complete—Subsequent fraudulent Addition—Negligence—Unauthorised Pledge—Redelivery to Pledgee—Liability to Pledgee.**—N. pledged with the plaintiffs, as security for an advance of money, eighteen hogsheads of tobacco, which were lying in his name at the defendants' warehouse. The goods were transferred upon the written order of N. to the plaintiffs' name in the defendants' books. It was the defendants' course of business to issue forms to owners of goods upon which the owners might require the defendants to transfer or deliver the goods to other persons. These forms were intended to be filled up *inter alia*, with the name of the vessel out of which the goods were discharged, the numbers of the packages, and the quantity of goods to be trans-



**Trover and Conversion—Continued.**

ferred or delivered. They were intended to be used, if necessary, for more than one lot of goods. N., having paid off sufficient of his debt to release one hoghead, induced the plaintiffs to sign a delivery form filled up with the vessel's name—"ex Umbria," the number of one of the packages, 246, but not filled up as to the quantity of goods to be delivered. N. fraudulently added a line and the figures 263 after "246," thereby meaning packages 246 to 263, and inserted in the third column the words "eighteen hogheads." By means of this forged document N. obtained delivery of the eighteen hogheads from the defendants. In an action of trover,

**HELD**—that the plaintiffs having constituted N. their agent to fill up the form, intending the defendants to act upon it, were responsible for his fraudulent exercise of authority, and were estopped from proving the limitation which they placed on his authority, and that the defendants were not liable in trover.

*Swan v. North British Australasian Co.* (1863) 2 H. & C. 175; 32 L. J. Ex. 273; 10 Jur. (NS) 102) and *Young v. Grote*, (1827) 4 Bing. 253; 12 Moore, 484, 5 L. J. (O.S.) C. P. 165) discussed

N., having pledged with the plaintiffs two parcels of goods which were placed in their name in the books of the defendants' warehouse, paid off the amount advanced by the plaintiffs on one parcel and obtained their signature to a delivery order properly filled up as to that parcel. He then fraudulently added to the form so signed the particulars of the other parcel. The defendants delivered both parcels to N.

**HELD**—that the defendants were liable in trover, that the plaintiffs were not guilty of negligence in not having so filled up the form as to make the addition in question impossible; that even if the plaintiffs were guilty of negligence, such negligence was not the *causa causans* of the loss, and, therefore, afforded no defence to the action.

N., having obtained the transfer of the two parcels of goods, as above stated, pledged part of one parcel with the defendant bank and the goods so pledged were transferred to the bank's name in the books of the dock company. N., having paid off the advance, obtained a delivery order from the defendant bank, and obtained delivery of the goods from the dock company before any demand had been made for delivery by the plaintiffs.

**HELD**—that there had been no conversion by the defendant bank

**UNION CREDIT BANK, LD. AND DAVIES v.**  
[*MERSEY DOCKS AND HARBOUR BOARD*,  
[1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81  
L. T. 44; 4 Com. Cas. 227—Bigham, J.]

**TRUCK ACTS.**

See **MASTER & SERVANT**, 8; **WORK AND LABOUR**.

**TRUSTS AND TRUSTEES.**

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See also **BANKRUPTCY**, 157, 277, 284;  
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**EXECUTORS , INSURANCE**, 48;  
**LIMITATION OF ACTIONS**, 30, 31, 59,  
60; **MORTGAGES ; PRACTICE AND**  
**PROCEDURE**, 192, 193; **POWERS ;**  
**SALE OF LAND ; SETTLEMENTS ;**  
**WILLS**.

**I. IN GENERAL.**

**1. Custody of Documents—Non-negotiable Securities.**—Where title deeds, and other non-negotiable securities, are in the custody of one trustee, and there is no suggestion that the documents are in danger, or that inspection is refused to the co-trustee, or involves expense to the estate, the co-trustee cannot claim to have the securities removed and deposited in their joint names at a bank.

**IN RE SISSON'S SETTLEMENT, JONES v.**  
[*TRAPPES*, [1903] 1 Ch. 262, 72 L. J. Ch.  
212, 51 W. R. 411, 87 L. T. 743—  
Eady, J.]

**2. Custody of Documents—Settlement—Power to Trustees of Personality to Advance Money to Buy Real Estate—Lien on Purchased Property for Such Advances.**—By a private Act of Parliament provision was made for keeping distinct the real and personal estate settled by R. Power was given to apply the personality in the purchase of land; but all money so applied was to be deemed a debt from the real to the personal estate, and the trustees of the personality were to have a lien on the land so purchased by way of equitable mortgage.

**HELD**—that the trustees of the personality were, as incumbrancers, entitled to the custody of the deeds relating to property so purchased as against the equitable tenant for life under the settlement.

**WHEELER v. TOOTELL**, (1903) 51 W. R. 693—  
[Eady, J.]

**3. Declaration of Trust—Intended Transfer of Money—Deposit Receipt—Invalid Declaration of Trust.**—In June, O. lodged a sum of £60 on deposit receipt in a bank, the receipt being in the following form: "Received from the parish priest of B. the sum of £60 for masses to be

**In General—Continued.**

accounted for at our office here." On the same day he lodged on deposit receipt in the same bank £50 for the parish priest of B. for repairs to his church, and he also lodged two sums of £385 each in the joint names of himself and each of two nieces. This was done in consequence of a conversation with the manager, during which O. stated that he wished to give the two sums of £50 and £60 for the purposes mentioned, but did not wish to make a will. Two days later O. drew out the £50 lodged on deposit receipt for repairs to the church and placed the amount to the credit of his current account. In September he lodged £100 on deposit receipt in the same bank for the parish priest of B. for repairs to church. This was done in consequence of a conversation with the manager, in which O. stated that he desired to leave this money to his successor for repairs to the church. This £100 was made up by taking £50 from each of the deposit receipts in favour of the nieces. O. died in November.

**HELD**—that as the money on deposit receipt remained in the possession and under the control of O. during his life, the relationship of the bank and O. was that of debtor and creditor and that no valid trust had been created.

**O'FLAHERTY v. BROWNE**, [1907] 2 Ir. R. 416—  
[C. A.]

**4. Declaration of Trust—Specific Bequest—Ademption—Parol Declaration of Trust in Lifetime.**—A testator, having varied or reinvested the proceeds of certain investments, which had been specifically bequeathed by his will to his wife, made frequent declarations in his lifetime that the substituted property was or would be his wife's property after his death.

**HELD**—that this did not amount to a declaration of trust.

**RE STALLON**, 51 Sol. Jo. 626—Joyce, J.

**5. Executory Trust—Direction to Settle—Possibility of Issue.**—A testator bequeathed *inter alia* two legacies of £300 to Mary M. and Elizabeth M. respectively, for their own sole and separate use, free from the control of any husband either might marry, the legacies not to be payable by the trustees and executors of his will until a settlement, to be approved of by them, should be made in reference to same. The legatees never married, and had attained the ages of seventy-five and seventy years respectively. No settlement had ever been executed, and the money was retained in the hands of the trustees.

**HELD**—that under the circumstances the legatees were entitled to have the legacies paid over to them by the trustees without any settlement.

**IN RE JORDAN'S TRUSTS**, [1903] 1 Ir. R. 119—  
[V.-C.]

**6. Fixtures—Tenant's Fixtures taken over by Landlord—Tenant for Life—Intention to improve Inheritance.**—A tenant for life leased a

mill and machinery for 21 years, and agreed to buy at the end of the term (the lessee agreeing to sell) any machinery then on the premises and not included in the lease.

The lessee added machinery during the term, and at the expiration of the term the tenant for life bought it.

A question arose between the life tenant's representatives and the remainderman as to the property in such machinery.

**HELD**—that such cases depend upon the intention of a person who attaches chattels to a freehold for trade purposes; that there was no evidence that the life tenant intended to make a present of this machinery to the remainderman, and that his representatives were entitled to it.

**IN RE HULSE; BEATTIE v. HULSE**, [1905]  
[1 Ch. 406; 74 L. J. Ch. 246; 92 L. T. 232—  
Buckley, J.]

**7. Following Trust Moneys—Moneys mixed with Trustee's own Money.**—Where a trustee, with or without authority, sells trust property, and banks the proceeds in his own name, the money may be followed so long as it can be traced with reasonable certainty. If the money has been mixed with the trustee's own money, and some of the blended funds have been drawn out, the trustee will be presumed to have drawn out and spent his own money and not that representing the trust estate. The same rule holds good as against the trustee's representative in bankruptcy.

**JOPP v. JOHNSTON'S TRUSTEES**, [1905], 6 F  
[1028—Ct. of Sess.]

**8. Following Trust Moneys—Trust and Private Moneys Mixed in One Banking Account—Principle.**—Where a trustee has mixed his own money and trust money in one banking account, and subsequently draws out and invests some of the mingled moneys, if such investment is still in his name or under his control when the bank balance becomes insufficient to repay the trust moneys, he cannot contend that the investment represents his own money alone, and that it is the trust money which has been spent in other ways and is not recoverable. However large the balance might be at the time, the trustee could not make any investment which would be free from a charge in favour of the trust until the trust moneys had been actually reinvested in proper form, or repaid. The order of priority in which the various payments in and withdrawals have been made is immaterial.

**IN RE OATWAY; HERTSLET v. OATWAY**, [1903]  
[2 Ch. 356; 72 L. J. Ch. 575, 88 L. T. 622—  
Joyce, J.]

**9. Fraud of Agent—Conflicting Equities—Unnecessary Transfer by Trustee of Legal Title—Enabling Dishonest Agent to deal with Trust Property—Innocent Mortgagee or Purchaser from Agent—Acknowledgment by Trustee of Payment of Consideration—Estoppel—Statutory Transfer—Vendor's lien—Conveyancing and Law of Property Act, 1841 (44 & 45 Vict. c. 41), s. 55.**—The plaintiff, who was the trustee under

**In General—Continued.**

a will, instructed H., a broker, to sell a bond of the Tyne Improvement Commissioners belonging to the trust estate, and sent the bond to H. H. knew that the plaintiff held this bond as trustee of the testator's estate. H. wrote to the plaintiff stating that he was arranging for the sale of the bond in two portions, and enclosed two transfer deeds by which the security was transferred to himself, the transfers stating that the consideration money had been paid to the plaintiff by H., although no money was in fact paid. The plaintiff executed these transfers and returned them to H. These transfers were duly registered by the Tyne Commissioners. H. then obtained an advance from the defendant on the security of the bond and the transfers. The transfer to the defendant was not registered. H. became bankrupt, and the question arose, Which of the two innocent parties, the plaintiff and the defendant, was to suffer for H.'s rascality? The transfers to H. were in a statutory form contained in a schedule to the Commissioners Clauses Consolidation Act, 1847, and in a schedule to the private Act.

**HELD**—that it was the unnecessary transfer of the legal title to H. that enabled him to deal with the bond as owner; that the plaintiff had invested H., the dishonest vendor or mortgagor, with all the *indicia* of title as absolute owner for the purpose of enabling him to deal with the property, although in a limited way only; that it was immaterial whether the trust was to sell only, or to mortgage only, if the mortgagee or purchaser had no notice of the existence of any trust at all; that the plaintiff, the owner of property, having clothed H. with the apparent ownership, and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee had paid him the consideration for it, was estopped from asserting his title against a person to whom such third party had disposed of the property, and who took it in good faith and for value, and it made no difference whether that acknowledgment was made before the Conveyancing Act, on a conveyance of land, by the receipt clause in the body of the deed and the indorsed memorandum, or since the act of the former only, or in a statutory transfer by the statement in the statutory form that the money had been paid, that whether the case was to be regarded as one of general authority with no limit brought to the mortgagee's notice, or as one of estoppel, the plaintiff had failed to establish the priority that he claimed and his claim to a vendor's lien was also defeated.

*Perry-Herrick v. Attwood* ((1857) 2 De G. & J. 21; 27 L. J. Ch. 121; 4 Jur. (N.S.) 101; 6 W. R. 204; 30 L. T. (N.S.) 267) followed.

*Carrutt v. Real and Personal Advance Co.* ((1889) 42 Ch. D. 263; 58 L. J. Ch. 688; 37 W. R. 677; 61 L. T. 163—Chitty, J.) explained and distinguished.

*RIMMER v. WEBSTER*, [1902] 2 Ch. 163; 71 L. J. [Ch. 561; 50 W. R. 517; 86 L. T. 491; 18 T. L. R. 548—Farwell, J.]

**10. Implied Trust—Trust or Partnership Estate comprising Leaseholds—No right to Renewal—Trustee or Partner purchasing Reversion—Whether subject to Trust.**—Where a person in the position of a trustee purchases the reversion in fee expectant upon the determination of a lease forming part of the trust estate, the question whether such reversion forms part of the trust estate depends (in the absence of fraud) upon whether the lease is by custom or contract renewable.

If the lessee has no ground for expecting a renewal of the lease except at a rack rent, the purchased reversion does not become subject to the trust, but may be held by the purchasing trustee for his own benefit.

*Randall v. Russell* ((1815) 3 Mer. 190—Grant, M.R.) and *Longton v. Wilsby* ((1897) 76 L. T. 770—Stirling, J.) followed and applied.

*BEVAN v. WEBB*, [1905] 1 Ch. 620; 74 L. J. [Ch. 300; 53 W. R. 651; 93 L. T. 298—Warrington, J.]

**11. Infant—Maintenance—Protection of Trustees—Life Interest Defeasible on Bankruptcy.**—A testator directed his trustees to pay the income of his residuary estate to certain persons for life, with a proviso that any life interest should be forfeited on bankruptcy or alienation; and in this event the trustees were authorised to apply the same for the benefit of the person so forfeiting the same. One of the persons was an infant. The will contained no maintenance clause.

**HELD**—that unless the trustees had notice or reasonable cause to suspect that a forfeiture had been incurred, they might safely from time to time pay the income to the adult beneficiaries on a form of receipt stating that no forfeiture had been incurred by the beneficiary giving the same. That as to the income payable to the infant, the trustee, on the authority of *M'Creight v. M'Creight*, (1849) 13 Ir. Eq. 814, could pay it to the mother and guardian of the infant who could give a valid receipt for it; and that under s. 43 of the Conveyancing Act, 1881, the trustees also had power to apply the income, when it had accrued, for the maintenance and education of the infant.

*IN RE LONG*; *LOVEGROVE v. LONG*, [1901] [W. N. 166; 36 L. J. N. C. 405; 111 L. T. Jour. 368—Byrne, J.]

**12. Insurance Policy—Surrendered by Order of Judge—Order considered erroneous by Court of Appeal—Rights of Child of the Marriage.**—A policy included in a marriage settlement was ordered by a Judge to be surrendered. This order was disapproved by the Court of Appeal, but it was too late to revive the policy.

**HELD**—that the trustees should pay annually to the only child of the marriage the sum which they ought to have paid as premium on the policy.

*IN RE FITZGERALD*; *SURMAN v. FITZGERALD*, (1904) 90 L. T. 274—C. A.

**13. Mortgage by Beneficiary—Mortgagee inquiring as to Prior Charges—Trustees induced to sign incorrect Declaration—Liability of**

**In General—Continued.**

*Trustees—Estopped.*—X., who was proposing to advance money to E. upon the security of his share in certain trust funds, asked the solicitors to the trustees for a declaration from the trustees that they had no notice of a prior charge on E.'s share. The solicitors replied that they never advised trustees to give such a declaration; at the same time they asked X. to call on M., one of the trustees, to obtain from him a certificate of E.'s identity. X. sent his clerk to M.; and the clerk, after obtaining the certificate, induced M. to sign a declaration as to no prior notices having been received. Upon seeing M.'s signature, his co-trustee signed the declaration without inquiry. It was disputed whether the clerk in answer to M., who was unwilling to sign the declaration without advice, did or did not say that his solicitors had assented to his signing the declaration. Notice of a prior charge had been in fact given, but forgotten; and X. lost his money.

**HELD**—that X. could not rely upon a declaration obtained under such circumstances; and that the trustees were not liable to make good his loss.

**PORTER v. MOORE**, [1904] 2 Ch. 367; 73 L. J. [Ch. 729; 52 W. R. 619; 91 L. T. 484—Eady, J.

**14. Mortgaging Trust Property—Leave of Court—Management—Urgent need for Funds to Preserve Security—Leave of Court to Raise.**—A sum of £125,000 held in trust for beneficiaries, some of whom were infants, was invested on mortgage of an Australian sheep farm. The mortgagor had bought the farm for £450,000 but had now been ruined by droughts. He had tried to sell the farm, but had had no offer, and it was now unoccupied. The trustees had commenced foreclosure proceedings, and the decree would shortly be made absolute.

In the meantime prospects had improved, but the farm being empty was deteriorating: it was also subject to land tax, and penalties for not keeping down rabbits.

**HELD**—that the Court would allow the trustees to raise by mortgage of the farm the sum of £30,000 for expenses of managing it and paying outgoings.

**NEILL v. NEILL**, [1904] 1 Ir. R. 513—Kenny, J.

**15. Payment into Court of Legacy—Executors deprived of Discretion as to Payment—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42.**—A testator directed his executors and trustees thereafter named to invest a sum of £1,100 and apply the income in payment to his son A. of a weekly sum for maintenance, with a half-yearly allowance for clothes, until they should be of opinion that it would be prudent to pay him the principal. The income of the £1,100 was applied as directed by the executor who proved the will, and after his death by his executors, who afterwards paid the principal into Court under the Trustee Act, 1893. A. applied for payment out.

**HELD**—that the payment into Court deprived

the executors of the executor of any discretion they had as to payment of the principal.

A. having consented to the settlement of the fund for the benefit of his wife and children, the fund was ordered to be paid out to the trustees of a proper settlement when appointed.

**IN RE MURPHY'S TRUST**, [1900] 1 Ir. R. 145—[M. R.

**16. Payment into Court—Mortgaged Fund—Rights of Mortgagor—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 22, sub-s. 1.**—Where trustees have *bond fide* doubts as to whether a mortgagor is entitled to be paid the whole or any part of a mortgaged fund in their hands, or have notice that there is something suspicious, or where there are any circumstances which make it reasonable for them to decline to be satisfied, they are not bound to pay over the fund on the receipt of the mortgagor under sub-section 1 of sect. 22 of the Conveyancing Act, 1881, but may seek the protection of the Court, and pay the money into Court.

*Re Bell, Jeffery v. Sayles* ([1896] 1 Ch. 1), considered and applied

**HOCKEY v. WESTERN**, [1898] 1 Ch. 350; 67 L. [J. Ch. 166; 78 L. T. 1; 14 T. L. R. 20; 46 W. R. 312—C. A.

**17. Priorities—Notice—Notice to one only of several Trustees—Death of that Trustee—Subsequent Assignee giving Notice to all the then Trustees.**—An assignee who has given notice to one only of several trustees, is not entitled to priority over a subsequent assignee, who takes his assignment after the death of that trustee, and gives notice to all the surviving, or existing, trustees.

M. by her marriage settlement agreed to settle all after-acquired property; one of the three trustees of a will, under which M. took a reversionary interest, was the solicitor who drew her settlement, and he therefore had notice of her covenant to settle such reversion. He, however, died without communicating his knowledge to his co-trustees under the will.

Before her interest fell into possession M. assigned it to an insurance society, who made all proper enquiries from the trustees for the time being, and gave them notice.

**HELD**—that the society were entitled to priority over the child of M. who after M.'s death was the beneficiary under the settlement.

Judgment of Byrnes, J., in *Freeman v. Laing* ([1899] 2 Ch. 355; 68 L. J. Ch. 586; 48 W. R. 9; 81 L. T. 167) see **MORTGAGE**, 29, followed.

**IN RE PHILLIPS' TRUSTS**, [1903] 1 Ch. 183; [72 L. J. Ch. 94; 88 L. T. 9—C. A.

**18. Removal of Trustee—Felon Trustee—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25—R. S. C., Ord. 55, r. 13A.**—The Court has jurisdiction on an application by originating summons to make an order for the removal from the trust of a trustee who has been convicted of felony, but who is unwilling to retire.

**IN RE DANSON**, (1899) 48 W. R. 73—Byrnes, J

**In General—Continued.**

**19. Remuneration Clause—Charges for Time and Trouble—Work Done—Charges Disallowed.]**—A will provided that "any trustee and executor hereunder, being a solicitor or other persons engaged in any profession or business, shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate . . . whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person."

**HELD**—that a trustee was not entitled to charge generally for his time and trouble in the management of the estate, but only for work done in the course of his profession or business.

*In re Fish, Bennett v Bennett* ([1893] 2 Ch 413; 62 L. J. Ch. 977, 69 L. T. 233—C. A.) distinguished.

**IN RE ROBINSON, CLARKSON v. DIXON, (1900)**  
[48 W. R. 698, 83 L. T. 164—Buckley, J.]

**20. Sale of Trust Property—Presbyterian Church—Premises held in Trust for Congregation—Congregational Debt for Building Purposes—Guarantors—Lien on the Property—Decree for Sale.]**—A Presbyterian church and manse were vested in trustees for the congregation. There was a debt on the building, such debt being guaranteed to a bank by certain individuals, including the trustees, but being treated as a congregational debt in the annual church accounts. The guarantors having been called upon to pay the debt, two of them brought an action against the deacons and the trustees asking for a sale of the property.

**HELD**—that the Court would not enforce payment by a sale of trust property, where such proceedings would destroy the trust.

**BOWMAN v. HILL, [1907] 1 Ir. R. 451—C. A.**

**21. Secret Trust—Validity.]**—A testator left all his property to his wife, resting satisfied that she would faithfully carry out his wishes regarding the same in the interest of their children, the particulars of which she was aware of. The will was witnessed by two of the children. The testator about the same time wrote a letter addressed to his wife, which stated his wishes as to the disposal of the property he had left to her by his will, and contained the following sentence: "I think this disposition is as fair as I can make it, and I hope it will satisfy all; but you, of course, may modify it if you think or find it desirable." Shortly afterwards the testator read out the will and letter in the presence of his wife and children, and she acquiesced in it.

**HELD**—that the circumstances were such as would make the letter a binding trust if it were intrinsically capable of creating a trust: but that, by reason of the sentence in question, there was no binding trust.

**SULLIVAN v. SULLIVAN, [1903] 1 Ir. R. 193—**  
[M. R.]

**22. Secret Trust for Charitable Purposes—Tenant in Common—Death of Testator within Three Months.]**—A testator devised certain houses, and also a legacy of £600 charged on the remainder of his property, which comprised landed property, to three persons absolutely, as tenants in common, coupled with a secret trust for charitable purposes. One of the legatees at the time the will was made was informed of the trust; the other two had no knowledge of it until after the testator's death. The testator died within three months of making his will.

**HELD**—that the bequest of the one-third of the property to the trustee who was aware of the trust was invalid, but that the other two-thirds went absolutely to the other two devisees.

**GEDDIS v. SEMPLE, [1903] 1 Ir. R. 73—C. A.**

**23. Settled Estate Liable to Pay an Annuity—Annuity Surrendered for Lump Sum—Apportionment.]**—A., entitled to a life interest in a portion of a testator's property, with remainder to her children, provided a proportionate part of the sum required to purchase the discharge of the settled property from a liability to make certain periodical payments to other persons.

**HELD**—that she was entitled to re-payment out of the estate, and that the trustees should raise the sum by mortgage of the share settled on her and her children.

*In re Bacon* ((1893) 62 L. J. Ch. 445; 41 W. R. 478; 63 L. T. 522—Kekewich, J.), see **SETTLEMENTS, 179**, followed.

*In re Dawson* ([1906] 2 Ch. 211; 75 L. J. Ch. 601; 54 W. R. 556; 94 L. T. 817—Eady, J.) not followed.

**IN RE HENRY; GORDON v GORDON, [1907] 1 Ch. [30; 76 L. J. Ch. 74; 95 L. T. 776—**  
Kekewich, J.]

**24. Trustee by Devolution—Liability to Act.]**—It is doubtful whether a person upon whom a trust estate devolves by operation of law can be compelled to act in the trust.

**IN RE RIDLEY'S TRUSTS, [1904] 2 Ch. 775;**  
[73 L. J. Ch. 696—Joyce, J.]

**25. Purchase by Trustee from cestui que trust—Non-disclosure of Information of Full Value of Beneficial Interest—Setting aside Transaction.]**—There is no difference whatever between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their *cestui que trust*.

There is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust*, but it is a well-known principle of equity that, if a transaction of that kind is challenged in proper time, a Court of Equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the *cestui que trust* when it was sold.

The defendant was a trustee and his brother was his *cestui que trust*, and the defender purchased his brother's share. The defender had

**In General—Continued.**

at the time secret information in his possession of what the value was, and that he might by concealing that information obtain £300 or £400 more than if the person with whom he was dealing had been acquainted with the value which had been placed by a skilled valuer upon the property.

HELD—that the transaction could not stand, but must be set aside.

Lord Cairns's *dictum* in *Thomson v. Eastwood* ((1877) 2 App. Cas. at p. 236) approved.

DOUGAN v. MACPHERSON, [1902] A. C. 197, 71 [L. J. P. C. 62; 50 W. R. 689; 86 L. T. 361—H. L. (Sc.)]

**26. Shares—Ownership—Trustee—Indemnity—by Cestui que trust—Calls on Shares—Creation of Relation of Trustee and Cestui que trust—Personal Liability of Beneficial Owner.]**—No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer.

The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal.

Where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property. It extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee.

*In re German Mining Co., Ex parte Chippen-dale* ((1863) 4 D. M. & G. 19; 23 L. J. Ch. 926; 2 W. R. 543, Turner and Knight Bruce, L.J.J.) applied.

When a trustee seeks indemnity from his *cestui que trust* against liabilities arising from the mere fact of ownership, there is neither principle nor authority for saying that the trustee need prove any request from his *cestui que trust* to incur such liability. In the case supposed the trust involves such liabilities, and the trustee, whilst he remains such, cannot get rid of them. He is subject to them as legal owner; but in equity they fall on the equitable owner unless there are good reasons why they should not.

The plaintiff was the registered holder of fifty shares in a banking company formed and registered with limited liability under the Companies Act, 1862. The shares were not fully paid up when it went into liquidation. Calls were made on the contributories, of whom the plaintiff was one. The question arose whether the plaintiff was entitled to be indemnified by the defendant, who was the beneficial owner of those shares. The shares had been placed in the plaintiff's name in April, 1891, by his then employers, who were share-brokers, and the plaintiff never had any beneficial interest in them. By divers acts the defendant became the sole beneficial owner of the shares in October, 1892, the legal title to

which was vested in the plaintiff with full knowledge of the fact that they were registered in his name as trustee for their original purchasers and their assigns whoever they might be.

HELD—that nothing more was required to create the relation of trustee and *cestui que trust* between the plaintiff and the defendant from the moment the defendant accepted the beneficial ownership of the shares, and that the plaintiff was entitled to be indemnified by the defendant against the calls made.

*Castellan v. Hobson* ((1870) L. R. 10 Eq. 47; 39 L. J. Ch. 490; 18 W. R. 731; 22 L. T. (N.S.) 575—James, V.-C.) and *James v. May* ((1873) L. R. 6 H. L. 328; 42 L. J. Ch. 802; 29 L. T. (N.S.) 217—H. L. (E.)) applied.

HARDOON v. BELILIOS, [1901] A. C. 118; 70 [L. J. P. C. 9; 49 W. R. 209; 83 L. T. 573; 17 T. L. R. 126—P. C.]

**27. Trustee carrying on Testator's Business—Tort by Trustee—Damages—Indemnity—Claim to Indemnity out of the Testator's Estate by Person recovering Damages against the Trustee.]**—If a trustee, in the course of the ordinary management of his testator's estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably, is entitled to be indemnified out of his testator's estate. When once a trustee is entitled to be thus indemnified out of the trust estate, and the third person has recovered judgment against the trustee, he may have the benefit of this right to indemnity, and go direct against the trust estate or the assets, as the case may be, just as on ordinary creditor of a business carried on by a trustee or executor is allowed to do, instead of going through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate.

*Bennett v. Wyndham* ((1862) 4 D. F. & J. 259) followed.

IN RE RAYBOULD; RAYBOULD v. TURNER [1900] 1 Ch. 199; 69 L. J. Ch. 248; 48 W. R. 301; 82 L. T. 46—Byrne, J.]

**28. Variation of Trusts—Alteration of Trusts for Benefit of Infants—Jurisdiction of Court to Approve.]**—There is no absolute rule that the nature of an infant's estate cannot be changed. The Court may in general order trustees to deal with trust property in whatever mode it may consider to be for the benefit of *cestuis que trust* who are infants or under disabilities.

After the death of the last of certain annuitants, trust property was to be divided amongst such members of a class as might then be alive. It was proposed to put an end to the trust, so that all members of the class then alive should take vested, instead of contingent, interests, provision being also made for the annuities. All persons interested agreed to the scheme, but there were two settlements under which unborn infants might take an interest in the trust funds

**In General—Continued.**

**HELD**—that the Court had jurisdiction to approve the scheme on behalf of the infants.

*Peto v. Gardner* ((1843) 2 Y. & C. 312, 60 R. R. 165) and *Day v. Day* ((1845) 9 Jur. 785), decisions of V.-C. Knight Bruce, not followed.

**IN RE WELLS; BOYER v. MACLEAN**, [1903] 1 Ch. 848; 72 L. J. Ch. 513; 51 W. R. 521, 88 L. T. 355—Farwell, J.

**II. ACCOUNTS.**

**29. Acting Trustee also a Beneficiary—Overpayments on account of Income made by him to other Beneficiaries—Death of Acting Trustee—Adjustment.**—H. was the acting trustee under a will, and he and his two brothers were the beneficiaries. On H.'s death it appeared that for some years in distributing the income of the trust property he had overpaid his brothers to the amount of £180.

**HELD**—that as H. was responsible for the mistake, his representatives were not entitled to recover this sum from the other brothers, nor to have their income from the trust funds impounded till the shares were equalised.

**IN RE HORNE; WILSON v. COX-SINGLAIR**, [1905] 1 Ch. 76; 74 L. J. Ch. 25; 53 W. R. 317; 92 L. T. 263—Warrington, J.

**30. Administration Action—Carrying back account beyond six years from Issue of Writ—Breach of Trust—Statutes of Limitations—Form of Order—Trustee Act, 1888** (51 & 52 Vict. c. 59), s. 8.]—Form of order for account by trustees for a period extending beyond six years from the commencement of action in cases where sect. 8 of the Trustee Act, 1888, applies.

Whether the order should be confined to an inquiry as to what moneys the trustees had in their hands at the date six years before the issue of the writ, and to an account from such date of all moneys subsequently received by the trustees, *quære*.

**IN RE DAVIES; ELLIS v. ROBERTS**, [1898] 2 Ch. 142; 67 L. J. Ch. 507; 79 L. T. 344—Kekewich, J.

**31. Delay in Accounting by Managing Trustee—Action against both Trustees in consequence—Costs of Action—Co-Trustee's Right to be Indemnified.**—A solicitor trustee who managed the trust matters was guilty of unreasonable delay in accounting to the beneficiary; the latter in consequence brought an action against both trustees. Accounts were then delivered, and everything found to be in order.

**HELD**—that the managing trustee must indemnify his co-trustee against the costs of the action.

*Lockhart v. Reilly* ((1856) 25 L. J. Ch. 697) applied.

**IN RE LINSLEY; CATTLEY v. WEST**, [1904] 2 Ch. 785; 73 L. J. Ch. 841; 53 W. R. 172—Warrington, J.

**32. Liability of Trustees to Account—Trustees Directors in Right of Trust Holding—Remune-**

**ration—Accounting for—Capital or Income.**—Where trustees are appointed directors of a company in virtue of the shares therein held by them as trustees, they must (in the absence of a special provision) account for the remuneration received by them as directors.

Such remuneration is to be treated as capital and an accretion to the shares of the remaindermen.

*Noble v. Cass* ((1827) 2 Sim. 343) distinguished.

**IN RE FRANCIS; BARRETT v. FISHER**, (1905) 74 [L. J. Ch. 198; 92 L. T. 77—Kekewich, J.

**33. Liability of Trustee to Account—Beneficiaries Living with Trustee—Maintained by Trustee—Verbal Arrangement.**—On the 24th April, 1875, F. M. married Mrs. T, a widow with four children, two sons and two daughters. Mrs. M (formerly Mrs. T.) was possessed of property producing an income of between £2,000 and £3,000 per annum. She died in July, 1888, leaving a will under which F. M. was the sole executor and trustee. By her will Mrs. M gave the residue of her estate upon trust in equal fourth shares, one being for each of the three younger children of her first marriage (namely, E. and W., the daughters, and C, one of the sons), and the other fourth for F. M. for life, with remainder to H. F. M., the only child of the marriage of F. M. with the testatrix. At the time of the death of the testatrix her daughters E and W. were of the ages of twenty-six and twenty-four respectively. The testatrix contemplated that E. and W. should after her death continue to reside with F. M. and she was known to have expressed a wish to that effect E. and W. did, in fact, continue to reside with F. M.—E. until her marriage in July, 1899, and W. until F. M. himself married again in May, 1901.

On the 7th of May, 1904, an action was instituted by E. and W. against F. M., asking for an account of the income to which they were entitled under the will of the testatrix from the date of the testatrix's death. F. M. deposed that shortly after the testatrix's death he made a verbal arrangement with E. and W. that in consideration of their contributing or permitting him to retain the whole of the income of their shares of the trust estate, he should bear the cost of their maintenance as members of his household, and pay or provide the money for the payment of their personal expenditure, including any cash that they might require.

Joyce, J., held (93 L. T. 72) that (1) under the circumstances the alleged arrangement could not be held binding upon E. and W., and that an account must be taken of the income of the fourth shares of E. and W. from the time of the death of the testatrix; but that (2), *per contra*, there must be an account of the moneys provided by F. M. that were received by or expended by E. and W. for their own benefit, and an inquiry as to what sums would be reasonable and proper to be allowed to F. M. by E. and W. out of their incomes in respect of their residence with or maintenance by F. M. from the time of the testatrix's death.

**Accounts—Continued.**

On the plaintiff's appeal against the second ruling:

**HELD**—that the defendant had not discharged the *onus* of showing that he had made E. and W. to understand that they were to pay him for their maintenance, and that the appeal must be allowed.

IN RE MOULTON; GRAHAME *v.* MOULTON, (1906)  
[94 L. T. 454; 22 T. L. R. 380—C. A.]

**34. Mortgage by Trustee of Trust Estate jointly with Own—Apportionment.**—A trustee who wrongfully raises money by mortgaging the trust estate jointly with own in proportion to their respective values, must account to the trust estate for the sum received by him in like proportion.

ROCHEFOUCAULD *v.* BOUSTEAD, [1898] 1 Ch.  
[550; 67 L. J. Ch. 427—C. A.]

**35. Trustee of Real Estate Paying a Voluntary School Rate—"Fair and Reasonable."**—A payment by a trustee of a mere voluntary subscription cannot be allowed in his accounts. But he may justify the payment of a voluntary school rate on the ground that a board school would entail a rate much in excess of the subscription, and can only be averted by maintaining a voluntary school.

HOW *v.* EARL WINTERTON, (1903) 51 W. R.  
[262—Kekewich, J.]

**III. APPOINTMENT OF TRUSTEES.**

**36. Absence Abroad—Temporary Return—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10, sub-s. 1.**—The plaintiff and Mrs. W. were the trustees of a will. The plaintiff was out of the United Kingdom for more than twelve months prior to 1st June, 1900, the date of the deed whereby Mrs. W. purported to appoint someone else in his place, with the exception of one week in November, 1899, during which he attended at the office of the trustees' solicitors and transacted part of the business of the trust.

**HELD**—that the power of appointing new trustees did not arise, and that the plaintiff and Mrs. W. were the trustees of the will.

IN RE WALKER, SUMMERS *v.* BARROW, [1901]  
[1 Ch. 259; 70 L. J. Ch. 229; 49 W. R. 167—  
Farwell, J.]

**37. Appointment by Court—Judicial Trustee.**—By the express terms of the Judicial Trustee Act, 1896, it is entirely in the discretion of the Court whether a judicial trustee shall be appointed or not; in the absence of misconduct on the part of a sole executrix the Court refused to appoint a judicial trustee on the application of the residuary legatee against the wish of the tenant for life and sole executrix, but remitted the summons to chambers to appoint an ordinary trustee under the Trustee Act, 1893, to act with the executrix, such trustee to be nominated by her.

IN RE RATCLIFF, [1898] 2 Ch. 352; 67 L. J. Ch.  
[562; 78 L. T. 834—Kekewich, J.]

**38. Appointment of an Unmarried Woman as Trustee.**—An unmarried lady will be appointed trustee if the Court is satisfied that she is capable of acting in the trust, although men who are admittedly unexceptionable have consented to act.

IN RE DICKENSON, [1902] W. N. 104—Farwell, J.

**39. Donee of Power appointing himself—Trustee Act, 1893 (56 & 57 Vict. c. 53) s. 10 (1).**—A person appointing new trustees under the statutory powers contained in sect. 10 (1) of the Trustee Act, 1893, cannot appoint himself either alone or jointly with others.

Where, however, such an appointment had been made, the Court in the exercise of its powers itself appointed the same persons to be trustees.

Montefiore *v.* Guedalla ([1903] 2 Ch. 723; 73 L. J. Ch. 13; 52 W. R. 151; 89 L. T. 472—Buckley, J., *infra*) distinguished and discussed.

IN RE SAMPSON, SAMPSON *v.* SAMPSON, [1906]  
[1 Ch. 435; 75 L. J. Ch. 302; 54 W. R. 342;  
94 L. T. 241—Kekewich, J.]

**40. Donee of Power appointing himself—Validity.**—There is no rule (as might appear from the headnote to *In re Skeat's Settlement* ([1889] 42 Ch. D. 522; 58 L. J. Ch. 656; 37 W. R. 778; 61 L. T. 500—Kay, J.), that a donee of a power to appoint new trustees cannot appoint himself.

The Court allowed the executors of a last surviving trustee to appoint one of their own number and two other persons as new trustees.

MONTEFIORE *v.* GUEDALLA [1903] 2 Ch. 723;  
[73 L. J. Ch. 13; 52 W. R. 151; 89 L. T. 472  
—Buckley, J.]

**41. Executors—Constructive Trustees—Power of Sale.**—A testatrix appointed executors with power to apply income for maintenance of daughters and an ultimate power of sale.

In 1873 an Order of Court appointed new "trustees," the executors having died.

**HELD**—that such new trustees had all the powers of the original executors, and could sell without the concurrence of the beneficiaries.

IN RE PERROTT AND KING'S CONTRACT, (1904)  
[90 L. T. 156—Eady, J.]

**42. Judicial Trustee—Appointment of Successor—Unfitness of Person Nominated—Jurisdiction of Court—Judicial Trustee Act, 1896, (59 & 60 Vict. c. 35), s. 1, sub-ss. 1, 3—Judicial Trustee Rules, 1897, r. 23 (1).**—An application was made to the Court for the appointment of a judicial trustee in succession to a retiring judicial trustee. The Court was not satisfied of the fitness of the person nominated by the applicant.

**HELD**—that when another fit person was suggested by some of the parties, the Court was not bound to appoint the official trustee under sub-sect. 3 of sect. 1 of the Judicial Trustee Act, 1896.



**Appointment of Trustees—Continued.**

DOUGLAS v. BOLAM, [1900] 2 Ch. 749; 83 L. T. [448; 70 L. J. Ch. 1; 49 W. R. 163; 17 T. L. R. 1—C. A.]

**43. Management of Land during Infancy—Infant absolutely entitled by Will—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (1).—**Section 42, sub-sect. 1 of the Conveyancing and Law of Property Act, 1881, enabling the Court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking absolutely by will.

IN RE BRADSHAW, [1904] 1 Ir. R. 18—M. R.

**44. Management of Land during Infancy—Infant taking by Descent—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42.—**The provisions of sect. 42 of the Conveyancing Act, 1881, enabling the Court to appoint trustees on the application of the next friend of an infant, who is beneficially entitled to the possession of any land, include the case of an infant taking by descent.

IN RE GLOVER, [1899] 1 Ir. R. 337—M. R.

**45. Power to Appoint—Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20).—**By a marriage settlement two trustees were appointed, and it was provided that if either of the trustees should die or be abroad, or desire to be discharged, or refuse or become incapable to act, then and in every such case it should be lawful for the husband and wife, or the survivor of them, to appoint a "new trustee."

HELD—that, in view of the Bodies Corporate (Joint Tenancy) Act, 1899, upon the death of one of the trustees a limited company could be appointed under the power as a trustee jointly with the surviving trustee.

IN RE THOMPSON'S SETTLEMENT, THOMPSON v. ALEXANDER, [1905] 1 Ch. 229, 74 L. J. Ch. 133; 91 L. T. 835; 21 T. L. R. 86—Eady, J.

**46. Power given to "My said Trustees"—Whether Power Personal or Annexed to Office.—**Every power given to trustees which enables them to deal with or affect the trust property, is *prima facie* given to them as an incident of their office, and passes with the office to its holders for the time being; and the mere fact that the power is one requiring the exercise of wide personal discretion is not in itself sufficient to exclude such presumption.

Ruling of Sir W. Grant, M. R., in *Cole v. Wade* ((1807) 16 Ves. 27; 10 R. R. 129) considered in the light of the decision of *Crawford v. Forshaw* ((1891) 2 Ch. 261; 60 L. J. Ch. 683; 39 W. R. 484; 65 L. T. 32—C. A.)

A testator appointed his wife M., his brother C. and his friend R. executors and trustees of his will; he gave all his estate to "my said trustees" upon trust for his wife for life "with full power to my said trustees" to expend capital for the benefit of his wife.

HELD—that (although C. was, as a reversioner under the will, interested in preserving the capital), the power ought not to be regarded as personal to the original trustees, but could be exercised by the trustees for the time being.

IN RE SMITH, EASTICK v. SMITH, [1904] 1 Ch. [139; 73 L. J. Ch. 74; 52 W. R. 104; 89 L. T. 604; 20 T. L. R. 66—Farwell, J.]

**47. Retirement—Discharge—Appointing new Trustee in his place—Practice—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25.—**Either from want of jurisdiction or from refusal to exercise it, the Court did not in fact discharge trustees under the Trustee Act, 1850, without appointing new trustees in their place; and the same practice obtains under the Trustee Act, 1893.

In *re Aston* ((1883) 23 Ch. D. 217; 31 W. R. 801; 48 L. T. 195—C. A.) applied.

In an action to administer a trust the Court always had, and still possesses, inherent jurisdiction to discharge a trustee without appointing a new trustee in his place.

*Courtney v. Courtney* ((1846) 3 J. & Lat. 519, 533) followed.

IN RE CHETWYND'S SETTLEMENT, SCARISBRICK v. NEVINSON, [1902] 1 Ch. 692; 71 L. J. Ch. 352; 50 W. R. 361; 86 L. T. 216; 18 T. L. R. 348—Farwell, J.

**48. Sole surviving Trustee a Lunatic not so found—Jurisdiction to appoint New Trustee—Vesting Order—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25, 41—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 143.—**Where the sole surviving trustee of a settlement is a person of unsound mind not so found, and is within the jurisdiction, the Chancery Division of the High Court has, under the Trustee Act, 1893, jurisdiction to appoint new trustees, but has no jurisdiction to make a vesting order.

IN RE M., [1899] 1 Ch. 79, 68 L. J. Ch. 86; 47 [W. R. 267; 79 L. T. 459; 15 T. L. R. 54—Stirling, J.]

**49. Statutory Powers—Existing Trustees—Vesting Order.—**The Court has jurisdiction to make a vesting order under sects. 26 and 35 of the Trustees Act, 1893, where the trustees in whom the property is to be vested have been already appointed.

IN RE KENNY'S TRUSTS, [1906] 1 Ir. R. 531—M. R.

**IV. BREACH OF TRUST.**

See SECT. VII. INVESTMENTS.

And see BANKRUPTCY, Nos. 70, 101, 102.

**50. Acting "honestly and reasonably"—"Fairly to be excused"—Relief from Liability—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3 (1).—**In applying sect. 3 of the Judicial Trustees Act, 1896, regard ought to be had to the nature of the will, or other instrument creating the trust, itself, and the difficulties in which the trustees may be placed by it. Where, therefore, the trustees and executors of a will, in assumed compliance with a direction therein

**Breach of Trust—Continued.**

contained to maintain the testator's estate in the like mode of investment as the same should be at his decease, until the happening of a certain event, neglected for about eighteen months to call in a debt of £166 due upon a promissory note, the estate in consequence sustaining a loss.

**HELD**—that, it was a case to which the section was applicable, and that the trustees and executors, having acted honestly and reasonably, ought fairly to be excused for the breach of trust, and ought not to be made liable for the loss incurred thereby, the smallness of the amount of the debt exonerating them from liability for omitting to obtain the directions of the Court.

**IN RE GRINDEY; CLEWS v. GRINDEY**, [1898] 2 [Ch 593; 67 L. J. Ch. 624; 79 L. T. 105; 14 T. L. R. 555; 47 W. R. 53—C. A.]

**51. Acting Reasonably—Fraud by Trustee's Solicitors' Clerk—Relief of Trustee—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.**—A lady succeeded to the office of trustee through the death of her husband. She lived at some distance from London, and employed her London solicitors as her agents. The solicitors ascertained what sums were to be paid and they, having been entrusted with a cheque-book, drew the cheques and then sent them to this lady for signature. These cheques were always signed to order. The lady signed the cheques, and the solicitors sent on the cheques to the persons entitled. A clerk of the solicitors told the lady a plausible story, intending to, and did, deceive her into signing and initialling three cheques, thus enabling the clerk to obtain payment for the cheques and to decamp with the proceeds.

**HELD**—that the lady had not acted otherwise than reasonably, and she was not bound to make good the loss to the trust estate merely because her solicitors' clerk had defrauded the trust; and that she was entitled to relief.

**IN RE SMITH; SMITH v. THOMPSON** (1902) 71 [L. J. Ch. 411; 86 L. T. 401; 18 T. L. R. 432—Kekewich, J.]

**52. Action against Trustees—Judgment declaring Defendants Liable for Breach of Trust—Death of one Defendant—Order to Continue Proceedings—Application of Co-Defendant Seeking Contribution**—In an action against trustees for a breach of trust, one of the defendants paid into Court a sum for which the defendants were subsequently declared liable. Some years after the final judgment in the action, a co-defendant, who at the time of the judgment had no means, died entitled, as alleged, to a policy of insurance which then became payable. On the application of the first-mentioned defendant, who desired to seek contribution from the estate of the deceased, the Court made an order for continuing the proceedings against the personal representative of the latter.

**COLLINGS v. WADE**, [1903] 1 Ir. R. 89—V.-C.

**53. Advancement out of Presumptive Share—Share Vested—Advance to Pay Debt of Husband of Child—Trustee Husband's Creditor.**—E. D. died on the 20th April, 1878, and by his will he directed his trustees to apply towards the education, or maintenance, or otherwise for the benefit of each of his children entitled under the trusts of the will to a share not absolutely vested, the annual income of such share; and the will further declared that it should be lawful for the trustees to apply in or towards the advancement in life of each child a sum not exceeding £500 of her presumptive share, such sum or lesser sum to be paid if the trustees should think fit, notwithstanding that the child's share was settled as thereafter mentioned, and the trustees were to be the sole judges of the advisability of such payment, and of what the term "advancement in life" might signify. Subject to that, after the shares became vested by the children coming of age, the income was to be paid to the children for life, and after their death to their children as they should appoint, and if there were no children, to go as they should appoint, and in default to their next of kin.

The testator left two children: F. J., who is still living and unmarried, and who came of age in 1880; and A. M., who came of age in 1881, and in 1885 married D. W. M., and of that marriage there are six children, who are the present plaintiffs.

In 1887 the trustees of the will were the present defendant F. and one C. M. was indebted to F., who was pressing him for payment, and the money was advanced to A. M. M. the wife and F. J. D. the sister-in-law for the purpose of being used by the husband to repay his debt to F.

The defendant C. became a trustee after the alleged breach of trust.

**HELD**—that under the will there was no power to make any advance at all at the time this advance was made, for it was to be made out of the presumptive share, and not when the share was vested; and that an advance for the use of the husband in his business could not be warranted under the will, and that certainly it was not a proper or justifiable exercise of the power of advancement, it being understood that the money was to be used to repay the debt to F.

Further, that the money advanced to A. M. M. must be replaced, but with regard to that advanced to F. J. D., the present plaintiffs having only a possibility of an interest in that money, no order could be made.

**MOLYNEUX v. FLETCHER** [1898] 1 Q. B. 648; [67 L. J. Q. B. 392; 78 L. T. 111; 14 T. L. R. 211; 46 W. R. 576—Kennedy, J.]

**54. Annuity—Failure to deduct Income Tax—Liability—Trustee Act, 1888 (51 & 52 Vict. c. 65), s. 8.**—A testator by his will bequeathed the residue of his estate to trustees upon trust for conversion and out of the income to pay certain annuities to his widow, three daughters, and a daughter-in-law, and to accumulate the surplus for 21 years from his death, the accumulations to be added to the capital. The capital was to be divided after the death of the last annuitant among the testator's grandchildren.

**Breach of Trust—Continued.**

One of the annuitants was a trustee of the will. The trustees paid the annuities without deduction of income-tax, the income-tax on the whole income of the fund being paid before the income came to the hands of the trustees.

**HELD**—that the trustees had committed a breach of trust in paying the annuities without deducting the income-tax, but as it was an innocent breach of trust they could, under sect. 8 of the Trustee Act, 1888, set up the Statute of Limitations as a bar to a claim for more than six years' arrears of payment, except in the case of the trustee annuitant who had had the benefit thereof.

**IN RE SHARP; RICKETTS v. RICKETTS**, [1906] 1 Ch. 793, 75 L. J. Ch. 458; 95 L. T. 522; 22 T. L. R. 368—Eady, J.

**55. Balances—Simple or Compound Interest—Rate of Interest.**—A testator by his will directed his estate to be realised and invested in the usual way, and to be held upon trust to pay the income to his wife, and then upon trust for certain of his children. There were clauses for maintenance and education, and directions to invest the residue of the income so as to accumulate at compound interest. After the death of the widow the maintenance and education were voluntarily undertaken by a friend, who, with a view to increasing their respective shares in the testator's estate, informed the trustees that the whole of the income might be re-invested by way of accumulation. The trustees neglected to accumulate. The contention was whether the trustees were liable for compound interest without there being any wilful default.

**HELD**—that it is a general rule that only simple interest is charged on the funds in the hands of trustees and executors. The principle upon which the Court proceeds is to charge them only with the interest which they have received, or which it is justly entitled to say they ought to have received, or which it is so fairly to be presumed that they did receive that they are estopped from saying they did not receive it. An improper investment must be treated as if it had not been made, or had been made for the benefit of the trustees out of their own moneys, and on that footing the charge of compound interest is to be made. The practice now is to charge interest at the rate of 3 per cent. instead of 4. The trustees were chargeable with compound interest at 3 per cent., with annual rests from one year after testator's death.

*Knott v. Cotte* ((1852) 16 Beav. 77) followed.

**IN RE BARCLAY, BARCLAY v. ANDREW**, [1899] 1 Ch. 674; 68 L. J. Ch. 383; 80 L. T. 702—Stirling, J.

**56. Defaulting Co-trustee—Liability of Inactive Co-trustee—Acting "honestly and reasonably"**—*Judicial Trustee Act*, 1896 (59 & 60 Vict. c. 35), s. 3.—P., the active trustee of the two trustees of the dissolution deed of a building society, who had been required to give an account of moneys received and expended by them, had absconded. Where the *cestui que*

*trust* asked, by summons, for the payment by the remaining trustee of the costs of the action which had ensued,

**HELD**—that S., the remaining trustee, had acted dishonestly—within the meaning of sect. 3 of the *Judicial Trustee Act*, 1896—in permitting his co-trustee to manage the affairs without check or inquiry, and was therefore liable to pay all the costs of the action.

**IN RE SECOND EAST DULWICH 745TH STARR—[BOWKETT BUILDING SOCIETY; MIALI v. PEARCE AND STREETER]**, (1899) 68 L. J. Ch. 196; 47 W. R. 408, 79 L. T. 726—Kekewich, J.

**57. Foreign Securities—One Trustee Abroad, the Others in England—Loss of Foreign Securities by Trustee Resident Abroad—Laches—Trustee Act**, 1888 (51 & 52 Vict. c. 59), s. 8.—A testator left his residuary estate to G. W. T. and others upon trust for his daughter A. H. T. for life, for her separate use, with remainder as she should appoint. G. W. T. survived his co-trustees, and died in 1879, having by his will appointed J. T. L. and W. H. S. executors thereof. W. H. S. resided in America and had the custody of certain American securities, part of the estate. He regularly paid the income thereof to A. H. A. (formerly A. H. T.), the tenant for life. New trustees were appointed in 1883. The tenant for life died in 1892, having by her will left her property to her husband, who survived her. W. H. S. was recognised as the American trustee, and when pressed to transfer the American securities to the new trustees in England he refused to do so. It was then discovered that he had recently made away with the securities and was insolvent. The new trustees and the widow of the tenant for life brought an action against J. T. L. and W. H. S. to render J. T. L. liable for the loss.

**HELD**—that sect. 8 of the *Trustee Act*, 1888, was a good defence as against the new trustees; that as to the widower he was guilty of such laches in not taking steps to obtain the transfer as debarred him from relief, because in such a case a delay for a shorter time than that prescribed by any Statute of Limitations may be sufficient, though in all cases regard should be had to the length of the delay and the nature of the acts done during the interval, and it should appear that there was sufficient knowledge of the facts constituting the title to relief.

**IN RE TAYLOR, ATKINSON v. LORD**, (1900) 81 [L. T. 812.]

**58. Fraud of One Trustee—Liability of Other—Purchase of Inscribed Stock by Broker Co-trustee—Acceptance of Half Commission—Liability for Loss of Trust Property through Fraud of Co-trustee—Trustee Act**, 1893 (56 & 57 Vict. c. 53), s. 24—*Judicial Trustees Act*, 1896 (59 & 60 Vict. c. 35), s. 3.—A trustee is not liable for the fraud of a broker co-trustee where the latter having been instructed to buy inscribed stock, the former has done all that could be expected of an ordinary prudent man to see that the investment has in fact been made.

**Breach of Trust—Continued.**

It is not the usual business practice for a purchaser of inscribed stock to attend personally at the Bank to accept the transfer: a trustee is not, therefore, liable because his omission to do so allows his broker co-trustee to commit a fraud.

The fact that a share of the commission has been accepted from the broker co-trustee, who is entitled to remuneration under the terms of the trust deed, does not affect his liability.

**SHEPHERD v. HARRIS AND OTHERS.** [1905] 2 Ch. 310; 74 L. J. Ch. 574; 53 W. R. 570; 93 L. T. 45; 21 T. L. R. 597—Farwell, J.

**59. Investment—Trustee Improperly Investing Trust Money in Business—Option of cestui que trust to have Interest at 5 per cent.**—If an executor or trustee makes profit by an improper dealing with the assets or the trust fund that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent., notwithstanding that 5 per cent. is not the current mercantile rate of interest.

Rule laid down by James, L.J., in *Vyse v. Foster* ((1872) L. R. 8 Ch. 809, 329; 42 L. J. Ch. 245, 248; 27 L. T. (N.S.) 774; 21 W. R. 207) followed.

**IN RE DAVIS; DAVIS v. DAVIS.** [1902] 2 Ch. 314; 71 L. J. Ch. 539; 51 W. R. 8; 86 L. T. 523—Farwell, J.

**60. Leaving Money in Hands of Law Agent for Six Months uninvested—Bankruptcy of Law Agent—Loss of Part of Fund—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17, sub-s. 3.**—Three gentlemen were trustees of a fund set apart to answer a life annuity and divisible on the death of the annuitant among the persons entitled in remainder. The sum of £3,700, part of this fund, was invested on a heritable bond. On July 15th, 1887, the bond was paid off. The trustees allowed their law agent to receive the money and to retain it in his hands uninvested for rather over six months. At the end of that time the law agent became bankrupt, and the greater part of the fund was lost. The surviving trustee and the representatives of the other two, who were dead, contended that the trustees were not responsible for the loss.

**HELD** (Lord Morris dissenting)—that the trustees were guilty of a plain and positive breach of trust, and were liable to replace the money lost by reason of their gross neglect, that the immunity clause did not afford the trustees any protection, and that the money with interest at 3 per cent. must be paid by the trustees or their representatives to the judicial factor.

Decision of First Division of Court of Session ((1898), 25 R. 697) reversed.

**WYMAN v. PATERSON.** [1900] A. C. 271; 69 L. J. [P. C. 32; 83 L. T. 473; 16 T. L. R. 270—P. C.

**61. Leaving Money in Hands of Solicitor to the Trust—Not Employing Stockbrokers—Fraud of Solicitor—Relief—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3**—In 1877 a firm of solicitors commenced to act as solicitors for the trustee of a settlement, and continued so to act in all trust matters down to 1899. C. H. was a partner in the firm throughout, and was the partner particularly concerned, having the personal conduct of this particular trust. The trustees, without employing a broker, allowed moneys for investment, arising from the sale of trust funds, to remain in the hands of C. H., who used it for his own purposes. No complaint was made of non-receipt of income by the beneficiaries, but the trustees never took any steps to ascertain that the stock supposed to have been purchased had got into their names, nor did they open a trust account to be under their control. They accepted C. H.'s statements without inquiry or investigation.

**HELD**—that the trustees were not justified in entrusting the investment to their solicitor and allowing him to get control of the trust money for that purpose; that in the present case there was not any moral necessity or sufficient practical reason from the usage of mankind or otherwise to justify them in so acting; that the trustees were liable as for breaches of trust; and that they could not be relieved under the provisions of sect. 3 of the Judicial Trustees Act, 1896, for though they had acted honestly, they had not acted reasonably.

**WILLIAMS v. BYRON.** [1902] 18 T. L. R. 172—[Byrne, J.]

**62. Liability—Concurrence of cestui que trust—Fund Replaced by Trustee—Income of such Fund.**—The Trustee Acts of 1888 and 1893 enlarge and do not curtail the jurisdiction of the Court as to indemnifying and relieving trustees.

Independently of those Acts a beneficiary of full capacity who with full knowledge consents either in writing or by parol to a breach of trust has no claim against the trustee for any loss thereby occasioned to that beneficiary's interest in the trust funds.

In 1885 a trustee, with the consent of the tenant for life, handed over the trust funds to the latter's wife, who spent them. In 1891 the trustee was ordered at the suit of the remaindermen to replace the funds by means of insurances on his life, &c.: at the time of his death in 1902 the whole fund was replaced with a surplus representing income since 1891.

**HELD**—that, as the tenant for life had concurred in the breach of trust, he could not require the trustee to make good his life interest, and that the trustee's representative was entitled to this surplus as against the life tenant's trustee in bankruptcy.

**FLETCHER v. COLLIS.** [1905] 2 Ch. 24; 74 L. J. [Ch. 502; 53 W. R. 516; 92 L. T. 749—C. A.]

**63. Liability of Retired Trustees—Liability for Wrong Investment—Trustees Retired from a Trust and Appointed or Concurred in the Appointment of New Trustees—The New Trustees**

**Breach of Trust—Continued.**

*Committed a Breach of Trust.*—In an action by an infant *cestui que trust* it was sought to make the retiring trustees liable for the breach committed by the new trustees.

**HELD**—that the retiring trustees had no reasonable ground for believing, and did not believe, that the trust would be otherwise than secure in the hands of their successors, that they had never contemplated any breach of trust, and certainly not that actually committed, and that they were, therefore, not liable.

The retiring trustees had themselves committed a breach of trust by investing in an unauthorised security. They claimed to be entitled to a return of the security on making good the loss to the trust estate.

**HELD**—that, as against the infant *cestui que trust*, they were not entitled to a return of the security.

**HEAD v. GOULD**, [1898] 2 Ch 250; 67 L. J. [Ch. 480; 78 L. T. 739; 14 T. L. R. 444; 46 W. R. 597—Kekewich, J.

**64. Payment of Part of Claim by One Trustee—Insolvency of Co-Trustee—Right to prove for Full Amount against Estate of Insolvent Trustee.**—Where a sum of money is found due by the certificate of a master, made under an order of the Court, from trustees in respect of a breach of trust, and one trustee has subsequently, under a compromise sanctioned by the Court, paid part of the amount due in full satisfaction of his own liability, and another trustee dies insolvent, the *cestui que trust* can prove against the estate of the insolvent trustee for the full amount found due by the certificate, without giving credit for sum received under the compromise.

**EDWARDS v. HOOD-BARRS**, [1905] 1 Ch. 20; 74 [L. J. Ch. 167; 91 L. T. 766; 21 T. L. R. 89—Kekewich, J.

**65. Power to lend Firm Money—Dissolution of Partnership—Discharge—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 17, sub-s. 3.**—A power to lend to a firm consisting of certain individuals does not authorise a loan to a firm differently constituted, whether including more individuals or less.

A testator, a retired partner in a firm, by a will nominated his wife and two of the three remaining partners in the firm as his trustees, and he "specially authorised" his trustees to allow his share of the capital at his death to remain as a loan to the firm. The wife died. One of the three partners—the appellant—retired under an agreement by which the two continuing partners paid him a sum of £9,000 for his interest in the firm, and took over all liabilities and released him of all debts. They subsequently discharged him and the old firm of the debt due to the trust. Soon after the new firm became insolvent. New trustees of the trust were appointed, and as creditors on the new firm they received a dividend out of the new firm's assets.

**HELD**—that the lending of the testator's share of the capital to the new firm was not within any power given by the will, and as it was not a proper investment, it was a breach of trust; that the discharge which was gratuitous was a fraudulent breach of trust; that the appellant was liable to make good the loss to the trust estate.

Decision of the First Division of the Court of Session ((1900) 37 S. L. R. 537) affirmed.

**SMITH v. PATRICK**, [1901] A. C. 282; 70 L. J. [P. C. 19; 84 L. T. 740; 17 T. L. R. 477—H. L. (Sc.).

**66. Principal Debtor—Surety—Indemnities—Release of Debt.**—Where the life tenant (a married woman) of the income from investments of a settled fund of £30,000, having a power of appointment by will over the capital and income of the same, requested the trustees to sell so much as would realise the sum of £10,000, which she was desirous of handing to her husband, himself one of the trustees: and where, all parties understanding that the said sale and payment were breaches of trust, the other trustee only consented on the life tenant and the co-trustee agreeing to enter into a covenant to indemnify him against all claims; and where the said sum was not repaid to the life tenant prior to her death, nor to her estate since her death upon the demand of the other trustee—

**HELD**—that the husband of the life tenant was the principal debtor to his wife's estate, and that she was surety.

**HELD FURTHER**—that, upon the true construction of the will of the life tenant, the £10,000 passed to the husband.

**IN RE BAIRD; BAIRD v. STAVELEY HILL**, (1899) [47 W. R. 277—Kekewich, J.

**67. Sale by Trustee to Himself—Consent of Beneficiaries—Executory Sale to a Third Party—Trustee taking over Third Party's Contract.**—A trustee for the sale of property cannot himself be the purchaser of it.

If, notwithstanding the form of the conveyance, the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the *cestui que trusts*, it ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui que trusts* were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length; that the *cestui que trusts* had the fullest information upon all material facts; and that having this information, they agreed to and adopted what was done.

If a contract with a third person to purchase is executory only, the trustee who is vendor has power either to enforce or rescind or alter the contract, but cannot step into the third person's place and take over the third person's contract for his own benefit.

**Parker v. McKenna** ((1874), L. R. 10 Ch 96; 44 L. J. Ch. 425; 23 W. R. 271; 31 L. T. N. S. 739) followed.

**Breach of Trust—Continued.**

**WILLIAMS v. SCOTT**, [1900] A. C. 499; 69 L. J. [P. C. 77; 49 W. R. 33; 82 L. T. 727, 16 T. L. R. 450—P. C.]

**68. Sale of Leaseholds—No Power of Sale—Liability of Trustees to make good Income—Relief—Judicial Trustee Act, 1896** (59 & 60 Vict. c. 35), s. 3.]—Where trustees of a settlement which did not contain a power of sale had, in the *bonâ fide* belief that they possessed such a power, advantageously sold leaseholds which formed part of the trust estate,

**HELD**—that under sect. 3 of the Judicial Trustee Act, 1896, they were entitled to be relieved from personal liability to make good the diminution of income sustained by the tenant for life in consequence of the sale.

Decision of Kekewich, J. ([1898] 2 Ch. 521; 67 L. J. Ch. 649; 46 W. R. 682; 79 L. T. 109), affirmed.

**PERRINS v. BELLAMY**, [1899] 1 Ch. 797; 68 L. J. [Ch. 397; 47 W. R. 417; 80 L. T. 478—C. A.]

**69. Trustee lending Money to his Solicitor without Security with Notice of Trust—Summary Order on Solicitor to bring the Money into Court.**]—The defendant being a clerk in the employment of M., a solicitor, in 1895, received, as executor of a will of a testatrix, a small sum of money to which the plaintiffs were entitled. This money the defendant handed over to his master, M., who had acted as his solicitor in proving the will of the testatrix, and who took it, knowing it to be trust money, and retained it without giving any security. The money was called in. It was not forthcoming. The plaintiffs served M. with notice of motion for an order on him to bring the money into Court. M. made an affidavit that he would pay the money "in due course," but objected that the Court had no jurisdiction in an action to which he was not a party to make an order upon him.

**HELD**—that the Court had jurisdiction to make a summary order on M., its officer, to bring the money into Court within fourteen days.

**IN RE CARROLL; BRICE v. CARROLL**, [1902] 2 Ch. [175; 71 L. J. Ch. 595; 50 W. R. 650; 86 L. T. 862—Farwell, J.]

**70. Trustee Partner—Employing Assets in Business—Account of Profits—Right to Goodwill.**]—Under articles of partnership entered into in 1872, C. N. and his brothers, E. N. and G. N., with two other persons, became partners for a term of ten years for the carrying on of an already existing business, consisting of the manufacture and sale of isinglass, gelatine, and glue. Under the provisions of the articles as modified by a declaration of trust executed by the brothers N. in March 1877, the capital of any one of the brothers dying during the term was to remain in the business till the expiration of the term, and was then to be held by the survivors on trust to dispose of it as his will should direct. C. N. died in August, 1877, having by his will of the preceding March appointed E. N., G. N., and another executors,

and bequeathed to them his capital and shares of profits of the business. Until the expiration of the partnership term the shares of profits were to be divided between testator's children, with provisions for maintenance and accumulation, and thereafter the capital and shares of profits were to be held by the executors on trust to enter into such arrangements as they might think desirable for carrying on the business in partnership with such persons as they might think proper. The testator declared his ultimate object to be the introduction of one or more of his sons into the business, but made provision for the division of the profits accruing on his share among all his children. He left numerous children, most of whom were infants at his death, and on the determination of the partnership in 1882 his share, with accumulations, amounted to about £30,000. The two surviving brothers N. formed a new partnership with another person, and until 1887 employed the testator's share in the business, paying his children interest thereon at 10 per cent. The profits made were much larger. In 1887 the business was converted into a limited company, and the children were allotted 10 per cent. preference shares to the value of the £30,000 at par.

In an action by the children of C. N. against E. N. (G. N. having died) claiming a declaration that the defendant was bound to make good the profits made between 1882 and 1887 attributable to the share of C. N. employed in the business, and also claiming a share in the goodwill,

**HELD**—that the plaintiffs were not entitled to anything in respect of goodwill, and that, with regard to the former part of the claim, the case was not materially different from *Vyse v. Foster* (L. Rep. 7 H. L. 318; 31 L. T. Rep. 177), and that the plaintiffs were not entitled to more than the 10 per cent, which they had received.

**SMITH v. NELSON**, (1905) 92 L. T. 313—Joyce, J.

**71. Trustees and Executors—Ceasing to be Executors—Assumption of Executors having Performed their Duty—Account—Pleading Statute of Limitations—Proceeds of Trust Property "Still Retained by the Trustee"**—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8.]—In the case of a will of ordinary type, where the same persons are appointed executors and trustees, those persons some time or other cease to be executors and become trustees. In the strict sense they never cease to be executors. Having accepted probate, they are, during the rest of their lives, the legal representatives of the testator; but after a certain time they have no duties as executors to perform, and can no longer be said to be doing anything *virtute officii*. Under such a will, the ordinary duty of the executor is to pay the debts, funeral and testamentary expenses, and when that is done (if there are no legacies in the ordinary sense) he has done his duty and is *functus officio*.

A testator by his will bequeathed all his personal estate and effects to two trustees upon

**Breach of Trust—Continued.**

trust to sell, convert, and invest and set apart a sufficient portion thereof to produce an annuity to be paid to his wife for life, and as to the remainder upon trust to pay one equal fourth for one of the trustees, and as to one other equal fourth to pay the annual produce thereof to A. P. for life and after her decease in trust for her children at twenty-one or marriage, and as to one other equal fourth upon trust for the other trustee, and as to the remaining fourth upon trust for M. S. for life, and after her decease in trust for her children at twenty-one or marriage. The trustees were appointed executors of the will. M. S. was by a codicil also appointed a trustee and executrix of the will. The testator died in 1857. The widow died in 1873. One of the trustees died in 1891. A. P. died in 1892, leaving children. M. S. died a spinster in 1893, and the remaining trustee died in 1899. After the death of the widow the executors and trustees divided the fund set apart for the annuity, and paid away the settled share to the tenant for life, A. P. No fraud was alleged.

**HELD**—that as there was no obstacle to winding up the estate in a reasonable time, it must be assumed, upon the imperfect evidence, that the executors did their duty, and that long before 1892, and probably before the death of the widow, they had ceased to be executors in the sense of having anything to do and the fund was held by them as trustees; that that would not free them from any claim for duty, as they remained executors and might be sued as such; that in distributing the investments, it must be assumed that they acted under the express trusts of the will, and that they were not responsible for the share of the one-fourth which ought to have gone to A. P. for life, which admittedly was not forthcoming.

**HELD ALSO**—that the defendants being sued as the representatives of trustees and not as executors, the Real Property Limitation Act, 1874, was inapplicable, but they were entitled to the benefit of the Trustee Act, 1888, s. 8, sub-s. 1 (b); that the one-fourth was not "still retained by the trustee, or previously received by him and converted to his use" within the meaning of that section, and that any right of action by a child of A. P. was barred by the lapse of six years from the time when the right of action accrued—viz., when A. P. died in 1892.

**IN RE TIMMIS, NIXON v. SMITH**, [1902] 1 Ch. 176; [71 L. J. Ch. 118, 50 W. R. 164; 85 L. T. 672—Kekewich, J.

**72. Trust Money "Still Retained by the Trustee"—Allowing Co-trustee to Receive Trust Money—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8.**—H. A. T. and C. H. were appointed trustees in November, 1888, of a large sum of three per cent. consols, and this sum was shortly afterwards transferred into their names. In December, 1888, H. A. T. and C. H. sold the consols and paid over the proceeds to a firm of solicitors, of which C. H. was a member. The plaintiff attained the age of 21 years on December 11, 1894, and thereupon became absolutely

entitled to a third of the proceeds. The plaintiff determined to leave the money in the hands of the solicitors for investment. The solicitors, from December, 1894, until September, 1899, paid to the plaintiff various sums of money on account of income and capital. The amount remaining due to the plaintiff was £2,122 16s. 3d. H. A. T. died in September, 1898. The plaintiff only recently discovered that H. A. T. had been a trustee for him of the trust fund.

**HELD**—that H. A. T.'s negligence had led to the loss of the trust fund; that there was no moral charge against him, and it was not suggested that he had converted the money to his own use; and that H. A. T. had not "retained" the property at all within the meaning of sect. 8 of the Trustee Act, 1888, as he had parted with it and allowed C. H., a member of the firm of solicitors, to take it.

**IN RE TUFNELL; BYNG v. TUFNELL**, (1902) [18 T. L. R. 705—Kekewich, J.

**73. Use of Trust Funds—Capital Replaced—Excess of Interest Obtained by Breach—Excess Paid to Life Tenant—Whether to be Regarded as Capital.**—A trustee took money out of consols, and by an unauthorised use of it received and paid to the life tenant, 5 per cent. interest. He subsequently restored the capital and invested it in authorised securities.

**HELD**—that the remaindermen could not require that the excess of interest over what would have been produced by consols should be added to capital or accounted for.

*Stroud v. Gwyer*, (1860) 28 Beav. 130; 2 L. T. 400 followed.

*Re Hull*, (1870) 45 L. T. 126 distinguished.

**SLADE v. CHAINE**, (1907) 97 L. T. 192—[Kekewich, J.

**74. Contract to Convey Real Estate—Refusal to Execute Conveyance—Vesting Order.**—A. was entitled to certain lands in Ireland in fee simple; he was also entitled, as first heir of entail by Scotch law, to a sum of £30,000, the proceeds of a sale of settled land, of which his eldest son B. was next heir of entail. In 1892 by an agreement in writing A. agreed with B that in consideration of B. consenting to disentail the £30,000, and agreeing that out of that sum the debts of A. to the extent of £9,000 should be paid, that an annuity of £1,000 should be secured for the lives of A. and his wife and the survivor, that the remainder of a sum necessary to secure portions for younger children should be provided, and that the balance of the fund should be secured for B. A. further agreed to convey his freehold lands to trustees upon certain trusts with a power of sale. The terms of the agreement had all been carried out, except the conveyance of the lands, which A. refused to execute. An action was brought in the Court of Session in Edinburgh, in which a decree was obtained ordering him to execute the conveyance; but he refused to do so. On an application under sect. 26 of the Trustee Act, 1893, for an order vesting the lands in the trustees of the agreement,

**HELD**—that A. was a trustee within that section, and that a vesting order should be made.

**Breach of Trust—Continued.**

IN RE RUTHVEN'S TRUSTS, [1906] 1 Ir. R. 236—  
[C. A.]

**75. Graft—Tenants in Common New Lease—Fiduciary Relation.]**—When a lease held by tenants in common has expired one of such tenants in common is not necessarily debarred from obtaining a new lease to himself personally, if he does not abuse or take an inequitable advantage of his position, and if the lessor has power to give and intends to give it to him to the exclusion of the former co-owners.

But such a tenant in common cannot claim to hold a new lease for his own benefit if it is established that a fiduciary relation had been created by agreement or conduct between the tenants in common with reference to the old lease, or to an essential part of the subject-matter thereof; or that the lessee had obtained the new lease after representing to the lessor and causing him to believe and intend that the new lease was to be for the benefit of all the co-owners; or thirdly, that the new lease was obtained by the use of a right or rights which a Court of equity would recognise as having been attached to the common property—for example, a licence and goodwill attached to licensed premises.

HUNTER v. ALLEN, [1907] 1 Ir. R. 212—Barton J.

**V. CONSTRUCTIVE TRUST.**

**76. Husband of Life Tenant and Father of Remaindermen Purchasing Trust Property from Mortgage—Fiduciary Relationship.]**—By a will in 1879 a testator devised certain freehold houses to his daughter for her life with remainder to her children. The testator died in that year, the houses being then mortgaged, and in 1880 the daughter's husband, who in right of his wife was tenant for life in possession, purchased the houses from the mortgagee under the power of sale contained in the mortgage for the sum due on the mortgage, the interest being in arrear, and the houses were conveyed to him.

In making the purchase the husband was acting in the interests of his children and for the purpose of giving effect to the provisions of the will. The husband subsequently claimed to retain the houses as his own property.

HELD—that the husband was a trustee of the houses, subject to the life interest of his wife, for the children.

*Keach v. Sandford*, (1726) 2 Wh. & T. p. 693 applied.

GRIFFITH v. OWEN, [1907] 1 Ch. 195; 76 L. J. [Ch. 92] 95 L. T. 5, 23 T. L. R. 91—Parker, J.

**77. Intestate's Leaseholds—Renewal Refund to Administratrix—New Lease Granted to One of the Next-of-Kin.]**—A person obtaining in his own name a renewal of a lease is deemed to be a trustee of the renewed lease (in favour of the late lessee or his representatives), if he occupies a fiduciary position in the matter, e.g., if he is an executor, trustee, administrator, or agent, in which case the presumption is irrebuttable, or if in respect of the old lease he

occupied some other special position, whereby he owed a duty to other persons interested, in which case, however, there is only a rebuttable presumption of fact.

On the death of an intestate the landlord gave his administratrix notice to quit and refused to renew the term to her or any one representing the intestate's estate, saying that, if he let the premises again, he should offer them to the eldest son "as a matter of respect to him and his late father." Ultimately he let the premises to this son.

HELD—that the son was not a trustee of the lease for the benefit of the various next-of-kin.

Rule in *Keach v. Sandford* (2 Wh. & T. L. C.) discussed.

*Ex parte Grace* ((1799) 1 Bos. & P. 376) distinguished.

*Palmer v. Young* ((1684) 1 Vern. 276) explained on the facts.

IN RE BISS; BISS v. BISS, [1903] 2 Ch. 40; 72 [L. J. Ch. 473; 51 W. R. 504, 88 L. T. 403—  
C. A.]

**VI. DISTRIBUTION.**

**78. Appropriation of Assets before Period of Final Distribution—Complete Appropriation—Discretion of Trustees—Implied Powers of Trustees to appropriate Proper Investments to Answer Trust Legacies before the Period for Final Distribution.]**—A *bona fide* appropriation of securities by trustees to answer a trust legacy in favour of one of several residuary legatees, when final and complete, will not be disturbed.

In 1881 trustees of a will, who were not expressly authorised to make appropriations of securities in favour of their *cestuis que trust* beyond a certain amount, entered in their books of account certain stock, in excess of such amount, as allotted to answer a share of the residuary estate settled upon one of several residuary legatees and her children. Such legatee received the interest on the stock during her life, and one of her children assigned his share therein for value, and new trustees of the will were from time to time appointed. The stock in 1886 had materially increased in value.

HELD—that a final and complete appropriation had been made, and the legacy was represented by such stock.

IN RE NICKELS; NICKELS v. NICKELS, [1898] 1 [Ch. 630; 67 L. J. Ch. 406, 78 L. T. 379, 46 W. R. 422—Stirling, J.]

**79. Share Previously Assigned by Beneficiary—Assignee Claiming Payment—Trustees not Entitled to Deliver up of Assignment.]**—Trustees who are distributing a trust fund cannot require the assignee of a beneficiary's share to deliver to them his assignment and other title deeds as a condition of payment.

IN RE PALMER; LANCASHIRE AND YORKSHIRE PROFESSIONARY INTEREST SOCIETY v. BURKE, [1907] 1 Ch. 486; 76 L. J. Ch. 406, 96 L. T. 816—Eady, J.

**80. Charge on one Beneficiary's Share—No Notice to Trustees—Assignment of such Share**



**Distribution—Continued**

*Subject to the Charge—Assignee Solicitor to Trustees—Trustees not Investigating his Title—Constructive Notice of Prior Charge—Liability—Relief—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3 (1)*—Trustees were about to distribute their trust funds. Their solicitor told them that he was assignee of one beneficiary's share, and, without investigating his title, they paid the share to him. Had they done so, they would have seen that his assignment was subject to a prior charge in favour of one N. No notice of this charge had been given to the trustees: but their solicitor had acted in the transfer of it from N. to the present plaintiff.

**HELD**—that the trustees were liable to the plaintiff, for if they had done their duty they would have been affected with notice of her charge by investigation of their solicitor's title, and that they were not absolved by his fraud.

*Jones v. Smith*, ((1841) 1 Hare 43; (1843) 1 Ph. 244) applied.

**HELD ALSO**—that sect 3 (1) of the Judicial Trustees Act, 1896, did not enable relief to be given to them.

*DAVIS v. HITCHING*, [1907] 1 Ch. 356; 76 [L. J. Ch. 272; 96 L. T. 293—Kekewich, J.

**VII. INVESTMENTS.**

*See also* SECT. IV. BREACH OF TRUST.

**81. Authorised Investment—Retention of—Duty of Trustee.**—In retaining authorised securities—whether they are authorised in the sense of being investments which the trustees may make, or whether they are specified investments transferred to the trustees and authorised to be retained by them—there is no duty or obligation on the trustee to make further investigation as to the title of the security or the solvency of the mortgagor, assuming that the trustee acts honestly and that there are no circumstances to give rise to suspicion. The liability of trustees in dealing with authorised securities must proceed upon the footing of wilful default in not calling in the security.

*RAWSTHORNE v. ROWLEY*, (1907) 24 T. L. R. [51—C. A.

**82. Bearer Securities—Custody—Deposit with Bankers.**—The law does not impose upon trustees more than the exercise of that ordinary care and diligence which a competent and prudent man of business would exercise in his own affairs. A testator authorised the retention of bearer securities, and one of the trusts of his will was to deal with these bearer securities, which were securities with coupons attached which had to be cut off at regular periods. The trustees had a current trust account with well-known bankers, and deposited the bearer securities with them to discharge the duty of cutting off the coupons when due, collecting them and placing the amount to the credit of the trustees' account.

**HELD**—that the trustees were perfectly justified in so depositing the securities.

*Field v. Field*, ([1894] 1 Ch. 425; 63 L. J. Ch. 233; 42 W. R. 346; 69 L. T. 826—Kekewich, J.) distinguished.

*IN RE DE POTHONIER; DENT v. DE POTHONIER*, [1900] 2 Ch. 529; 69 L. J. Ch. 773; 83 L. T. 220—Cozens-Hardy, J.

**83. Bond or debenture of "public company corporate, municipal, commercial, or otherwise"—Investment in bond of unincorporated body.**—A power to invest trust moneys in "bonds, mortgage debentures, debenture stock, preference or other shares of any public company or body corporate, municipal, commercial, or otherwise," is confined to such investments in public companies and bodies duly incorporated.

A trustee invested trust funds subject to such a power in the bond or debenture of a body called "The Trustees for the Town and Harbour of Whitehaven," which at the time of investment were unincorporated.

**HELD**—that the word "corporate" was attached to the word "body," so that the clause should read any "public company or body corporate, whether municipal, commercial or otherwise," and consequently such an investment was a breach of trust.

As to whether the trustee might be relieved from liability under the Judicial Trustee Act, 1896, s. 3, *quære*.

*WOOD v. MIDDLETON* (1898) 79 L. T. 155.—[Stirling, J

**84. Corporation Stock—Population of Borough—"Returns of the Last Census"—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1 (m).**—The census returns for 1901 gave the population of the borough of B. as 47,003. A note at the foot of the page stated that since the date of the actual census the borough has been extended so as to include some extra parishes, adding: "The figures at the date of the census were as follows—Bournemouth C. B. 59,762."

**HELD**—that B. was a borough "having, according to the returns of the last census," a population exceeding 50,000 within the meaning of sect 1 (m) of the Trustee Act, 1893.

*IN RE DRUITT, DRUITT v. DEHLER*, [1903] 1 Ch. 446; 72 L. J. Ch. 441; 67 J. P. 99; 88 L. T. 483; 19 T. L. R. 269; 1 L. G. R. 353; —C. A.

**85. Hazardous Securities—Tenant for Life and Remainderman—Power to Trustees to Retain Securities.**—A testator by his will bequeathed his personal estate to trustees upon trust for his wife for life with remainders over, and the will provided that the trustees might retain any of the investments belonging to the testator at his death for such period as to them might seem proper without being responsible for any loss occasioned thereby. The testator at the time of his death was possessed of fully paid-up shares in a company, the shares being of a hazardous, though not of a wasting, nature.

**HELD**—that the discretion in the trustees to retain the investments showed a contrary intention which displaced the general rule as to con-

**Investments—Continued.**

version laid down in *Howe v. Earl of Dartmouth* ((1802) 7 Ves. 137) that the trustees therefore were not bound to convert the shares, but might retain them; and that if they did retain them the tenant for life was entitled to the whole income therefrom.

IN RE BATES; HODGSON v. BATES. [1907]  
[1 Ch. 22; 76 L. J. Ch. 29, 95 L. T. 753,  
23 T. L. R. 15—Kekewich, J.]

**86. Loan to Tenant for Life—Security—Life Policy without Profits—Bond and Annuity—Trustee out of his own Money converts Policy into one with Profits—Trustee's Right to Surplus.**—A trust fund of £1,000 was put in settlement on the marriage of T, who took a life estate therein. The trustees of the settlement, who had very wide powers of investment, lent the trust fund to T, who gave his bond and warrant of attorney, and contracted to insure his life for £1,000. He also, by deed, directed and appointed that the trustees should during his life stand possessed of an annual rent-charge of £50 in the first place for the payment of premiums. No policy of insurance for £1,000 was effected, but instead thereof there were two separate policies for £500 effected. One of the trustees of the settlement, out of his own money, paid for several years an additional premium on one £500 policy, and thus converted it from a policy without profits into a participating policy, and so entitled to profits or bonus. After the death of T, there were profits or bonus to the amount of £326 paid in respect of this £500 policy.

HELD—that the sum of £326 representing profits or bonus did not belong to the *cestuis que trust* under the settlement of 1846, but went to the representative of the trustee, who had paid the additional £1 annual premium.

IN RE BAGNALL'S TRUSTS; FLYNN v. DALGLEISH, [1901] 1 Ir. R. 255—Porter, M. R.]

**87. Loan upon Personal Credit without Security—Advance to Tenant for Life—Liability of Trustees.**—Where the tenant for life under a voluntary settlement made by herself requested the trustees to exercise the power which by the settlement was given them of investing the fund upon personal credit without security, by advancing the moneys to herself upon such conditions,

HELD—that the trustees were at liberty, in their discretion, to make the advance, being satisfied of the reasonable prospect of the moneys being recouped.

*Keays v. Lane* ((1869), Ir. R. 3 Eq. 1) distinguished.

Proposition in Lewin on Trusts (10th ed. p. 335) controverted.

IN RE LAING; LAING v. RADCLIFFE, [1899]  
[1 Ch. 593; 68 L. J. Ch. 230; 47 W. R. 311;  
80 L. T. 228—Kekewich, J.]

**88. Mortgage—Insufficient Security—No Personal Misconduct or Neglect—Relief—Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), s. 3, sub-s. 1.**—Where trustees of a settle-

ment took a mortgage, no actual valuation of the property comprised in the security was made, but a portion of the land adjoining had recently been sold by auction. No consent in writing to the investment was given. The property would have been a sufficient trust security for £4,262 13s. 4d., the difference between that sum and the sum of £4,500 actually advanced being £237 6s. 8d. There was no personal misconduct or neglect on the part of the trustees, who acted under the advice of the solicitors to the trust.

HELD—that the trustees must make good the sum of £237 6s. 8d., and that no order as to costs would be made.

WAITE v. PARKINSON (1901), 85 L. T. 456—Joyce, J.]

**89. "No other Securities"—Funds in Court—Change of Investment—Proposed Investment prohibited by Testator—Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 10—R. S. C., 1883, Ord. 22, r. 17.**—Trust funds in Court included accumulations of income directed by the testator to be invested in 3 per cent. Consolidated Bank Annuities, "and no other securities."

HELD—that a change of investment of the funds in Court by the sale of New Consols and reinvestment in other securities authorized by Ord. 22 r. 17, could not be made.

In *re Wedderburn's Trusts* ((1878) 9 Ch. D. 112; 47 L. J. Ch. 743; 27 W. R. 53; 38 L. T. 904—Malins, V.-C.) not followed.

OVEY v. OVEY, [1900] 2 Ch. 524; 69 L. J. Ch. 804; 49 W. R. 45; 83 L. T. 311—Cozens-Hardy, J.]

**90. Nominal Debentures under Local Loans Act—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1 (g), 5 (3).**—The authority to invest in nominal debentures or nominal debenture stock, stock under the Local Loans Act, 1875, which is conferred by sect. 5 (3) of the Trustee Act, 1893, upon trustees who have already "power to invest money in the debentures or debenture stock of any railway or other company" extends only to trustees to whom such power is expressly given by the trust instrument, and not to trustees who may possibly have such power by virtue of sect. 1 (g)

*Quære*, whether sect. 1 (g) can be properly said to give power to invest in railway debenture stock, since it only applies to certain classes of railways.

IN RE TATTERSALL; TOPHAM v. ARMITAGE [1906] 2 Ch. 399; 75 L. J. Ch. 680; 70 J. P. 537; 95 L. T. 353, 54 W. R. 603; 4 L. G. R. 1083—Eady, J.]

**91. "Other Public Company."—Whether American Company Included.**—In construing the will of an English testator, who speaks therein simply of "public funds and Government securities" and "real or leasehold securities," he must be understood to have used such words in their commonly accepted sense, *i.e.*, public funds of the United Kingdom, British Government securities, real or leasehold property or

**Investments—Continued.**

mortgages in England or Ireland; and, therefore in the same will "railway or other public company" is to be construed as confined to public companies in the United Kingdom, and not as including an American Company, even though it has purchased, and paid in shares for, the business of an English company.

IN RE CASTLEHOW; LAMONBY v. CARTER, [1903] 1 Ch. 352; 72 L. J. Ch. 211; 88 L. T. 455—Byrne, J.

**92. Postponing sale of improper investments—Loss—Relief from liability—Judicial Trustees Act 1896 (59 & 60 Viet. c. 35). s. 3.**—A widow, who was tenant for life, executrix, and trustee of the will of her husband, who died in 1882, converted part of his residuary personal estate; but, acting on the advice of a commission agent who had been the friend and adviser of her husband, postponed the sale of eight other investments left by the testator, which consisted principally of shares only partly paid up in banking and other companies, and were not securities on which trust funds could properly be invested, in the expectation that the price of the shares would rise. An action was commenced against her by beneficiaries under the will, for the purpose of having her liability in respect of any loss or misapplication of the trust funds determined; and the court directed a sale of the shares, which took place about fourteen years after the testator's death. Upon a summons taken out by the plaintiffs in the action, the court made a declaration that the shares ought to have been sold at the expiration of twelve calendar months from his death, and directed inquiries for the purpose of ascertaining the amount of loss or gain resulting from the postponement of the sale. From the chief clerk's certificate, in answer to the inquiries, it appeared that while the postponement of the sale of some of the shares had resulted in a gain, the loss from the postponement of the sale of the rest amounted to £1,593 10s. 6d., and exceeded the gain by £349 6s. Upon a summons by the plaintiffs for the determination of the questions whether or not the executrix was liable to make good to the testator's estate the loss which had resulted from the postponement of the sale of the shares in respect of which there had been a loss; whether she was entitled to deduct from such loss, or to be allowed, the gain which had resulted from the postponement of the sale of the shares in respect of which there had been a gain; and whether she was entitled to relief under sect. 3 of the Judicial Trustees Act, 1896;

HELD—that the executrix was not entitled to relief under sect. 3 of the Judicial Trustees Act, 1896; and that she was liable to make good to the estate the sum of £1,593 10s. 6d., being the amount of the loss without deducting or allowing for the gain which had resulted from the postponement of the sale of the shares in respect of which there had been a gain.

IN RE BARKER; RAVENSHAW v. BARKER, (1898) [77 L. T. 712; 46 W. R. 296—North, J.

**93. Power to Trustees to retain Personal Estate "in its Present Form of Investment"—Ordinary Shares in a Limited Company—Reconstruction—Ordinary and Preference Shares in new Company—Power to retain new Shares.**—A testator declared by his will that his "trustees may postpone the sale and conversion of my real and personal estate or any part thereof for so long as they shall think fit, and retain the same or any part thereof in its present form of investment."—The investment clause in the will concluded: "Preference stock or shares of any joint stock company at the time of investment paying a dividend on the ordinary stock or shares of" the company. At the time of the testator's death he held 750 fully-paid ordinary shares of £5 each in a limited company, which had no preference shares. The company was very successful, and the trustees retained 520 of the testator's shares. The company was reconstructed, wound up voluntarily, and the assets transferred to a new company. The trustees felt that it would be for the benefit of the estate that they should accept 520 ordinary and 520 preference shares, all fully paid, in the new company in lieu of the 520 ordinary shares in the old company. Subsequently the new company began to pay dividends on its ordinary shares, and continued to do so. When the preference shares were issued the company was not paying dividends on its ordinary shares, so that at that time the preference shares were not authorised investments.

HELD—that the investment was the same, because the new company was a reproduction or transformation, of the old company; there was no difference in the form of business, no change so as to cause additional liability; that the new shares were within the words of the will, "in its present form of investment"; and that the trustees were justified in retaining them.

IN RE SMITH, SMITH v. LEWIS, [1902] 2 Ch. [667; 71 L. J. Ch. 885; 51 W. R. 11—Buckley, J.

**94. Sale of Ground Rents—Trustees Authorised to Vary or Transfer "Securities"—Whether Ground Rents included.**—A settlement provided that the trustees should stand possessed of certain shares, stock and securities, upon trust to (*inter alia*) sell the same and invest them in the purchase of freehold ground-rents "with power to vary or transfer such stocks, funds, shares, or securities into or for others of the same or a like nature." The trustees purchased certain ground-rents, and sought to sell them to the defendants, who objected that the power to sell did not extend to ground-rents.

HELD—that the word "securities" being often used loosely in the same sense as investments, ground-rents were included in the term, and that the trustees might sell.

IN RE TAPP AND LONDON DOCK COMPANY'S [CONTRACT, [1905] W. N. 85—Kekewich, J.

**95. Shares in Limited Company—Reconstruction Scheme—New Company with Larger**

**Investments—Continued.**

*Capital and Power to issue Debentures—Trustees for Beneficiaries not sui juris—Sanction of Court to enable Trustees to agree to Scheme—Retainer by Trustees of New Shares—Jurisdiction.*—As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the *cestuis que trust*, that certain acts should be done by the trustees, which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction to sanction on behalf of all concerned such acts by the trustees as above referred to. Such jurisdiction is to be exercised with great caution, and the Court will take care not to strain its powers. As a rule these circumstances are better investigated and dealt with in Chambers.

Where a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale; in such a case the Court would have jurisdiction to authorise, and would authorize, the trustees to postpone the sale for a reasonable time.

Where there is a prosperous limited company whose shares are fully paid up, and a condition of affairs has arisen which makes it desirable, in the interest of all the shareholders, that by their consent the company should be reconstituted by the company being wound up and a new company formed to take over its assets and the new company is to be like the old company, except that the capital is larger and the new company will have power to issue debentures, and the shares in the old company will be represented by fully paid-up shares and debentures in the new company, and every shareholder who is *sui juris* agrees to the scheme, but some shares are held by trustees who wish the sanction of the Court to their assenting on behalf of beneficiaries who are not *sui juris* or not in existence, the other beneficiaries agreeing, then, under such circumstances, the Court has jurisdiction to sanction, and ought to sanction, the proposed

acts of the trustees. In such cases where the trustees are not by the terms of the trust instrument authorised to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the Court for leave to further retain the shares and debentures they will obtain under the scheme of reconstruction, if they desire to retain them beyond one year from the time the reconstruction is carried out.

*In re Crawshaw* ((1888) 60 L. T. 357; 4 T.L.R. 782—North J.) and *In re Morrison* ([1901] 1 Ch. 701; 70 L. J. Ch. 399; 49 W. R. 441; 84 L. T. 383; 17 T. L. R. 330—Buckley, J., see EXECUTORS, 208) considered.

IN RE NEW; IN RE LEAVERS; IN RE MORLEY, [1901] 2 Ch. 534; 70 L. J. Ch. 710; 50 W. R. 17; 85 L. T. 174—C.A.

**96. Sub-Mortgage of a Puisne Mortgage of Land in Ireland—Insufficient Security—Acting "honestly" but not "reasonably"—No Advice Taken by Trustee—Relief—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.**—In an Irish settlement, as in an English one, if trustees have power to invest trust funds on the security of land in England, the laws of the two countries as to whether a particular investment on English land is or is not a breach of trust are the same. So, if the trustees have power to invest on the security of land in Ireland, the laws of the two countries as to whether a particular investment on Irish land is or is not a breach of trust are the same.

Under the trusts of a marriage settlement trustees were directed to invest a sum of £5,000 upon (*inter alia*) chattel real securities in Ireland. This sum was by the trustees invested in an authorised investment, and then the fund was sold out and the proceeds invested on the security of a sub-mortgage of a puisne mortgage of land in Ireland. The land was subject, in the first place, to two mortgages for £4,700 and £2,460 respectively. Then came a mortgage which was originally £17,900, but which might be taken as reduced at the time of the defendant's investment to £12,150 or thereabouts. This last-mentioned mortgage was sub-mortgaged—first for a sum of £4,000 and then for a sum of £2,153 and then came a sub-mortgage for £5,000, and it was this last mortgage which was substantially the security taken by the defendant and his co-trustee. The £5,000 was secured collaterally by a covenant by the owner of the land for the payment of the £5,000 and interest, and by a charge on the land created by the owner, but this last-mentioned charge would, of course, rank after the full charge of £12,150. The trustees obtained with their security neither the legal estate nor the title-deeds. If for any reason they wished to redeem the prior mortgages, they had no trust funds available for the purpose. The defendant took no advice as to whether it was prudent and right for him as a trustee to take such a security.

Held that the defendant was not justified as trustee in taking the security in question; and that the defendant was not protected by sect. 3 of the Judicial Trustees Act, 1896, for although he had acted "honestly," he had not acted "reason-

**Investments—Continued.**

ably," and he ought not therefore, fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach.

CHAPMAN v. BROWNE. [1902] 1 Ch. 785; 71 [L. J. Ch. 465; 86 L. T. 744, 18 T. L. R. 482—C. A.

97. *Transformation of Shares—Power to Retain in Present State of Investment—Accretion of Premiums or Profits.*—Trustees of a settlement were authorised to retain existing investments; and in case any preferential right to take "any new or other shares or stock in any company should be offered to them" by virtue of their holding, they were empowered to give up such right absolutely or in favour of the life tenant, or otherwise subscribe for such new or other shares, and treat the profits as income.

One of the existing investments comprised shares in an American company formed to hold securities of other corporations. The company having been held to be illegally constituted, an arrangement was made by which shares of two other companies were issued in exchange for its shares, and options were also given to take new shares in such companies.

HELD—that the trustees could not retain the shares in the two companies, and that the life tenant was not entitled to the benefit of the options as income.

*In re Smith; Smith v. Lewis* ([1902] 2 Ch. 667; 71 L. J. Ch. 885, No. 93, *supra*) distinguished.

IN RE ANSON; LOVELACE v. ANSON [1907] 2 Ch. [424; 76 L. J. Ch. 641; 97 L. T. 472—Kekewich, J.

98. *Unauthorised Change of Investment—Power of Court to Sanction—Cases in which such Sanction will be Given—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 85), s. 3.*—The Court can and will on an emergency sanction something not authorised by a trust; but it will not do so merely because the course proposed will be beneficial to the *cestui que trust*, unless there is some real urgency in the case; nor will it sanction something the effect of which is to create a new trust, and not to administer the existing one.

The following are the more common instances of the exercise of the power: making advances out of capital for the benefit of an infant; carrying on a business which is unsaleable; selling a business to a company in exchange for shares therein, and holding such shares for a limited period; holding for a period land upon which trustees have foreclosed.

Sect. 3 of the Judicial Trustees Act, 1896, has not enlarged the jurisdiction of the Court so as to enable it to excuse a contemplated breach of trust.

*In re New* ([1901] 2 Ch. 534; 70 L. J. Ch. 710; 50 W. R. 17; 85 L. T. 174—C. A., No. 95, *supra*), discussed.

IN RE TOLLEMACHE (or IN RE T.), [1903] 1 [Ch. 457; 72 L. J. Ch. 225; 51 W. R. 568; 88 L. T. 13—Kekewich, J.

Affirmed—the Court will not go further than it went in *In re New*.

[1903] 1 Ch. 955; 72 L. J. Ch. 539; 51 W. R. 597; 88 L. T. 670—C. A.

99. *Unauthorised Investment—Loss of Part of Fund—Tenant for Life and Remainderman—Capital and Income—Apportionment.*—A trustee of funds settled by a will without the knowledge of the tenant for life in breach of trust made an unauthorised investment of part of the settled funds, resulting in loss of income and capital. The trustee's estate was of no appreciable value. The question arose how the loss caused by the breach of trust was to be borne.

HELD—that neither the tenant for life nor the remainderman was to gain an advantage over the other—neither was to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund. The total amount of the dividends that the tenant for life would have received if the sale and wrongful investment had not been made should be ascertained, as also the value of the authorised investment at her death; the fund in Court representing the trust fund—*plus* the income actually received, *minus* accretions, since the death of the tenant for life should be ascertained, which would give the amount actually produced by the wrongful investment up to the death of the tenant for life. This aggregate must be divided between the estate of the tenant for life and the remainderman in the proportion which the total amount of dividends the tenant for life would have received from the date of the wrongful conversion to her death bears to the value of the authorised investment at her death, *minus* what she actually received, but not being liable to refund any overpayment.

IN RE BIRD; IN RE EVANS; DODD v. EVANS, [1901] 1 Ch. 916; 70 L. J. Ch. 514; 49 W. R. 599; 84 L. T. 294—Farwell, J.

100. *Unauthorised Investment—Partly Paid Shares—Death of One Trustee—Subsequent Call—Right to Contribution.*—If trustees make an unauthorised investment, and, after the death of one, the estate suffers a loss thereby, and the surviving trustee incurs a further liability on the investment, the surviving trustee is entitled to contribution from his co-trustee's estate in respect of the loss sustained by the estate, and also in respect of his own additional loss, at any rate if he has done his best to mitigate such loss.

*Ashurst v. Mason* ((1875) L. R. 20 Eq. 225; 44 L. J. Ch. 337; 23 W. R. 506) applied.

JACKSON v. DICKINSON, [1903] 1 Ch. 947; 72 [L. J. Ch. 761; 88 L. T. 507; 19 T. L. R. 350—Eady, J.

101. *Unauthorised Investment—No Loss of Capital—Liability of Trustee in Respect of Dividends Paid to Tenant for Life.*—A trustee, who has paid over to a tenant for life the full dividends received from unauthorised invest-

**Investments—Continued.**

ments, is not liable to the trust estate (no loss of capital having occurred) in respect of the excess of such dividends over the rate of dividends obtainable on authorised investments.

*Stroud v. Gwyer* ((1860) 28 Beav. 130) followed.

IN RE APPLEBY; WALKER *v.* LEVER, WALKER *v.* NISBET, [1903] 1 Ch. 565; 51 W. R. 153—C. A.

**102. Unauthorised Investment—Right of Beneficiaries to Elect to Keep Property**—In the case of an unauthorised trust investment the trustee can resell and make a good title to a purchaser with notice, unless all the beneficiaries are at once competent and desirous of taking the land *in specie*.

H., a trustee under a will, in breach of trust spent £2,500 upon a leasehold house; and, after his death, his executor agreed to sell it for £2,600. The beneficiaries were two infants, or the survivor contingently on attaining twenty-one, or, in default of either reaching that age, the next of kin-of-kin of the testatrix.

HELD—that the executor was entitled to realise the investment, and could make a good title.

IN RE JENKINS & J. E. RANDALL'S, LD. CON-  
[TRACT, [1903] 2 Ch. 362; 72 L. J. Ch. 693;  
88 L. T. 628—Eady, J.

**103. Unauthorised Securities—No Trust for Conversion—Express Power to Retain—Enjoyment in Specie**—The life tenant of residue (or a legacy) under a will containing no trust for conversion, and a power to retain (or appropriate) existing unauthorised investments, is entitled to the income of such investments if so retained (and appropriated) by the trustees.

*In re Bates* ([1907] 1 Ch. 22; No. 85 *supra*), and *In re Sheldon* ((1888) 39 Ch. D. 50; 58 L. J. Ch. 25; 59 L. T. 133; 37 W. R. 26—North J.) followed.

*In re Chaytor* ([1905] 1 Ch. 233; 74 L. J. Ch. 106; 53 W. R. 251; 92 L. T. 290—Warrington, J., *see* EXECUTORS, 345) distinguished.

IN RE WILSON; MOORE *v.* WILSON, [1907] 1 Ch. 394; 76 L. J. Ch. 210; 96 L. T. 453—Eady, J.

**VIII. PRACTICE.**

**104. Contempt—Committal—Trustee Ordered to Lodge in Court Money in Possession or Under Control**—In order to bring a trustee within the third exception of sect. 4 of the Debtors Act, 1869, it must be proved that the money ordered to be paid into Court was or had been actually "in his possession or under his control," and that the master's certificate was not sufficient evidence of this.

*In re Fewster; Herdman v. Fewster* ([1901] 1 Ch. 447, *see* BANKRUPTCY, 136) followed.

IN RE WILKINS; EMSLEY *v.* WILKINS, [1901] [W. N. 202; 36 L. J. N. C. 543—Buckley, J.

**105. Petition raising Construction of Will—Beneficiaries contesting Point—Trustees served with Notice of Appeal—Appearance by Counsel**

—*Costs*.]—*Semble*, trustees ought not to appear by separate counsel upon an appeal, as to which they are neutral, unless they think it likely that they will be called upon to assist the Court.

They are, however, by the present practice entitled to do so; but in taxing their costs the taxing-master will consider the position of the trustees, and should allow only a moderate fee.

CARROLL *v.* GRAHAM, [1905] 1 Ch. 478; 74 [L. J. Ch. 398; 53 W. R. 549; 92 L. T. 66—C. A.

**106. Petition—Service on Trustee—Tender for Costs—R. S. C, Ord. 65, r. 27 (19).**—Ord. 65, r. 27 (19), as to a tender for costs on service of a petition does not apply to a trustee whose duty it is to appear and protect the trust fund, the subject-matter of the petition.

LOWE *v.* MOORE, [1906] 22 T. L. R. 640—Eady, J.

**IX. RESULTING TRUST.**

**107. Charity—Funds raised by Issuing Circular—Death of Objects of Fund—Unapplied Surplus—Resulting Trust for Subscribers**—A gentleman collected a sum of upwards of £248 for the purpose of being applied towards the relief of two ladies who were deaf and dumb. There was no information as to the terms upon which this fund was handed over to him. After his death the matter was taken up by another gentleman, still living, who issued a circular stating what had been done. The fund collected by both was applicable to the same purposes. Both ladies died.

HELD—that it was never intended that the fund was to become the absolute fund and property of the ladies, so that they should be in a position to demand a transfer of it to themselves, and that there must be a declaration that there was a resulting trust for the benefit of the subscribers to the fund of the moneys remaining unapplied.

IN RE ABBOTT FUND; SMITH *v.* ABBOTT, [1900] [2 Ch. 326; 69 L. J. Ch. 539; 48 W. R. 541—Stirling, J.

**108. Failure of Trusts—Marriage Portion**—A., on the marriage of his daughter C, paid to trustees a sum of £800 upon trust for the husband and C, for their lives and for the survivor for life, with remainder to the children of the marriage; and if C. should die leaving the husband surviving, and there should be no children, to pay such sum to the husband. He also covenanted, after securing to each of his children not yet provided for a like sum of £800, to dispose of the residue of his property so that on the death of himself and his wife it should be divided equally among his surviving children, the share of C. to be and enure to the like trusts, intents, and purposes as were expressed concerning the said sum of £800. In the event of the husband not surviving C. and there being no issue (which happened), there was no trust expressly declared in the settlement concerning the trust property. By his will the father bequeathed the residue of his property in accordance with the terms of the covenant.

**Resulting Trust—Continued.**

**HELD**—that the £800 should be regarded as a marriage portion, given to C. on her marriage, as a provision for her, and that C. took both the £800 and the share of her father's residuary estate absolutely, there being a resulting trust in her favour.

*Ward v. Dyas* (L. & G. 177) followed.

**DOYLE v. CREAM**, [1905] 1 Ir. R. 252—Barton, J.

**109. Fund Subscribed for Education of Children—Surplus.**—A fund was subscribed "for or towards the education of" the children of a certain person deceased, it being "by no means intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education." When the children came of age a surplus from the fund remained after paying sums for their education.

**HELD**—that there was no resulting trust of the surplus for the subscribers to the fund; and that it should be divided amongst the children in equal shares.

**IN RE ANDREW; CARTER v. ANDREW**, [1905] 2 Ch. 48; 74 L. J. Ch. 462; 53 W. R. 585; 92 L. T. 766; 21 T. L. R. 512—Kekewich, J.

**110. Money Placed in Name of Third Person.**—The testatrix placed a sum of £300 on deposit at a bank in the name of her niece, towards whom she was not *in loco parentis*. She retained the deposit note in her own possession, and did not inform her niece of the fact of the deposit having been made. The testatrix subsequently made a codicil to her will purporting to dispose of the money.

**HELD**—that there was a presumption of a resulting trust in favour of the testatrix and no evidence to rebut the presumption.

**IN RE HOWES; HOWES v. PLATT**, (1905) 21 T. L. R. 501—Eady, J.

**111. Trust for Sale—Trustee's Indemnity and Reimbursement Clause—Unexhausted Residue.**—A gift of property to trustees in trust for sale, followed by the declaration of a particular trust which does not exhaust the whole of the property thus given, will be treated as creating a primary general trust of the whole of such property, so that there will be a resulting trust of the unexhausted residue in favour of the testator's heir and next of kin. The insertion of a trustee's indemnity and reimbursement clause will further strengthen the conclusion thus drawn from the presence of the trust for sale.

The principles laid down by Lord Eldon in *King v. Denison*, ((1813) 1 V. & B. 260; 12 R. R. 227), and by Stuart, V.-C., in *Williams v. Roberts*, ((1857) 27 L. J. Ch. 177; 4 Jur. (N.S.) 18) applied.

**IN RE WEST; GEORGE v. GROSE**, [1900] 1 Ch. 84; [69 L. J. Ch. 71; 48 W. R. 138; 81 L. T. 720—Kekewich, J.

**X. TRUSTS FOR SALE, ETC.**

**112. Power of Sale, with Power of Postponement—Sale Impeached by Beneficiaries on Ground**

*of Improvidence—Valuation of Property.*—A testator who died in September, 1904, devised and bequeathed his residuary estate to trustees upon trust for sale with a power of postponement, and upon trust out of the proceeds to pay his debts, an annuity to his widow, and a yearly sum for the maintenance and education of his children. Part of the testator's estate was a freehold house, let to a tenant for twenty-one years from September 29th, 1898, at a yearly rent of £225, the lease being determinable at the tenant's option at the expiration of seven years. The house, which was subject to a mortgage for £3,500, was valued for probate at £4,100, the trustees having accepted the valuation from the beneficiaries' solicitor, who had some knowledge of property in the district. In January, 1905, the trustees, on the advice of a firm of auctioneers and estate agents, whose manager, though not a qualified valuer, had viewed and reported on the house, offered to sell the house to their tenant for £4,000, but this offer, as well as another to sell for £3,700, was refused by the tenant, who, however, offered to purchase it for £3,000. The trustees, who had heard that the tenant was likely to exercise his option to determine the lease, and had obtained a further report that the property had considerably deteriorated in value since the date of the lease, agreed, after taking the advice of counsel, to accept the tenant's offer, and a contract was entered into in February, 1905.

**HELD**—in an action by the beneficiaries, who impeached the contract on the ground that the price was grossly inadequate, and that the trustees had not taken steps to ascertain the best price obtainable for the property, and that the trustees had not informed them of the existence of the negotiations, that there was no obligation to consult the beneficiaries' solicitor, and that the trustees having acted on the advice of a firm of high reputation, and there being no evidence that there was any market for such a house at a higher price or at any price, the contract could not be impeached.

**GROVE v. SEARCH; GRIFFIN v. SEARCH**, (1906) 22 T. L. R. 290—Kekewich, J.

**113. Power of Sale—Trustees under a Will Executed in 1856—Legal Estate in Trustees—Power of Survivor to Sell.**—Even in the case of a will executed before the Conveyancing Act, if the legal estate is devised to the trustees of the will, the survivors or sole survivor can exercise a power of sale given to them by name or under the description of "my trustees." The contrary rule only applies where the trustees have a bare power without the legal estate.

**IN RE BACON; TOOVEY v. TURNER**, [1907] 1 Ch. 475; 76 L. J. Ch. 213; 96 L. T. 690—Eady, J.

**114. Power of Sale—Conflict between Two Sets of Trustees—Real Estate Settled—Trustees to Transfer to Appointees—Power of Sale—Appointment by Will to Trustees for Sale—Deducing Title—Cost of—Special Condition.**—Real estate was conveyed to trustees upon trust for a husband and wife and the survivor

**Resulting Trust—Continued.**

of them for life, the trustees being directed upon the survivor's death to "pay and transfer" the property to the children as appointed. They had a power of sale during the lives of the husband, wife and any child.

The husband survived the wife and appointed the property to other trustees upon trust for sale and conversion—the proceeds to be divided among the children.

The trustees of his will purported to sell under the power contained in it.

**HELD**—that their trust for sale overrode the power of sale in the settlement; that they were the proper persons to sell, and could call for a conveyance of the legal estate.

The conditions of sale provided that the purchaser should bear the expense of preparing any deed necessary for getting in outstanding estates, or completing the vendor's title, &c.

**HELD**—that nevertheless the vendors must bear the cost of deducing the title to the outstanding legal estate.

**IN RE ADAMS' TRUSTEES AND FROST'S CONTRACT, [1907] 1 Ch. 695; 76 L. J. Ch. 408; 96 L. T. 833—Warrington, J.**

**115. Power to Postpone Conversion—"Uncontrolled Discretion"—Payment of Legacy in Full—Admission of Assets.**—A testator by will gave his property to trustees upon trust for sale and conversion, with power to the trustees to postpone conversion so long as they should in their uncontrolled discretion deem proper, and the testator declared that without limiting the general operation of that power he specially intended that it should be made applicable to his shares in a named company. After his death the trustees, in the *bond fide* exercise of their discretion, held the shares for some years in a generally falling market.

**HELD**—that having exercised their discretion *bond fide*, they were not liable for loss incurred thereby.

**HELD ALSO**—that the fact that some of the trustees, in exercising their discretion honestly, modified their opinion as to a sale in deference to the views of a co-trustee, who had a personal interest in the matter, did not amount to a failure to exercise a discretion and was not a breach of trust.

The mere payment of a legacy by an executor of a will is not conclusive as an admission of assets.

**IN RE SCHNEIDER; KIRBY v. SCHNEIDER, [(1906) 22 T. L. R. 223—Warrington, J.]**

**116. Power to Postpone Conversion—"Property not Actually Producing Income"—Mortgage—Payment of Interest to be Deferred.**—L. by his will gave all his estate to trustees on trust for sale and conversion, his wife to receive the income for her life. There was no power to postpone conversion, and he directed that no property not actually producing income should be treated as producing income or entitling any person to the receipt of income. He died in 1901. A mortgage held by him recited that the

mortgagor owed a certain sum and that it had been agreed that payment should be postponed, and the mortgagor covenanted to pay the debt with simple interest at his death, and if the aggregate was not then paid, to pay interest on such aggregate by equal half-yearly payments.

The mortgagor died in 1906, and the testator's widow, the life tenant, died directly after.

**HELD**—that the interest attributable to the period between the testator's death and the mortgagor's death belonged to the estate of the widow and not to that of the testator.

**In re Hubbuck [(1896) 1 Ch. 754; 65 L. J. Ch. 271; 73 L. T. 788; 44 W. R. 289—C. A.] applied.**

**IN RE LEWIS; DAVIES v. HARRISON, [1907] 2 Ch. [296; 76 L. J. Ch. 539—Warrington, J.]**

**117. Trust for Sale—Election to take "in specie"—Appropriation—Purchase by Trustee for Sale.**—To establish an election to take "*in specie*" and free from a trust to convert it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties, and where it is sought to establish such an election by a person or persons only entitled so to elect subject to the right of third persons to insist on a sale, it must be shown that such persons have assented.

Sir R. M. by his will gave all his real and leasehold estate to his son Robert and another upon trust for sale and to stand possessed of the proceeds upon trust, to appropriate investments, to answer annuities for his wife, Lady M., his daughter M., and his son Henry. The testator gave his residue to his son Robert, and died in 1843. Henry was then incapable of managing his own affairs and so continued down to the time of his death. An additional trustee, Lady M., was appointed, and afterwards a new trustee was appointed. Robert died in 1849, leaving all his property to his mother, Lady M., his sister, M., and his brother Henry. Administration with the will annexed was granted to Lady M. In 1853 Lady M. became sole trustee of Sir R. M.'s will. She left the leaseholds and died in 1873, leaving all her property to her daughter M., who died in 1877 leaving her property to Sir C. D., in whom all the property remaining subject to the trust of the will of Sir R. M. became vested. Sir C. D. paid into Court to the account of Henry, who was in 1878 found of unsound mind by inquisition. In 1887 Sir C. D. died, and his will was proved by G. C. D., one of his executors. In 1888 Henry (acting by his committee) and G. C. D. let the property for twenty-one years. Henry died a bachelor in 1892, and letters of administration to his estate were granted to G. B. one of his next of kin. In 1893 G. C. D., as surviving trustee of Sir R. M.'s will, at the request of G. B., assigned the leaseholds to H. P. L. The next day H. P. L., as trustee, assigned the premises to G. C. D. In 1901 G. C. D. agreed to sell the entirety of the leasehold property to Powell, and the purchaser took the objection that in 1893 G. C. D. was a trustee for sale of the property, and could not purchase the half of it which was then conveyed to him.



**Resulting Trust—Continued.**

**HELD**—that, upon a consideration of all the facts, there never was an effectual election to take the property, the subject-matter of the contract, otherwise than in the form directed by the testator, and that the trust for sale was operative and capable of being exercised by the vendor, G. C. D., at the date when he affected to purchase; that he was consequently a trustee for sale, and as such incompetent to purchase without the assent of all persons beneficially interested.

**HELD ALSO**—that, assuming that G. C. D. was competent to purchase without the assent of all persons beneficially interested, it was quite clear that the title was one depending upon the establishment of facts and dealings of a complicated, and in some instances of an ambiguous, nature, such as were not merely practically capable of being challenged or put in issue, but not unlikely to be raised, and with a reasonable chance of success; and that the title was not one to be forced upon a purchaser.

*In re Handman and Wilcox's Contract* ([1902] 1 Ch. 599; 71 L. J. Ch. 263; 86 L. T. 246—C. A., see *SALE OF LAND*, 130) followed.

**IN RE DOUGLAS AND POWELL'S CONTRACT**, [1902] 2 Ch. 296; 71 L. J. Ch. 850—Byrne, J.

**118. Retirement of Trustee for Sale—Purchase by him of Trust Property Twelve Years there-after—Validity.**—A trustee for sale owes a duty to his *cestuis que trust* to do everything in his power for their benefit, and is therefore absolutely precluded from buying the trust property, irrespective of questions of under-value or otherwise, because he may be thus induced to neglect his duty. Beyond that, if he retires with a view to becoming a purchaser so as to put himself in a position to do what would otherwise be a breach of trust, that will not do. But if he has retired and there is nothing to show that at the time of the retirement there was any idea of a sale, and in fact there is no sale for twelve years after his retirement, there is nothing apart from any circumstances of doubt or suspicion to prevent him from becoming a purchaser.

**IN RE BOLES AND BRITISH LAND COMPANY'S CONTRACT**, [1902] 1 Ch. 244; 71 L. J. Ch. 130; 50 W. R. 185; 85 L. T. 607—Buckley, J.

**119. Trust for Sale—Fraud of Trustee—Trustee Executing Indenture of Sale to Secure Debt—Creditor taking with Notice of Trust—Indenture in Hands of bona fide Holder for Value—Priority—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 54, 55.**—Lands were devised by will to trustees upon trust for sale and investment, and to pay the income thereof among certain beneficiaries. All the trustees except one died, and the sole surviving trustee, who had given promissory notes to a creditor in respect of a debt, arranged with the creditor that the debt should be further secured on part of the trust estate. To carry out this arrangement the trustee executed a deed which purported to be a conveyance on sale to the creditor of certain land, the subject of the trust, for £2,000, and

the deed contained the usual receipt for the purchase money. No purchase money was actually paid, the deed being, according to the arrangement, held as security for the moneys due on the promissory notes in case they should not be met at maturity. The creditor, who knew of the breach of trust, deposited the deed with another person as security for an advance, the latter having no notice, actual or constructive, of the breach of trust, or that the £2,000 mentioned in the deed had not been paid. In an action by the beneficiaries:

**HELD**—that there was no contract for the sale of the land by the trustees of the will and no vendor's lien; that the equities of the beneficiaries and of the equitable mortgagee were equal, and as the equity of the beneficiaries was prior in point of time, it must prevail.

**CAPELL v. WINTER**, [1907] 2 Ch. 376; 76 L. J. [Ch. 496; 97 L. T. 207; 23 T. L. R. 618—Parker, J.

**120. Trust for Sale—Leaseholds—Sale by way of Underlease—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13.**—Trustees for sale offered by auction in separate lots five leasehold houses held under one lease. It was a condition of sale that if all the lots were sold at the sale the purchaser of the most valuable should execute underleases to the other purchasers at apportioned rents, and that if (as in fact happened) some remained unsold the vendors would grant underleases of the lots sold to the respective purchasers.

**HELD**—a valid exercise of the trust for sale.

*In re Walker and Oakshott's Contract* ([1901] 2 Ch. 383; 70 L. J. Ch. 666; 50 W. R. 41; 84 L. T. 809—Kekewich, J., see *SALE OF LAND*, 38) overruled.

**IN RE JUDD AND POLAND AND SKELCHER'S CONTRACT**, [1906] 1 Ch. 684; 75 L. J. Ch. 403; 54 W. R. 513; 94 L. T. 595—C. A.

**121. Trust for Sale—Repurchase by Trustee—Sale by Trustees—Contract of Sale Incomplete.**—So long as a contract to sell by trustees remains executory and the trustees have power either to enforce it or rescind or alter it one of the trustees cannot repurchase the property from the purchaser from the trustees.

A purchaser, the defendant, from trustees refused to accept a proper assurance from them because after he had agreed to purchase, he found out that there would be a fine payable on admission considerable in proportion to the value of the property, and he persuaded D, one of the trustees, to enter into a contract to purchase from him at the same price and on the same terms, except that a considerable proportion of the purchase-money was to remain on mortgage at 4 per cent. In an action by the trustees for specific performance by the purchaser from them,

**HELD**—that the purchaser from the trustees was bound to complete his contract; that he was not in a position to enforce specific performance against the trustee D., who agreed to purchase from him, not being able to confer upon him a marketable title: and that he must, in law, be

**Resulting Trust—Continued.**

deemed to have known that the trustee D. was incapable of purchasing under the circumstances.

*Dictum* of Mellish, L.J., in *Parker v. McKenna* ((1874) L. R. 10 Ch. 96, 125; 44 L. J. Ch. 425, 441; 23 W. R. 271; 31 L. T. (N.S.) 739) applied.

*DELVES v. GRAY*, [1902] 2 Ch. 606; 71 L. J. Ch. [808; 51 W. R. 56; 87 L. T. 425—Byrne, J.

**ULTRA VIRES.**

*See* COMPANIES, 239, 240; MARKETS AND FAIRS, 1; PUBLIC AUTHORITIES; RAILWAYS, 8, 13, 16, 31.

**UMPIRES.**

*See* ARBITRATION.

**UNDUE INFLUENCE.**

*See* CONTRACT.

**UNLAWFUL ASSEMBLIES.**

*See* CRIMINAL LAW AND PROCEDURE.

**UNINCORPORATE ASSOCIATIONS.**

*See* BUILDING SOCIETIES; FRIENDLY SOCIETIES; LOAN SOCIETIES; TRADE AND TRADE UNIONS.

**UN SOUND FOOD.**

*See* FOOD AND DRUGS; PUBLIC HEALTH.

**USE AND OCCUPATION.**

*See* LANDLORD AND TENANT.

**USES AND TRUSTS.**

*See* REAL PROPERTY AND CHATELS REAL; TRUSTS AND TRUSTEES.

**USURY.**

*See* MONEY AND MONEY LENDING.

**VACCINATION.**

*See* PUBLIC HEALTH.

**VAGRANCY.**

*See* CRIMINAL LAW; POOR LAW.

**VALUERS AND APPRAISERS.**

*And see* AGENCY; AUCTIONS.

1. *Contract—Exercise of Reasonable Care and Skill.*—C., a solicitor, was applied to by V., who was not his client, but who owned mineral-water factory and three licensed houses, to find someone who would advance money on the premises. C. knew that R., another solicitor, who represented under a power of attorney the plaintiff, had money to advance, and at an interview between C. and R. it was arranged that an advance, to be guaranteed by an insurance society, should be made to V., but no stipulation for an independent valuation of the premises was then made. C., with authority to conduct the mortgage on these lines, requested the L. G. and T. Society to insure the mortgage, knowing that the society usually employed the defendant M., a local valuer of repute. C. applied to the society for a copy of M.'s valuation, and this application was ultimately acceded to by them, they saying that on future occasions when C. was acting for the mortgagee he should have a copy. The society repudiated responsibility for M.'s fee, which was afterwards paid by V. through C. The society instructed M. to value the premises, and he reported to them by a valuation written on their printed form. C. relied to the knowledge of M. on M.'s valuation in making the advance on mortgage to V.

**HELD**—that M. was not the agent of C. as principal, in making this valuation, and that the above facts did not establish that contractual relation which was necessary to enable the plaintiff to maintain an action for negligence in making the valuation against M.

**HELD, FURTHER**—that, upon the evidence, there is no absolute rule as regards the proper method of ascertaining the value in such cases as the present; and that although M., valuing the premises, adopted methods which might have been improved upon, still they were methods which a man of position endeavouring to do his duty, might fairly adopt without its being said that he was wanting in reasonable care and skill.

Observations as to the duty of a licensed valuer to examine the takings books of managed licensed houses and premises of a like character,

**Valuers and Appraisers—Continued.**

and as to the number of year's purchase on which he ought to proceed in making his valuations.

*Semble*, it is not within the province of a valuer to give an opinion as to what may properly be advanced on property.

Decision of Kekewich, J. ((1905) 92 L. T. 345) affirmed.

LOVE *v* MACK (1905), 93 L. T. 352—C. A.

**VENDOR AND PURCHASER.**

*See* SALE OF LAND.

**VETERINARY SURGEONS.**

*See* MEDICINE.

**VICTORIA.**

*See* DEPENDENCIES AND COLONIES.

**VOIDABLE ASSIGNMENTS, CONVEYANCES, AND SETTLEMENTS.**

*See* BANKRUPTCY; FRAUDULENT CONVEYANCES.

**VOLUNTARY ASSOCIATIONS.**

*See* CHARITIES; CLUBS.

**VOLUNTEERS.**

*See* RATING; ROYAL FORCES.

**WAGES.**

*See* MASTER AND SERVANT.

**WAIVER AND ACQUIESCENCE.**

*And see* LANDLORD AND TENANT, 93, 98, 99.

1 *Grant of Gold Mining Lease to Two Persons—Waiver or Abandonment of Right or Interest in Lease by One—Evidence.*—Where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or a licence.

A lease for the purpose of gold mining was granted by the Crown to M. L. and the respon-

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dent. M. L. afterwards by letter disclaimed and abandoned all interest in and claim to the mine. The respondent acted on M. L.'s letter, furnished the money required for working the lease thenceforward out of his own resources, and made no claim upon M. L. for contribution.

**HELD**—that there was sufficient evidence of an agreement or licence by M. L. to waive or abandon his vested right or interest in the lease, and that M. L. was merely a trustee for the respondent of his legal interest (if any) therein.

Rule in *Clarke v. Hart* ((1858), 6 H. L. C. 633, at p. 656; 5 Jur. (N.S.) 447) followed.

PALMER *v* MOORE, [1900] A. C. 293; 69 L. J. P. C. [64; 82 L. T. 167—P. C.

2 *Inquiry Waived—Payment Without Full Knowledge of Facts—Recovery.*—The doctrine that a person can recover money voluntarily paid over, without full knowledge of the facts, is subject to an exception that a person who has waived all inquiry into the facts, cannot, on subsequently ascertaining fresh facts, recover the money.

BEEVOR *v* MARLER, (1898) 14 T. L. R. 289—  
[Div. Ct.

**WAREHOUSES AND WAREHOUSING.**

*See* BAILMENT; RATES AND RATING.

**WARRANT.**

*See* CRIMINAL LAW.

**WARRANTIES.**

*See* AUCTIONS; FOOD AND DRUGS; SALE OF GOODS.

**WASTE.**

*See* REAL PROPERTY; SETTLEMENTS; TRUSTS.

**WATERMAN.**

*See* METROPOLIS; WATERS AND WATER-COURSES.

**WATERS AND WATER-COURSES.**

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**Waters and Water-Courses—Continued.****III. SEASHORE.**

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And see EASEMENTS; FISHERIES; HIGHWAYS; SEWERS AND DRAINS; SHIPPING AND NAVIGATION.

**I. IN GENERAL.**

1. *Award—Watercourse—Repairing and Cleansing—Highway Authority.*—Under an inclosure Act for inclosing land in a township the Commissioner in 1815 made an award. The plaintiffs claimed to be entitled by virtue of that award to have a drain or watercourse—ordered by the award to be made—cleansed, scoured and maintained by the defendants as successors of the surveyor of highways of the township, and to have the expenses defrayed out of a rate or rates to be levied in the manner provided in the award.

HELD—that the plaintiffs were so entitled.

ATTORNEY-GENERAL *v.* TAMWORTH RURAL [DISTRICT COUNCIL, (1901) 85 L. T. 190—Byrne, J.

2. *Navigation—Tolls—Undue Preference—Lower Tolls or Rates—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31)—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.*—The defendants were the trustees of the navigation of the River Ouse, near York, and charged a toll of 6*d.* per ton on grain and flour. The owners of certain flour mills gave notice of their intention to remove their mills unless the tolls and accommodation were altered. The defendants accordingly spent money in improving the navigation, and the owners of the mills built riverside wharves and premises. The defendants agreed not to charge more than £600 a year on the whole of the millowners' traffic, the owners paying the ordinary tolls until the *maximum* was reached. Since the date of the agreement the millowners' traffic had so increased that the tolls charged to them worked out at 1½*d.* a ton.

HELD—that this amounted to undue preference, and the Court, though it was not its duty to prescribe the manner in which the grievance should be remedied, indicated what they considered to be a sufficient and reasonable rate temporarily.

MILLS, FAIRWEATHER & CO. *v.* YORK CORP.—[RATION, [1901] 17 T. L. R. 19—Rail. and Can. Com.

3. *Water-rights—Water Supply from Land of Another—Fouling of Supply on that Land by leaving open Rubble Drain—Right of Action for Fouling—No claim to Easement or Right to Water—Natural User.*—The plaintiff's water supply was obtained from a rubble drain in the fields of X. and Y. through a syphon under a brook dividing the plaintiff's land from the said fields to a cistern on the plaintiff's land. The water was used for drinking purposes. The defendants, by the license of X. and Y., opened the rubble drain to examine it, and left it open

for ten weeks, whereby mud and dirt got into the drain, and the plaintiff's supply was fouled. In an action in the County Court for wrongful interference and damage to the plaintiff's water supply by the defendants, the plaintiff, although producing evidence that the water supply had been used by her for many years, expressly disclaimed any easement or right to the water supply that the case might be within the jurisdiction of the County Court. The County Court Judge gave judgment for the defendants.

HELD (on appeal)—that as the plaintiff had disclaimed any easement or right to the water supply, and the defendants did not appear to have deliberately fouled the drain, but had merely done something which led to the water being fouled, the plaintiff had no right of action, and the decision of the County Court Judge was right.

DICKINSON *v.* SHEPLEY SEWERAGE BOARD, [1904] 68 J. P. 363—Div. Ct.

**II. RIVERS.****(a) Ownership of Soil.**

And see EVIDENCE.

4. *Grant of Lands Bounded by a River—Construction—Presumption of Right to Bed of River ad medium filum aquae—Evidence to Rebut the Presumption—Fishery—Tidal Waters—Definition of Ordinary High Tide.*—A riparian owner on one bank claimed the exclusive right to the whole bed of the river and of the fishery therein as lord of the manor, and also by user from time immemorial. The riparian owner on the opposite bank brought an action for an injunction against trespass.

HELD—that the plaintiff having acquired his lands, which were not part of the said manor, by grants, in which the right to half the bed of the river and the fishing rights over such half would be presumed, the defendant's evidence was insufficient to establish his exclusive right to the whole bed of the river or the fishery therein.

An ordinary high tide is taken at the point of the line of the medium high tide between the springs and neaps, ascertained by taking the average of the medium tides during the year.

ELLIOT *v.* EARL MORLEY, [1907] 51 Sol. Jo. 625—Joyce, J.

5. *Inclosure Award—River Running Along Waste—Allotment of Waste—Bed ad medium filum.*—An Act for enclosing moors, commons, and waste grounds of a manor, does not apply to the bed of a river which is proved to be not waste of the manor, and not subject to any commonable rights. Therefore an award under the Act of waste bordering on the river does not carry with it the bed of the river *ad medium filum*.

ECROYD *v.* COULTHARD, [1898] 2 Ch. 358; 67 [L. J. Ch. 458; 78 L. T. 702; 14 T. L. R. 462—C.A.

6. *Medium filum—Main and Subsidiary Channels*—Where the water of a river in its ordinary condition covers the *alveus* from bank to bank, it

**Rivers—Continued.**

is the centre of the *alveus* between the banks that is the *medium filum*, and consequently the boundary of the properties on the opposite banks.

Where the great part of the water of the River Tay flowed down on the defender's side, and the pursuer contended that the *medium filum* was to be found in the centre of the stream flowing down on his, the pursuer's, side:

**HELD**—that the *medium filum* was to be drawn through any sand or gravel banks, such as constitute the Tay Bridge and Dunskeig Islands, without carrying it round that particular channel in which for the time the greater body of water was flowing.

**MENZIES v. BREADALBANE**, (1902) 4 F. 55— [2nd Div.

**7. Ownership of the Bed of the Stream—Island**—Usque ad medium filum aquæ.]—The rule that where a stream flows between two manors or properties, in the absence of any evidence to the contrary, the boundary is taken to be the *medium filum* of the stream, applies, where the stream is divided by an island, only to the *medium filum aquæ* of each branch.

**GREAT TORRINGTON COMMON CONSERVATORS v. MOORE STEVENS**, [1904] 1 Ch. 347; 73 L. J. Ch. 124; 68 J. P. 111; 89 L. T. 667; 2 L. G. R. 397—Joyce, J.

**8. Sudden Change of Course—Ownership of Soil**.]—Where a river, whether tidal or not, separating two estates belonging to different owners suddenly changes its course, the property in the soil does not change. English and Indian law agree upon this point.

**THAKURAIN RITRAJ KOER v. THAKURAIN [SARFARAZ KOER]**, (1905) 21 T. L. R. 637—P. C.

**(b) Pollution.**

And see titles **NUISANCES; PUBLIC HEALTH.**

**(1) Manufacturing Refuse.**

**9. Manufacturing Effluent—Discharge into a Tributary—"Stream" or "Sewer"**—*West Riding of Yorkshire Rivers Act*, 1894 (57 & 58 Vict. c. clxvi.), ss. 9, 10, 12.]—A natural stream, or watercourse, may cease to be a stream, and may become a sewer, into which persons may acquire certain rights of drainage as against the local authority; and it may do so, even although the natural flow of water along its bed has not wholly ceased. But the mere fact that for a number of years sewage has been discharged into a watercourse is not of itself sufficient to convert the watercourse into a sewer; nor is the fact that the watercourse has been covered over material, unless it was done by the local authority in order to turn the watercourse into a sewer.

**Semble**—after the year 1861 the local authority could not convert a watercourse into a sewer merely by the illegal act of discharging sewage into it.

**Falconer v. South Shields Corporation** (1895) 11 T. L. R. 223—Div. Ct., and **Brown v. Dun-**

**stable Corporation** ([1899] 2 Ch. 378; 68 L. J. Ch. 498; 63 J. P. 519; 47 W. R. 538; 80 L. T. 650—Cozens-Hardy, J., *see* **SEWERS AND DRAINS**, 29) considered.

**WEST RIDING OF YORKS RIVERS BOARD v. [REUBEN GAUNT & SONS, LD.]**, (1902) 67 J. P. 183; 19 T. L. R. 140; 1 L. G. R. 133—Div. Ct.

**10. Manufacturing Effluent—Prescriptive Right of Drainage—Polluting Liquid—Public Health Act**, 1875 (38 & 39 Vict. c. 55), s. 21—*Rivers Pollution Prevention Act*, 1876 (39 & 40 Vict. c. 75), s. 7.]—The plaintiffs' predecessors in title had a right to cause their drain, which received the manufacturing effluents from their mills, to empty into the sewer of the local authority, afterwards vested in the defendant district council, and the plaintiffs had a right to continue to cause their drain to empty into the same sewer under sect 21 of the Public Health Act, 1875. The defendants, being advised that the discharge of the trade effluent from the plaintiffs' mills into the sewer was, on account of its temperature and for other reasons, prejudicially affecting the disposal by irrigation or otherwise of the sewage matter, and exposing them to liabilities under the Rivers Pollution Prevention Act, 1876, informed the plaintiffs of their intention to cut off the connection between the sewer and the drain. The plaintiffs claimed an injunction to restrain the defendants from so disconnecting the drain. There was no proof that the sewers of the district were insufficient for carrying the trade effluent, as well as all other sewage which had to be carried away by them.

**HELD**—that there being no objection on the ground that the effluent would cause such pollution as to render it injurious in a sanitary point of view and unfit for conveyance along the sewer, the plaintiffs were entitled to the injunction asked for.

Decision of **Byrne, J.**, ([1900] 1 Ch. 781, 69 L. J. Ch. 470; 64 J. P. 792; 48 W. R. 614; 83 L. T. 22), affirmed.

**EASTWOOD BROTHERS, LD. v. HONLEY URBAN [DISTRICT COUNCIL]**, [1901] 1 Ch. 645; 70 L. J. Ch. 313; 49 W. R. 308, 84 L. T. 169—C. A.

**11. Manufacturing Refuse—Pollution of possibly dry Channel above entry of Watercourse—Stream or Sewer—Rivers Pollution Prevention Act**, 1876 (39 & 40 Vict. c. 75), ss. 4, 10, 11, 20.]—The defendants sent polluting liquids from their factory into a channel. This channel was said to have originally carried down water from a well above the factory, but the defendants diverted this water supply above their factory, took it into their mill, and discharged it in a polluted state into the channel close to their factory. The channel ran from the factory past certain cottages; then joining a stream, fell with the stream into a river. Fifty or sixty cottages emptied their sewage into the channel below the factory till 1892, when a sewerage scheme was put into operation for the district. Two cottages still discharged slop-water into the channel, and two or three small water-courses

**Rivers—Continued.**

fell into it below the factory. A County Court Judge held that the channel was a "stream" within the meaning of sect. 20 of the Rivers Pollution Prevention Act, 1887, and that the defendants had committed an offence under sect. 4 of that Act.

**HELD**—on appeal, that a stream within the meaning of the Act may be either a natural or an artificial one; and that the Court was not prepared to differ from the conclusion of the learned County Court Judge that the channel was a stream, since (apart from the existing water-courses below) pure water would still flow along the course but for the acts of the defendants.

*West Riding of Yorkshire Rivers Board v. Gaunt*, ((1902) 67 J. P. 183; 19 T. L. R. 140—Div. Ct., No. 9, *supra*), discussed.

*Fulconar v. South Shields Corporation* ((1895) 11 T. L. R. 223—Div. Ct.) distinguished.

**WEST RIDING OF YORKS RIVERS BOARD v. PRESTON & SONS**, (1905) 69 J. P. 1; 92 L. T. 24; 3 L. G. R. 289—Div. Ct.

**12. Manufacturing Pollution—Refuse sent into Sewer and thence into Stream—Facilities for Entering Sewer not Afforded by Sanitary Authority—Liability of Manufacturer—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 3, 4, 7, 10.**—By sect. 4 of the Rivers Pollution Prevention Act, 1876, "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. . . ."

A person sending noxious manufacturing refuse into a sewer, vested in the sanitary authority, which is carried thence, together with sewage, into a stream, commits an offence under sect. 4, at all events if he does not prove that the sanitary authority has afforded him facilities for draining his factory into the sewer under sect. 7 of the Act.

*Seem*—even if he does prove that he has been afforded such facilities by the sanitary authority, he also commits an offence under sect. 4.

*Kirkheaton Local Board v. Ainley, Sons & Co.* ([1892] 2 Q. B. 274; 61 L. J. Q. B. 812; 56 J. P. 374; 67 L. T. 209; 41 W. R. 99—C. A.) followed.

**WEST RIDING OF YORKSHIRE RIVERS BOARD v. BUTTERWORTH AND ROBERTS**, (1907) 71 J. P. 516; 5 L. G. R. 1246—Div. Ct.

**13. "Wilful suffering"—Thames Conservancy Act 1894 (57 & 58 Vict. c. clxxxvii.), s. 92.**—By sect. 92 of the Thames Conservancy Act, 1894, "If any person without lawful excuse . . . wilfully causes or suffers any washing or other substance produced in making or supplying gas or any other offensive matter, whether solid or fluid, to flow or pass into the Thames or into any tributary . . . he shall for every such offence be liable to a penalty not exceeding 20*l.*, and to a daily penalty not exceeding 10*l.*"

**HELD**—that persons were not guilty of wilfully suffering offensive matter to pass into the

Thames by an omission to do something which might have mitigated the evil.

*Smith v. Barnham* (34 L. T. 774) considered.

**HIGH WYCOMBE CORPORATION v. THAMES [CONSERVATORS]**, (1898) 78 L. T. 463; 14 T. L. R. 358—Div. Ct.

**14. Works Constructed since 1876—Defence—Reasonably Practicable and Available Means—Prescriptive Right to Pollute—Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75), ss. 6, 10, 16.**—Where works have been entirely constructed since 1876, the occupiers cannot in answer to a charge of polluting a river rely on sects. 6 and 10 of the Rivers Pollution Act of that year, and plead that they are using "all reasonably practicable and available means" to render the pollution harmless.

The effect of sect. 16 of the Act is to keep alive the right to abate a nuisance, but it does not preserve the right to continue pollution.

**MIDLOTHIAN COUNTY COUNCIL v. PUMPHREY & STON OIL CO.**, (1904) 6 F. 387—Ct. of Sess.

## (u) Sewage.

**15. Agreement to receive Trade Effluent—"Causing or suffering to flow or pass"—Liability of Local Authority—Middlesex County Council Act, 1898 (61 & 62 Vict. c. cci.) s. 13—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 7—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 21.**—A district council, having taken over a sewage farm from a local board, their predecessors in title, collected and treated on such farm the sewage of the district and discharged the effluent therefrom into a river. By a contract between the board and the owner of a margarine factory it was agreed that the said owner should be entitled to discharge the liquids and effluents from the said factory into the sewers of the board, subject to the condition that the said owner before so doing should extract all solid fat or fatty matters in suspension from the said liquids and effluents. This condition was not efficiently fulfilled, and the result was that the effluents, containing fat and fatty matter, became mixed with the sewage on the farm and the land became clogged with the fat and was not capable of filtering the sewage. On a summons being taken out under the Middlesex County Council Act, 1898, by the county council against the district council for "causing and suffering" sewage and other injurious and offensive matter to flow into the river, the justices ordered the district council to discontinue such flow or passage.

**HELD**—that such order was rightly made, and that the district council had "caused or suffered" the filthy effluent to pass into the river. The district council were not compelled to receive into their sewers liquid containing fat or fatty matters, and if they did receive it they were bound to adopt some process on their farm which would effectually purify the effluent therefrom.

**SOUTHALL NORWOOD URBAN DISTRICT COUNCIL v. MIDDLESEX COUNTY COUNCIL**, (1901) 65 J. P. 215; 49 W. R. 376; 83 L. T. 742; 17 T. L. R. 208—Div. Ct.

**Rivers—Continued.**

**16. Deteriorating the Purity of the Water—Injunction—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 17.**—By sect. 17 of the Public Health Act, 1875, "nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse . . . until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse . . ." The test as to whether there has been an infringement of the above section is whether the local authority have conveyed into the stream at any point sewage or filthy water so as to deteriorate the purity and quality of the water at that point, and to ascertain this the inquiry must be as to what was in fact the purity and quality of the particular stream at the point before the sewage or filthy water was conveyed into it, and whether it has in fact been deteriorated.

If deterioration is proved by the discharge at any one point, it is no answer to say that taken as a whole the operations have not produced any deterioration upon the stream as a whole.

If there has been such deterioration the Attorney-General is entitled to an injunction; but, upon an application to enforce the injunction, the Court would be reluctant to do so until the local authority had reasonable time for remedying the matter complained of, and had neglected to use the opportunity thus afforded.

**ATTORNEY-GENERAL v. BIRMINGHAM, & C, DISTRICT DRAINAGE BOARD, (1907) 24 T. L. R. 126—Kekewich, J.**

**17. Flow of Sewage into a River—Notice by Conservancy Board to Discontinue—Discontinuance—Permitting Sewage to Flow again—Offence—Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv), ss. 92, 93—Lee Conservancy (Amendment) Act, 1900 (63 & 64 Vict. c. cxvii), ss. 28, 29.**—In July, 1902, the respondents were served with a notice by the appellants under sect. 92 of the Lee Conservancy Act, 1868, to discontinue the flow of sewage into the river Lee. In September, 1905, sewage matter, through the negligence of a workman of the respondents, was allowed to escape into the river. There was no evidence that sewage had been caused or suffered to flow into the river from the date of the notice in 1902 up to the occurrence in 1905.

**HELD**—that the isolated passage of sewage into the river in 1905 was not an offence under sect. 93, inasmuch as the respondents having ceased since the notice to discharge sewage into the river could not, in consequence of such isolated act, be said to have "failed to discontinue" the flow of such sewage under sect. 93 of the Lee Conservancy Act, 1868.

**LEE CONSERVANCY BOARD v. LEYTON URBAN [DISTRICT COUNCIL, (1906) 70 J. P. 318; 95 L. T. 487; 4 L. G. R. 662—Div. Ct.]**

**18. Passing into River Solid Matter in Suspension in Water—Offence—West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi), ss. 3, 5.**

—The respondents were the owners and occupiers of a mill situated on the bank of a river in the appellants' district. Adjoining the mill was a large dam fed by a goit from the river and a tributary stream, and having an outlet at the other end into a lower part of the river. The sewage from some 400 houses, besides the treated trade effluent of six mills, entered the river above the dam. Owing to the waters being impounded in the dam a deposit of mud and sludge had formed in the basin of the dam. The respondents in order to get rid of such mud, sludge, and deposit, opened the sluice at the outlet of the dam, turned the whole of the waters of the river through the dam, while men with spades conveyed and scraped the mud, sludge, and deposit into the current so made when it was carried in suspension through the outlet, making the river muddy and unfit for any purpose.

**HELD**—that the respondents had committed no offence under sect. 5 of the West Riding of Yorkshire Rivers Act, 1894.

**WEST RIDING OF YORKSHIRE RIVERS BOARD [v. RAWSONS, (1903) 67 J. P. 407; 89 L. T. 363; 1 L. G. R. 736—Div. Ct.]**

**19. "Putrid Solid Matter"—"Particles of Matter in Suspension in Water"—Rights of Impounding or Diverting Water—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 2, 17, 20.**—The defendant had been for many years the owner of weaving sheds on the banks of a river, and before the passing of the Rivers Pollution Act, 1876, had acquired a right of diverting and impounding water for the purpose of his business. The water higher up the stream contained vegetable refuse, which, if it had been allowed to flow along the natural course of the river, would not have become putrid. But when it settled in the defendant's impounding reservoir, it became putrid, and when the reservoir was periodically cleared out by opening sluices, the effluent contained the vegetable refuse which had so become putrid. The effluent consisted of 97.6 per cent. of water, and 2.4 of solid matter. Proceedings having been taken against the defendant, in which it was alleged that he put putrid solid matter into the river contrary to the provisions of sect. 2 of the Rivers Pollution Act, 1876—

**HELD**—that the defendant was protected from liability under the Act by sect. 17.

**HELD ALSO** (by A. L. Smith and Rigby, L.J.)—that the matter put into the river by the defendant was not solid matter within sect. 2 of the Act.

Per Vaughan-Williams, L.J.—*Quære*, whether the proper time for considering whether the matter was solid was not the moment of commencing the operation of flushing rather than the moment when the matter came into contact with the stream.

**Rivers—Continued.**

Judgment of Divisional Court ([1899] 1 Q. B. 27; 68 L. J. Q. B. 20; 63 J. P. 195; 15 T. L. R. 5) affirmed.

**RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL**, [1899] 2 Q. B. 385; 68 L. J. Q. B. 984; 63 J. P. 708; 48 W. R. 22, 81 L. T. 38; 15 T. L. R. 455—C. A.

**20. Rights of Riparian Owner—Prescriptive Rights of House-owners—Injunction—Damages—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 15, 17, 19, 299—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61, s. 1).**—The sewage of a town had for many years been discharged by a corporation acting as the local sanitary authority into a river which passed through the town, and the pollution of the water perceptibly increased as new houses contributed their sewage. The plaintiff's castle and land was situated along the course of the river some distance below the town, and the water of the river was used for feeding a lake therein situated. At the outfall from the lake was a water-wheel from which power was obtained to pump water from an adjacent well up to the plaintiff's castle. Owing to the pollution the supply to the lake had to be cut off, and the use of the water-wheel discontinued.

In an action by the plaintiff, firstly, for an injunction to restrain the corporation from polluting the river in such a way as to prevent him from using the water for the purposes of his lake, and so as to be a nuisance to the castle and estate; secondly, for a mandatory order to compel them to do certain works of cleansing and removal of foul matter from the plaintiff's lands; and, thirdly, for damages for injuries done by the pollution.

**HELD**—firstly (*a*) that persons who had discharged their sewage for more than twenty years into the sewers had obtained a prescriptive right, and that it would be impossible to grant an injunction which would interfere with these prescriptive rights; *Attorney-General v. Dorking Union* ((1882) 20 Ch. D. 595; 51 L. J. Ch. 585; 30 W. R. 579; 46 L. T. 573—C. A.) followed; (*b*) that to grant an injunction only as to sewers not twenty years old was impracticable; and, moreover, the county council having obtained an order under the Rivers Pollution Prevention Acts, 1876 and 1893, compelling the corporation to abstain from polluting the river after a date fixed, and the corporation being now engaged in carrying out works in order to comply with that order, an injunction was unnecessary.

Secondly that a mandatory order to do work on the plaintiff's land could not be granted, and that the proper remedy was in damages.

Thirdly (*a*) that an action for damages would not lie against the defendants for mere acts of non-feasance or neglect, the plaintiff's proper remedy being under section 299 of the Public Health Act, 1875; but (*b*), that they were liable in damages in respect of acts done by themselves.

Fourthly, that the plaintiff could recover in respect of the cost of providing an engine and new water supply to his fields, and injury to his

fishing and a house which he let, but not for loss of amenities of his castle, which he did not wish to let, nor for the silting up of the lake, for he ought to have excluded the polluted water earlier.

Fifthly, that damages could be recovered for a period of six years, there being a "continuance of damage or injury."

**HARRINGTON (EARL OF) v. DERBY CORPORATION**, [1905] 1 Ch. 205; 74 L. J. Ch. 219; 69 J. P. 62; 92 L. T. 153; 21 T. J. R. 98, 3 L. G. R. 321—Buckley, J.

**21. Sewer—New Drainage Works—Somersetshire Drainage Act, 1877 (40 & 41 Vict. c. xxxvi.), s. 134**—Section 134 of the Somersetshire Drainage Act, 1877 (Local and Personal), is in the following words:—"No person shall without the consent of the commissioners . . . open any new drain or other work into any of the drainage works of the commissioners . . . and no persons shall cause any filthy or unwholesome water, or washings of manufactories or mines, or other foul or poisonous liquid, to flow into any watercourse within the jurisdiction of the commissioners . . . and any person offending against this enactment shall incur a penalty not exceeding £5, and a further penalty of forty shillings for every day during which the offence is committed; but this section shall not apply to any person having a legal right to cause such water, washing, or liquid as aforesaid to flow into any existing river, stream or watercourse."

The sewage of the town of Bridgwater flowed into the Parrett, a tidal river within the jurisdiction of the commissioners. The appellants, the commissioners, sought to restrain the respondents, the urban sanitary authority, from carrying out certain works for the more effectual drainage of the town and disposal of the sewage thereof and from making a new outfall into the river Parrett.

**HELD**—that the river Parrett was not a "drainage work" of the commissioners, though it was within their jurisdiction and though they had done some work in the bed of the stream, and that assuming that the river Parrett, though an arm of the sea, is a "watercourse" within the meaning of the Act, the Corporation was outside the section for the following reasons—"The Act does not say that any person who had a legal right to cause filthy or unwholesome water or washings of manufactories or mines or other foul or poisonous liquid to flow into a watercourse, is not to increase the pollution, or not to pour the foul water into the watercourse at a different spot, nor does the Act prohibit the making of new sewers, or the enlargement or improvement of old ones."

**SOMERSETSHIRE DRAINAGE COMMISSIONERS v. CORPORATION OF BRIDGWATER**, (1900) 81 L. T. 729—H. L. (E.).

**22. Stream Polluted from other sources—Discharge of Sewage which would have been Appreciable if Stream were Pure—Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75), s. 3.**—In considering whether any discharge pollutes a river, regard must be had to the river in its pristine



**Rivers—Continued.**

state; it is no defence to proceedings under the Pollution Acts to say that the stream is so polluted by other persons that the pollution in question is inappreciable

**HAINESWORTH v. WEST RIDING RIVERS BOARD,**  
[1902] 5 L. G. R. 356 n.—Div. Ct.

**23. Stream not Fouler below than above Entry—Discretion of County Court Judge not to make Order Restraining Pollution—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 3, 10.]**—On an application in the County Court by a county council for an order under sect. 10 of the Rivers Pollution Prevention Act, 1876, requiring a rural district council to abstain from polluting a stream by sewage, it was proved (*inter alia*) that from seventeen to twenty outlets of sewage—for the most part slops and urine—passed into a stream in the district of the district council. Some of these outlets were sewers. Evidence was also given that the stream was as pure, if not purer, below the sources of pollution, as it was above. There were weirs between the place where a sample of the water was taken above the sources of pollution and the place where one was taken below such sources. The County Court Judge refused to make an order on the ground that the pollution was not appreciable.

**HELD**—that if the County Court Judge had decided on the ground that the stream was not rendered more foul by the entry of the sewage, he was wrong in law. The test was: Would the river in its pristine state be polluted? If the County Court Judge had decided on the right principle his judgment was contrary to the evidence, and the Court overruled his decision on the facts.

**Per Phillimore, J.**—The County Court Judge has a discretion not to make such an order where pollution is proved; but that discretion does not vary with the length of his foot. It may be exercised (1) where the pollution is so trivial that the maxim *de minimis* applies, and (2) where the complainants are in fault themselves, as in *Kirkheaton District Local Board v. Ainley, Sons & Co.*, [1892] 2 Q. B. 274, 61 L. J. Q. B. 812; 56 J. P. 374; 67 L. T. 209; 41 W. R. 99—C. A. Further, the County Court Judge has a discretion in enforcing the order.

**STAFFORDSHIRE COUNTY COUNCIL v. SEISDON [RURAL DISTRICT COUNCIL, (1907) 71 J. P. 185, 96 L. T. 328—Div. Ct.**

**24. "Stream"—"Sewer"—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), part 3, ss. 4, 20.]**—In proceedings taken under part 3 of the Rivers Pollution Prevention Act, 1876, the County Court Judge found that the beck in question was a "stream" within the meaning of sect. 20 of that Act; but he did not expressly find that it was not a "sewer" within the meaning of the Public Health Act, 1875, and it was objected that his decision was for that reason ambiguous.

**HELD**—that the question was in fact raised

before the Judge, and was in terms decided by him.

**WEST RIDING OF YORKS RIVERS BOARD v. [YORKSHIRE INDIGO SCARLET AND COLOUR DYERS, LD, (1903) 67 J. P. 80—Div. Ct.**

**25. "Tidal" Waters—What are—Vertical Rise and Fall—West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi.), ss. 7 (1), 24.]**—The respondents were summoned by the appellants for sending into the River Wharfe liquid sewage matter contrary to sect. 7 of the West Riding of Yorkshire Rivers Act, 1894. The respondents relied upon sect. 24 of the same Act, which provides that nothing in the Act shall apply to any "tidal" waters which have not been determined by the Local Government Board to be a stream in accordance with sect. 20 of the Rivers Pollution Prevention Act, 1876.

**HELD**—that in construing the expression "tidal waters" it is necessary to take into account not merely the horizontal ebb and flow, but also the vertical rise and fall so far as the same are unaffected by wind, whether or not the rise is caused by the tide properly so called or is occasioned by water being arrested by the tide on its way to the sea.

**WEST RIDING OF YORKSHIRE RIVERS BOARD [v. TADCASTER RURAL DISTRICT COUNCIL, (1907) 71 J. P. 429; 97 L. T. 436, 5 L. G. R. 1208—Div. Ct.**

•(iii) Procedure.

**26 Action in County Court—Application to Transfer to High Court—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 11.]**—An application by the plaintiffs under sect. 11 of the Rivers Pollution Prevention Act, 1876, for the transfer to the Chancery Division of the High Court of an action commenced in the County Court, on the ground that it raised intricate questions of fact and law, was refused; the Court being of opinion that additional expense would be occasioned by transferring the case from the County Court, where the question of fact could be locally determined, and from which tribunal there was an appeal to the High Court on questions of law.

**WEST RIDING OF YORKSHIRE RIVERS BOARD v. [RAVENSTHORPE URBAN DISTRICT COUNCIL, (1907) 71 J. P. 209; 5 L. G. R. 347—Joyce, J,**

**27. Manufacturing and Mining Pollution—Notice of Intention to take Proceedings—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), Part III., ss. 4, 6, 13.]**—Notice of intention to take proceedings under Part III. of the Rivers Pollution Prevention Act, 1876, may be given before the consent of the Local Government Board obtained to such proceedings being taken.

**WEST RIDING OF YORKSHIRE RIVERS BOARD [v. SCARR END MILL CO., (1901) 65 J. P. 776—Div. Ct.**

**Overruled in West Riding of Yorkshire Rivers Board v. Robinson Bros., No. 28, infra.**

**Rivers—Continued.**

**28. Manufacturing Pollution—Proceedings by Sanitary Authority—Consent of Local Government Board—Notice of Intention to take Proceedings—Validity of Notice—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 4, 6, 13.]**—Where proceedings are proposed to be taken by a sanitary authority under the Rivers Pollution Prevention Act, 1876, for an offence against Part III. of the Act relating to manufacturing and mining pollutions, the two months' notice of intention to take proceedings which the Act requires to be given to the offender, cannot be given until the consent of the Local Government Board to the taking of the proceedings has been obtained.

*Midlothian and Linlithgow County Council v. Oakbank Oil Co., Ltd.* ((1903) 5 F. 700; 67 J. P. 412), *infra*, approved.

*West Riding of Yorkshire Rivers Board v. Scarr End Mill Co.* ((1901) 65 J. P. 776), *supra*, overruled.

**WEST RIDING OF YORKSHIRE RIVERS BOARD**  
[*v. ROBINSON BROS.*, [1907] 1 K. B. 431; 76 L. J. K. B. 426; 71 J. P. 137; 96 L. T. 162; 23 T. L. R. 249; 5 L. G. R. 409—C. A.]

**29. Statutory Procedure Preliminary to Prosecution—Notice to Manufacturer—Time for—Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75), ss. 6, 13.]**—The notice which a sanitary authority are required by sect. 13 of the Rivers Pollution Act, 1876, to give to a manufacturer two months before they commence proceedings against him cannot validly be given before the authority have obtained the consent required by sect. 6—in Scotland that of the Secretary of State.

**MIDLOTHIAN COUNTY COUNCIL v. OAKBANK**  
[*OIL CO., LD.*, (1903) 5 F. 700; 67 J. P. 412—Ct. of Sess.]

**(c) Repairing Banks, etc.**

**30. "Banks"—Duty to Repair—Flood Banks raised behind the Natural Banks—River Ure Navigation Acts, 1767 (7 Geo. 3, c. xciii.), s. 50, and 1820 (1 Geo. 4, c. xxxv.), s. 88.]**—By sect. 50 of an Act of 1767 the defendants' predecessors were authorised to canalise the river Ure, and for that purpose to dig, cut and raise the banks; and, if they raised the level of the water, they were to cause the banks to be proportionately raised and strengthened, and also to repair and maintain the said raised banks. By sect. 88 of an Act of 1820 they were directed to keep "the banks of the said river Ure in good and sufficient repair." At some date prior to 1820, but when and by whom was not proved, "flood banks" were erected a few yards behind the natural banks of the river; and the plaintiff, a riparian owner, contended that under the Acts above mentioned the defendants were liable to maintain such flood banks.

**HELD**—that the judge had rightly come to the conclusion that the "flood banks" were not the "raised banks" contemplated, and that the defendants were not liable to repair them.

Decision of Kekewick, J. (19 T. L. R. 265) affirmed.

**VYNER v. NORTH-EASTERN RY. CO.**, (1904) 20 T. L. R. 192—C. A.

**31. Non-tidal River—Public Navigable River—Locks erected by Patentee on Private Property—Right to take Tolls—"Sole and exclusive passage and transit" for Boats—Liability to repair and maintain Locks.]**—The appellant's predecessors in title obtained the grant of a patent for making rivers navigable by locks or sluices. They erected a number of locks upon channels cut through their own land, and so rendered the River Ouse navigable from St. Neot's to St. Ives.

Further patents or charters were subsequently granted, and the joint effect of these was in dispute.

The traffic on the river had now ceased to be profitable to the owner of the locks, and he had ceased to keep them in repair.

Thereupon the County Council claimed a declaration that he was under a liability to keep the locks in good repair.

**HELD**—(1) that the cuts or channels were part of a navigable river, and that the appellant could not exclude the public from them; but that (2) his obligation to keep the locks in repair was conditional upon his receiving from authorised tolls sufficient money for the purpose; and that (3) if he could not keep them in proper repair he was bound to close them.

Decision of C. A. ([1901] 2 Ch. 671; 70 L. J. Ch. 828; 85 L. T. 325; 17 T. L. R. 768) reversed.

**SIMPSON v. ATTORNEY-GENERAL AT THE RE-**  
[**LATION OF THE COUNTY COUNCIL OF HUN-**  
**TINGDONSHIRE AND OTHERS**, [1904] A. C. 476;  
20 T. L. R. 761; 74 L. J. Ch. 1; 69 J. P. 85;  
91 L. T. 610; 3 L. G. R. 190.—H. L. (E.)]

**32. Private Act—Duty to Maintain Banks—Construction of Act.]**—The defendants were under a statutory obligation to maintain and keep the banks of the River Ure "in good and sufficient repair, and from time to time to strengthen and support the same, when necessary, for containing all the water of the said River Ure, so that the adjacent lands and grounds may not be subjected to be overflowed or damaged by water, except in case of flood and during the continuance thereof.

**HELD**—that these words imposed an obligation upon the defendant to maintain and repair the banks so as to prevent their being eaten away and damaged in the course of nature by the water of the river.

Decision of C. A. (1897) 137 L. R. 368 reversed.  
**VYNER v. N. E. RY. CO.**, (1898) 14 T. L. R. 554  
[—H. L. (E.)]

**(d) Rights of Riparian Owners.**

**33. Abstraction of Water for purposes unconnected with Riparian Tenement—Railway Company taking Water for Engines.]**—A riparian owner on a natural stream has an absolute right to use the water for domestic purposes and

**Rivers—Continued.**

for cattle; he may also have a right to use it for other purposes connected with his riparian land, subject to certain restrictions as to reasonableness of amount, and restoration of water after use. But he has no right to use water for purposes unconnected with his riparian tenement.

A railway company, whose line crossed a natural stream by a bridge, owned a few yards of land on each bank. they claimed in right of their ownership to take water in a pipe for the use of their engines on all parts of their line.

**HELD**—That such a use was unconnected with their riparian tenement, and that a millowner lower down the stream might block up the pipe.

*Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875) L. R. 7 H. L. 705; 45 L. J. Ch. 638; 24 W. R. 284; 33 L. T. 513—H. L.) followed.

*Earl of Sandwich v. Great Northern Ry. Co.* (1878) 10 Ch. D. 707; 27 W. R. 616 overruled.

*McCARTNEY v. LONDONDERRY AND LOUGH [SWILLEY RY. CO., LD., [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385—H. L. (Ir.)*

**34. Curtailment by Statute—Arching over Stream—Girder**—"Building, Erection, or Thing over the Bed"—*Burnley Borough Improvement Act 1871* (34 & 35 Vict. c. cliv.), ss. 134, 135—*Burnley Borough Improvement Act 1883* (46 & 47 Vict. c. lxxvii.), s. 46.]—By sect. 135 of the Burnley Borough Improvement Act 1871, "if any building, erection, or thing has been built, erected or placed in or on the sides of either the Brun or Calder and within 15ft. from the centre thereof," the corporation can summon the owner or builder before the justices, who shall order the same to be removed and can inflict penalties. By sect. 135 "nothing in this Act contained shall prevent the owners of land adjoining the said streams from arching over the same, provided always that the span of such arch shall be not less than 30ft.," and a certain space was to be left under such arch.

By sect. 46 of the Burnley Borough Improvement Act 1883, "notwithstanding anything in the Act of 1871 contained, every building, erection, or thing . . . built, erected, or placed above the bed . . . shall be so built, erected, or placed as to leave a clear space between such building, erection, or thing and any building, erection, or thing in or on the opposite side of such respective river of not less than 30ft.," and if this is not complied with the owner or person erecting can be summoned by the corporation.

The appellants, who were the owners of both sides of the river, placed across the river an iron girder, which was the first of several, on one half of which girders they proposed to make a car-rageway. They were summoned for unlawfully erecting this girder and not leaving a space between such girder and a building on the side of the river of not less than 30ft.

The magistrates held that sect. 135 of the Act of 1871 was superseded, and that this was a building, erection, or thing placed above the head of the waterway.

**HELD**—(*dissentiente* Lawrance, J.), that the view of the magistrates was correct, and that this was in contravention of sect. 46 of the Act of 1883, sect. 135 not being applicable, but that so far as sect. 46 was inconsistent with sect. 135, it must be taken to override or limit the earlier section. Also that the words "above the bed" meant "over the bed."

Per Wright, J.: It was very doubtful whether this was arching at all.

*BURNLEY CO-OPERATIVE SOCIETY v. PICKLES.* [(1898) 62 J. P. 260; 77 L. T. 803—Div. Ct.]

**35. Impeding Passage of Salmon—Undue Abstraction of Water.**—Proprietors of salmon fisheries are entitled to an interdict restraining lower riparian owners from materially obstructing the passage of salmon.

In 1882, millowners on a salmon river, who had an admitted right to divert some water into artificial channels, increased their diversion to such an extent as to leave the natural channel at times dry.

In 1900, proprietors of salmon fisheries higher up the river asked for an interdict.

**HELD**—that it ought to be granted.

Decision of Ct. of Sess. ((1904) 5 F. 818) affirmed.

*ALEX. PIRIE & SONS, LD. v. EARL OF KINTORE [AND OTHERS, [1906] A. C. 478; 75 L. J. P. C. 96 H. L. (Sc.)*

**36. Natural Stream—Artificial Stream—Inference of Right to Reasonable Use of the Water—Mill—Manufactory—Pollution.**—The plaintiffs and their predecessors in title had been entitled during 400 years to the uses of an ancient watercourse for the purposes of a flour mill upon an artificial cut or channel running out of it. The mill owner had had from time immemorial the control of the flow of the water. He had been able, therefore, so to deal with the water as to avail himself of it at such times as he pleased, and in such manner as was beneficial for the working of the mill. He had also, it seems, cast upon him the obligation of cleaning the watercourse and repairing its banks. The owners of the adjoining properties had used the water for the purpose of watering their cattle and for the ordinary purposes for which riparian owners would use a natural stream. The predecessors in title of the defendants were owners of a tannery on the site of which the defendants' factory stood, and they used the water for the purposes of their tannery business. The plaintiffs' predecessors in title sold their land, with rights of water, for the erection of a manufactory, and the plaintiffs before they became owners of the mill used and still used the water for the purposes of their manufactory, and did not use it exclusively for the purpose of their mill. The plaintiffs claimed, as owners both of the mill and the factory, a right to the whole and unpolluted flow of the water of the stream for the use both of the mill and the factory. The defendants claimed a right by prescription to divert and consume for manufacturing purposes a part of the water of

**Rivers—Continued.**

the stream, and to pollute the stream by discharging refuse into it. The case was treated upon the basis that the stream was an artificial watercourse.

**HELD**—that it ought to be inferred that the owners of the lands abutting on the watercourse reserved to themselves at the time when the watercourse was constructed the right to a reasonable use of the water as it passed their lands, and that the plaintiffs were in like manner entitled to a right to the use of the water for all reasonable purposes, and not merely for the purposes of their mill—that is, over and above the special use of the water for the purposes of the mill, both the plaintiffs and the other adjoining owners were entitled to those rights to which the owners of lands adjoining a natural stream would be entitled *inter se*; that the defendants' right to use the water was limited by this, that they must not so use it as to cause injury to the plaintiffs and that the plaintiffs must prove sensible injury; and that there had been an unjustifiable pollution of the stream by the defendants, but no unreasonable withdrawal of water by them.

*Sutcliffe v. Booth* ((1863) 9 Jur. (N.S.) 1037; 32 L. J. Q. B. 136) followed.

Decision of Byrne, J. ([1901] 17 T. L. R. 239) reversed.

*BAILY & Co. v. CLARK, SON & MORLAND*, [1902] 1 Ch. 649; 71 L. J. Ch. 396; 50 W. R. 511; 86 L. T. 309; 18 T. L. R. 364—C. A.

**37. Public Navigable River—Access to Wharf—Obstruction to Neighbour's Wharf—Injunction.**—A wharfinger in a public navigable river is entitled to berth his vessel alongside his wharf or jetty even though it overlaps the neighbouring frontage, and to keep it there for the purpose of loading or discharging, so long as he does not interfere with the access, when required, to his neighbour's wharf; but when access is required by the neighbour the vessel must be moved to give that access at once.

*Original Hartlepool Collieries Co., v. Gibb* ((1877) 5 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. (N.S.) 433—Jessel, M. R.) followed.

*LAND SECURITIES CO., LD. v. COMMERCIAL [GAS CO., (1902) 18 T. L. R. 405—Eady, J.*

**38. Right to Flow of Water in a Stream—Riparian Owner—Injurious Affecting—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 57, 332.**—The owner of a corn-mill sought to restrain a district council from interfering with the natural flow of the stream working his mill. The council owned land on one side of the lake from which the stream flowed, and proposed to construct a dam there so as to increase the storage of water to be supplied for their district, thereby diminishing the stream flowing down to the mill.

**HELD**—that a riparian owner was entitled to an uninterrupted flow of water in the future as in the past; the Public Health Act, 1875, s. 332, did not enable the council to "injuriously affect" the plaintiff's right to an uninterrupted

flow of water without his consent in writing, nor was there a statutory power enabling them to interfere with the plaintiff's common law rights. Injunction granted.

Decision of Kekewich, J. ([1899] 1 Ch. 583; 68 L. J. Ch. 233; 63 J. P. 181; 47 W. R. 376; 80 L. T. 107; 15 T. L. R. 165), affirmed.

*ROBERTS v. GWYRFAL DISTRICT COUNCIL*, [1899] 2 Ch. 608; 68 L. J. Ch. 757; 64 J. P. 52; 48 W. R. 51; 81 L. T. 465; 16 T. L. R. 2—C. A.

**39. Rights of Millers in Water in Mill Dam**—The ownership of a dam in a river does not convert the stream into a pool so as to give the owner of the dam the exclusive right to use the whole of the water in the dam. He has merely the ordinary right of user as a riparian owner, and such further rights as he may have acquired by prescription against other owners.

Decision of Ct. of Sess. (42 Sc. L. R. 380) reversed.

*WHITE & SONS v. WHITE & SONS*, [1906] A. C. [72; 75 L. J. P. C. 14; 94 L. T. 64—H. L. (Sc.)

**40. Spring—Natural Channel—Abstracting Water from Spring-head before it enters the Channel—Riparian Owners—Injunction.**—The rule is that where there is a natural spring the water of which has acquired a natural channel from its source to a river, a tank, by the licence of the owner of the soil, cannot be put in and the water taken at the spring-head and prevented going down, although it has not entered what might be called the channel from the top of the spring.

Where a spring has existed, and existed as a spring coming direct from the land and running in a natural course, the fact that at some remote date some one has built round and over the issuing point, the source of the spring, in order to improve its method of issuing from the earth, makes no difference to the application of the said rule.

The principle of *Dudden v. Clutton Union* ((1857), 1 H. & N. 627; 26 L. J. Ex. 146) and *Bunting v. Hicks* ([1894] 70 L. T. 455; 7 R. 293—C. A.) applied.

*MOSTYN v. ATHERTON*, [1899] 2 Ch. 360; 68 [L. J. Ch. 629; 48 W. R. 168; 81 L. T. 356—Byrne, J.

**41. Underground Water—Course of Channel not Known—Rights of Riparian Owners.**—The rights in relation to water flowing in a defined and known channel on or under the surface of the earth are now well settled; every riparian proprietor has an equal right to the ordinary use of the water which flows in the stream adjacent to his lands as it has been wont to run. This right is an incident to the property in the land through which it passes, and does not depend on a supposed grant, but is *jure naturæ*. But the right does not extend to water percolating through the strata in no known channels or to common surface water rising out of springy or boggy ground and flowing in no definite channel.

**Rivers—Continued.**

There is no right in underground water where the course of its channel is unknown.

**BRADFORD CORPORATION v. FERRAND**, [1902] 2 Ch 655; 71 L. J. Ch 859; 51 W. R. 122; 87 L. T. 388; 18 T. L. R. 830; 67 J. P. 21—Farwell, J.

**42. Watercourse—Manufacturers—Rights of Lower Riparian Owners—Abstraction of Water—Substitution of other Water—Pollution of Water.**—*Semble*, it is no defence to an action for wrongfully abstracting water from a stream that the person so abstracting it is at present discharging compensation water into the stream from another source.

It being found as a fact that manufacturers were materially diminishing the flow of a stream by using water for manufacturing purposes which must be considered "extraordinary" purposes, and that they were also polluting the stream by dyewater or refuse,

**HELD**—that an injunction must be granted at the suit of lower riparian owners.

*Wood v. Wand* (1849), 3 Ex. 748 and *Sampson v. Hoddinott* (1858), 3 C. B. N. S. 596 discussed.

**SHARP AND OTHERS v. WILSON AND OTHERS**, [1905] 93 L. T. 155; 21 T. L. R. 679—Joyce, J.

**43. Water Percolating into Pond—Right to Substitute a Pipe to Feed Pond—Right of Access to Repair Banks of River.**—The fact that a pond adjoining a stream has always been filled from the stream by water percolating through the banks, does not justify the owner in filling it from the stream by pipes and syphons, and so depriving a lower riparian owner of water for his mill.

**HELD**—upon the facts that a millowner had a right to keep in repair the banks of a stream, and for that purpose to have access to the property of a higher riparian owner.

*Breston v. Waite* (1856) 5 E. & B. 986, applied.

**ROBERTS v. FELLOWES**, (1906) 94 L. T. 279—[Joyce, J.]

**(e) River Thames.**

**44. Bank of—"Alteration"—"Repair"—Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879** (42 & 43 Vict. c. cxcviii.), s. 23.]—The respondents were liable to maintain and repair a river bank on the Thames. It became necessary to repair and replace certain old piles and camp shedding in the same or similar positions. To effect this the respondents removed certain timber capping and two feet of the camp shedding, leaving the bank only sixteen feet above ordnance datum instead of eighteen feet, as it was previously. While the bank was in such state an extraordinary tide washed over the bank and flooded the adjacent property. The respondents were summoned for a penalty for making an alteration to a bank so as to affect the security of the premises on which the same were situate, or the

premises adjacent or near thereto, without the previous consent in writing of the appellants, contrary to sect. 23 of the Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879.

**HELD**—that what the respondents had done was a "repair" to and not an "alteration" of the bank, and that they had therefore not committed the offence charged in the summons.

**LONDON COUNTY COUNCIL v. LONDON BRIGHTON [AND SOUTH COAST RAILWAY CO.]**, [1908] 2 K. B. 72; 75 L. J. K. B. 613; 70 J. P. 298; 94 L. T. 773, 4 L. G. R. 721.—Div. Ct.

**45. Navigation—Conservators—Dredging—Sale of Proceeds of Dredging—Authorising by Licence another Person to Dredge and sell proceeds of Dredging—Riparian Owner—Thames Conservancy Act, 1894** (57 & 58 Vict. c. clxxxviii) ss. 43, 87.]—The defendants were authorised by the Thames Conservancy Act, 1894, to dredge the upper part of the river Thames for the purpose of maintaining and improving and freeing or keeping free from obstruction the navigation of the Thames; and they were further authorised to sell the proceeds of that dredging as they thought fit—that is to say, so much as they did not require for the purposes of the Act—carrying the money to the credit of the Conservancy account.

**HELD**—that the defendants could not give authority to another person not only to dredge, but also to sell the proceeds of the dredging for his own benefit.

**PALMER v. THAMES CONSERVATORS**, [1902] 1 Ch. 163; 71 L. J. Ch. 212; 66 J. P. 55; 85 L. T. 537; 18 T. L. R. 88—Kekewich, J.

**46. Navigation—Steamboat employed in Towing Barges—Bye-law requiring Licensed Waterman on Steamboat—Validity of—Watermen and Lightermen Amendment Act 1859** (22 & 23 Vict. c. cxxxiii) s. 80.—Bye-law 60 of the bye-laws made by the Company of Watermen and Lightermen of the river Thames provided that "every steamboat navigated on the river within the limits of the Act, in the towing of barges, lighters, vessels and craft, shall have one licensed waterman on board such steamboat, for the purpose of assisting in the management and navigation thereof;" and the bye-law was made under sect. 80 of the Watermen and Lightermen Amendment Act 1859, which gave power to make bye-laws "for the government of the company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act and the several powers and authorities thereby vested in the company."

**HELD**—that the bye-law was not one that could be made under sect. 80, as it was not a bye-law "for the government of the company," or "for the government and regulation of lightermen and watermen," or "for carrying into effect the purposes of the Act and the powers

**Rivers—Continued.**

vested in the company;” that the bye-law was therefore *ultra vires* and bad, and that it was bad also as being unreasonable.

KENNAIRD *v.* CORY AND SON, LTD., [1898] 2 [Q. B. 578; 62 J. P. 580; 67 L. J. Q. B. 809; 78 L. T. 816; 14 T. L. R. 499; 47 W. R. 30; 19 Cox C. C. 145.—Div. Ct.

47. *Obstruction—Action for Damages—Tolls for Navigating River—Liability of Conservators—Thames Conservancy Act, 1894* (57 & 58 Vict. c. clxxxvii.), ss. 3, 83, 160, 161, 165.]—By the Thames Conservancy Act, 1894, the bed and banks of the River Thames were vested in the Conservators, who were authorised to remove obstructions therein. There was a public right of navigation, and the Conservators were empowered to demand tolls for the use of locks and piers, and also tolls for vessels other than pleasure boats navigating the Thames, ascertained according to the capacity of the vessel to carry. A passenger steamer plying on the Thames was injured by a pile projecting from the bed of the river. The owners of the steamer paid lock and pier tolls, but not navigation tolls. In an action to recover damages against the Conservators,

HELD—that, though the steamer did not carry cargo, yet, inasmuch as she was not a “pleasure boat,” within the meaning of the Act, the Conservators were entitled to charge navigation tolls in respect of her, to be calculated according to her capacity to carry, and her owners had a right to expect that the Conservators would take reasonable care not to expose the steamer to danger from obstructions to the navigation.

HELD—however, on the facts that the Conservators had taken such reasonable care, and were therefore not liable.

Decision of Kennedy, J. (95 L. T. 104; 22 T. L. R. 419; 11 Com. Cas. 130) affirmed.

QUEENS OF THE RIVER STEAMSHIP CO. *v.* CONSERVATORS OF THE RIVER THAMES AND EASTON GIBB & SON, (1907) 96 L. T. 901; 12 Com. Cas. 278; 23 T. L. R. 478.—C. A.

48. *Piers—Rights of London County Council to Levy Tolls—Transfer of Powers—Greenwich Pier—Thames River Steamboat Service Act, 1904* (4 Edw. 7, c. ccciii.), s. 15.]—The London County Council have no statutory power to charge any tolls in respect of Greenwich or Woolwich Piers beyond those prescribed by sect. 15 of their Steamboat Service Act, 1904. They are not entitled to charge the tolls prescribed for Woolwich Pier by the private Acts of the Greenwich Pier Company, whose “rights and privileges” were transferred to the Council.

Any facilities provided by the Council beyond those which the Act of 1904 requires them to provide must be paid for by the persons at whose request the same are provided.

LONDON COUNTY COUNCIL *v.* GENERAL STEAM [NAVIGATION CO., LD., (1907) 96 L. T. 57; 10 Asp. M. C. 340.—Bray, J.

49. *Thames Conservancy Bye-laws, 1898—Bye-law 27—Navigation of Barges—“One Com-*

*petent Man”—“One Man in Addition”—Ultra vires—Thames Conservancy Act, 1894* (57 & 58 Vict. c. clxxxvii.), s. 191.—*Licensed Lightermen—Hauling Barges out of Dock—“Navigated”—Watermen’s and Lightermen’s Amendment Act, 1859* (22 & 23 Vict. c. cxxviii.), s. 66.]—Bye-law 27 of the Thames Conservancy Bye-laws, 1898, provides that “Any lighter navigating the river shall when under way have at least one competent man constantly on board for the navigation and management thereof, and all such craft exceeding 50 tons, but of not more than 150 tons burthen, shall, when under way, have one man in addition on board to assist in the navigation and management of the same.”

HELD—that the bye-law was not *ultra vires* and that both men required by the bye-law must be lightermen or watermen licensed by the Watermen’s Company, or apprentices duly qualified.

*Perkins v. Gingell* (1885) 2 T. L. R. 39; and *Goldsmith v. Slattery* (1890), 63 L. T. 273, followed.

Three lighters lashed together were hauled out of dock into the river by a line attached to one of them. The line was then slackened, and the lighters were carried up by the tide as far as the line would allow. A man on board by means of a pole pushed the lighters along the shore till they reached a spot ninety-five yards from the dock, where they were made fast.

HELD—that the lighters had not been “navigated” within the meaning of sect. 66 of the Watermen’s and Lightermen’s Amendment Act, 1859.

A lighter, with a licensed lighterman on board, was drawn out of dock by means of hydraulic machinery fixed at the pierhead. On gaining the river the lighterman cast anchor, but it failed to hold, and, by the force of the wind and tide, the lighter was taken up the river for over 500 yards. The lighterman then secured the lighter.

HELD—that the lighter was not “navigating” the river within the meaning of bye-law 27.

GARDNER, LOCKER AND HINTON, LD. *v.* DOE; [BUCK *v.* SMITH; KEEN *v.* ADAMS, [1906] 2 K. B. 171; 75 L. J. K. B. 814; 95 L. T. 492.—Div. Ct.

50. *Thames Tunnel—Navigation—Danger to Tunnel—Quia Timet Action—Evidence—Expert’s Report of Historical Value—Thames Tunnel Act, 1824* (5 Geo. 4, c. 156), ss. 79, 80.—*East London Railway Act, 1865* (28 & 29 Vict. c. 51), s. 23.—*Thames Conservancy Acts, 1857* (20 & 21 Vict. c. 147), ss. 50, 52, 98; 1894 (57 & 58 Vict. c. 187), ss. 83, 85.]—The Conservators of the Thames, in whom the rights of the Crown in the soil of the Thames are vested, and who have statutory powers to dredge the Thames, and to alter, deepen, restrict, enlarge, and improve its bed and channel, proposed to dredge the river in a manner likely to endanger the Thames Tunnel, a work constructed under the river by statutory authority.

HELD—that the Conservators must exercise their rights subject to the statutory rights of the owners of the tunnel, and must be restrained by

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injunction from carrying out any dredging works likely to endanger the tunnel.

An engineer's report (in reference to events not within living memory), which is regarded in engineering circles as an authority on the facts in dispute, is admissible as evidence.

EAST LONDON RY. CO. v. THAMES CONSERVATORS, (1904) 68 J. P. 302, 20 T. L. R. 378—Farwell, J.

**III. SEASHORE.****(a) In General.**

**51. Charter—Grant of Adjacent Land—Open and Continuous User—Presumption.**—A charter of 1621 granted to the respondent's predecessors certain land adjacent to the foreshore, it was not clear on the face of it whether the foreshore was included. The grantees built a quay on the foreshore, maintained it as of right, and took tolls for the use of it.

**HELD**—that such open and continuous user gave rise to the inference that the site of the quay was included in the original grant.

Decision of C. A. ([1905] 1 I. R. 509) affirmed  
ATTORNEY-GENERAL FOR IRELAND v. VAN-DELEUR, [1907] A. C. 369; 76 L. J. P. C. 89; 97 L. T. 221—H. L. (Ir.).

And see No. 53, *infra*.

**52. Parcels—Land "bounded by seashore"—Discrepancy between Plan and Description—Sea Receding—Accretion.**—In 1864 the defendant's predecessor conveyed to plaintiff's predecessor land described as situate on the seashore and bounded by the seashore. The plan on the conveyance showed a strip of land lying between the land sold and the area delineated as seashore.

Since 1864 the sea had receded, and a dispute arose as to the land, now of considerable extent, lying between the delineated frontage of the land sold in 1864 and the sea.

**HELD**—that the "sea shore" meant the land adjacent to the sea, ordinarily vested in the Crown, and that the plaintiff was entitled to free access to the sea.

*Per* Romer, L.J.—the land in dispute must be held to be an accretion and belonging to the plaintiff.

*Per* Vaughan Williams and Stirling, L.J.J.—the defendants were estopped from saying that the land sold was bounded by anything but the sea shore.

*Per* Vaughan Williams, L.J.—the land had been sold with an implied covenant that it should face and be bounded by the sea shore.

Decision of Eady, J. ([1904] 2 Ch. 525, 73 L. J. Ch. 757; 52 W. R. 665; 91 L. T. 317; 20 T. L. R. 695) affirmed with variation.

MELLOR v. WALMSLEY, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 53 W. R. 581; 93 L. T. 574; 21 T. L. R. 591—C. A.

**53. Patent—User—Presumption.**—The foreshore may constitute part of a manor which adjoins the sea, and may pass from the Crown by a grant of the manor, although the technical words to describe it are wanting.

When a patent contains words under which the foreshore may pass, it may be shown by user that a particular part only passed, although it be clear that other parts did not, or although it be uncertain whether they did or not.

Where a patent, though omitting the technical words, contains words under which the foreshore may pass, the proper course is to attribute open and notorious acts of user by the lord to a legal origin, and to hold that the foreshore (or the particular part so used) did pass by the patent.

Decision of M.R. ([1905] 1 Ir. R. 483) affirmed.  
VANDELEUR v. GLYNN AND ANOTHER, [1905] 1 Ir. R. 509—C. A. (Ir.).

And see No. 51, *supra*.

**54. Right of Crown—Presumption.**—In the absence of evidence to the contrary, the right of the Crown to the seashore landwards is *prima facie* limited to the line of the medium high tide between springs and neaps.

Attorney-General v. Chambers ((1854) 4 De G. M. & G. 206) followed.

The defendant, an owner of sea-side property, had placed, replaced and maintained on the foreshore in front of it boulders and piles for the purpose of protecting his property.

**HELD**—that such acts, though lasting over a period of thirty years, were not sufficient to enable him to defeat the title of the plaintiff to the foreshore which had been granted to him many years ago by the Crown.

The piles, &c., were only placed there by the defendant as ancillary to the use of his own property in order to protect it; and though he had acquired an easement, or right to continue doing so, he had done nothing intended to dispossess the plaintiff.

Decision of Warrington, J. (20 T. L. R. 589), affirmed.

PHILPOT v. BATH, (1904) 21 T. L. R. 634—C. A.

**55. River Tyne—Durham Palatine Jurisdiction Act, 1858 (21 & 22 Vict. c. 45).**—The foreshore below ordinary high-water mark, and the river bed to mid-stream, of the Tyne opposite to the manors of Gateshead and Whickham, within certain limits, and with certain exceptions, are vested in the Crown as part of the hereditary revenues of the Crown.

The judgment in this case (which extended over eleven years) was taken by consent; pleaders will find the information, prayer and answer set out at length at 67 J. P. 155.

ATTORNEY-GENERAL v. CORPORATION OF NEWCASTLE-UPON-TYNE (1903).

**56. Sea Wall—Rate for Maintaining—Sewers Rate—Persons Benefited.**—By an enclosure award of 1853 two commons or moors were enclosed, and the allottees were ordered to construct a sea-wall along the frontage to the sea.

The lands to the right and left included in the same level had already been protected by walls along their front, such walls being also turned back inland at right angles, because there was then no wall in front of the commons.

In 1903 an extraordinary flood damaged one of the old walls, and a rate was levied to repair

**Seashore—Continued.**

it under a local act upon "all the ratepayers upon the level."

**HELD**—that allottees under the award were liable to contribute, although before their own wall was built the commons derived no benefit from the original walls.

**BAKER v. PARRY**, (1905) 3 L. G. R. 684—

[Warrington, J.]

**(b) Rights over Foreshore.**

*And see title HIGHWAYS, No. 3.*

**57. Access—Limits of Public User—Bathing in the Sea from Foreshore Owned by Private Persons—Highway—Evidence of Dedication.**—Where the foreshore lying between high-water mark and low-water mark of ordinary tides is owned by private persons, in the absence of proof of some right to go upon such foreshore, there is no common law right to go there except for certain purposes, such as in order to avoid perils arising in the course of navigation on the sea, and probably launching a boat for the purposes of fishing. There is no common law right to bathe.

**Blundell v. Catterall** ((1821) 5 B. & Ald. 268) followed.

It is not to be inferred that the owner of the foreshore has dedicated it to the public from the mere fact that he does not object to people who do no damage wandering at will on the sand from time to time uncovered by the sea.

**Blount v. Layard** ([1891] 2 Ch. 691 (*n*))—C. A.) applied.

Decision of **Buckley, J.** (73 L. J. Ch. 160, 68 J. P. 161; 52 W. R. 263; 90 L. T. 199; 20 T. L. R. 180) approved.

**BRINCKMAN AND OTHERS v. MATLEY**, [1904] 2 [Ch. 313; 73 L. J. Ch. 642; 68 J. P. 534; 91 L. T. 429; 2 L. G. R. 1057—C. A.]

**58. Access to Sea at all states of Tide—Right of Navigation—Injunction against Obstruction of Foreshore.**—An owner of land bounded by the sea has a private right of access thereto for the purposes of navigation, including a right of access to the sea, when not actually in contact with his land, across the foreshore. An injunction will issue to restrain any improper obstruction of such an owner's right to use the foreshore for purposes of navigation.

**COPPINGER v. SHEEHAN**, [1906] 1 Ir. R. 519— [Barton, J.]

**59. Custom of Fishermen to Dry Nets.**—A custom for all the inhabitants of a parish, being fishermen, to spread and dry their nets at all seasonable times on a piece of land above high-water mark is a valid custom.

Such a custom is not invalidated by the fact that the local "fisheries" are now carried on at different seasons in the year to those of ancient times, and with different kinds of nets which take longer to dry.

The evidence necessary to prove or disprove such a custom as to a particular piece of land, where the coast line has altered, considered.

A custom of this kind affecting land will affect also land added thereto by accretion.

Decision of **Farwell, J.** ([1904] 2 Ch. 534; 68 J. P. 479; 53 W. R. 55; 91 L. T. 513; 20 T. L. R. 609), affirmed.

**MERCER v. DENNE**, [1905] 2 Ch. 538; 21 [T. L. R. 760; 70 J. P. 65; 54 W. R. 303; 3 L. G. R. 1293—C. A.]

**60. Fishing—"Waste or Cultivated Land"** under 11 Geo. III, c. 31, s. 11.—The right of fishermen to have the free use of land above high water-mark, under 11 Geo. 3, c. 31, s. 11, only continues while the ground is waste and uncultivated, and ceases when it is enclosed by the proprietor as part of a shipbuilding yard.

**CAMPBELLTOWN SHIPBUILDING CO. v. ROBERTSON**, (1898) 25 R. 922; 35 Sc. L. R. 722— Ct. of Sess.

**61. Lease by Crown to Local Authority—Public Rights—Meetings and Addresses—Injunction.**—The public have no right, without the consent of the Crown or its lessees, to enter upon the foreshore of the sea, when dry, except for the purposes of navigation and fishing; and therefore no one is entitled to hold meetings or deliver addresses on any part of the foreshore without such consent. An injunction is a formidable legal weapon which the Court will refuse to grant where the injury or inconvenience caused by the trespass is trivial.

**Blundell v. Catterall** ((1821) 5 B. & Ald. 268) followed.

**LLANDUDNO URBAN COUNCIL v. WOODS**, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 63 J. P. 775; 48 W. R. 43; 81 L. T. 170—Cozens-Hardy, J.]

**62. Removal of Sand—Harbour—Boundary—"Precincts"—Construction of Statute—Musselburgh Harbour Act, 1840 (3 & 4 Vict. c. lxxiii), ss. 2, 49, 76.**—By sect. 2 of the Musselburgh Harbour Act of 1840 the word "harbour" shall be understood to mean the "harbour of Fisherrow," and shall include the whole precincts thereof as after specified. By sect. 76 the said harbour shall be deemed to extend "along the shore" from the Magdalena Burn on the west to the Ravenshaugh Burn on the east, and to seaward to the extent of 100 yards below low-water mark opposite to the shore between the aforesaid burns. The distance between the two burns was two miles.

By sect. 49 it shall not be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones except from such place or places as shall from time to time be appointed by the harbour commissioners. In an action by the harbour commissioners against persons who were proprietors of part of the foreshore between the two burns to restrain them from digging sand, &c. :—

**HELD**—that the harbour and its precincts included the whole foreshore between the two burns, and that the defenders were not entitled to remove sand from their land without the authority of the harbour commissioners.

**Attorney-General v. Tomline** ((1880) 14 Ch. D 58) followed.



**Seashore—Continued.**

Decision of Ct. of Sess. ((1903) 5 F. 387) affirmed.

MUSSELBURGH REAL ESTATE CO., LD. v. CORPORATION OF MUSSELBURGH, [1905] A. C. 491—H. L. (Sc.).

**63. Removal of Shingle—Erecting Seawall—Reclaiming Land—Bonâ fide Claim of Right—Order of Board of Trade—Harbours Act, 1814 (54 Geo. 3, c. 159), s. 14—Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 16.]**—By an order of the Board of Trade made under sect. 14 of the Harbours Act, 1814, as amended by sect. 16 of the Harbours Transfer Act, 1862, the taking or removing of any shingle from the shores or banks of the sea at a certain place was prohibited. The appellant, acting under instructions from the owner of the adjoining land, removed shingle from the foreshore at that place below ordinary high-water mark, on to the foreshore above high-water mark, where his men mixed it with cement to form concrete for the construction of a seawall for the protection of the adjoining land. The portion of the foreshore from which the shingle was removed had formerly belonged to the landowner, but the sea had encroached upon it. Upon an information charging the appellant with an offence against the Order, the appellant contended that no offence had been committed, and claimed the right to take shingle from one part of his property to another, and that, therefore, the justices' jurisdiction was ousted by a *bonâ fide* claim of right. The justices convicted the appellant.

HELD—that an offence had been committed, and that the conviction was right.

ANDERSON v. JACOBS, (1905) 93 L. T. 17; 21 [T. L. R. 453—Div. Ct.]

**64. Right of Owners of Boats to fix Moorings in foreshore—Ordinary Incidents of Navigation—Immemorial User—Presumption of Legal Origin—River Thames.]**—From time immemorial the owners of boats and small craft had been in the habit of fixing moorings for their vessels in the foreshore of a certain part of the river Thames within the port of London.

HELD—that the fixing of such moorings was an ordinary incident in the navigation of vessels at the place in question, and that the rights of the owner of the soil of the foreshore were subject to the rights of persons navigating vessels there to fix such moorings.

HELD ALSO—that a legal origin for such immemorial custom, whether a grant from the Crown, or from the lord of the manor, or former regulations of the authorities of the port of London could, and ought, to be presumed.

ATTORNEY-GENERAL v. WRIGHT, [1897] 2 Q. B. [318; 8 Asp. M. L. C. 320; 66 L. J. Q. B. 384; 77 L. T. 295; 13 T. L. R. 480; 46 W. R. 85—C. A.]

**WATERWORKS.**

I. IN GENERAL . . . . .	1054
II. CHARGES FOR WATER . . . . .	1057
III. COMPENSATION WATER . . . . .	1060
IV. DIVIDENDS . . . . .	1062
V. SUPPLY OF WATER . . . . .	1064

See also COMPULSORY PURCHASE; METROPOLIS; PUBLIC HEALTH.

**I. IN GENERAL.**

**1. Affixing Stop-tap Without Permission—Waterworks—Clauses Act, 1863, s. 19.]**—The defendant, without the consent of the water authority, affixed a stop-tap to a waterpipe used by her.

HELD—that a stop-tap was an "alteration" or "apparatus" within sect. 19 of the Water-clauses Act, 1863, and that a conviction was proper.

WILLIAMS v. LLANDUDNO DISTRICT COUNCIL [(1898) 14 T. L. R. 18—Div. Ct.]

**2. Conduit—Land—Easement—"Proprietor"—Assessment.]**—A person who is entitled to exclude everybody else, and who is himself entitled to possess and enjoy a thing, must be, in any ordinary sense of the term, the "proprietor."

A conveyance began by reciting the Glasgow Waterworks Act. Then it conveyed to the magistrates and council of the city of Glasgow, "according to the true intent and meaning of the Act," first, certain lands, and in the second place "all and whole the heritable and irredeemable servitude right privilege and tolerance of a way-leave for the purpose of their opening up the surface of the land and forming constructing and maintaining therein a culvert or conduit for conveying water to the city of Glasgow and executing all necessary works in connection therewith."

HELD—that the statute itself made the conduit, which was land itself and not a mere easement, the property of the water company for all time, and for all time deprived the original proprietor of the conduit

GLASGOW CORPORATION v. M'EWAN, [1900] [A. C. 91—H. L. (Sc.)]

**3. Land—Injurious Affection—Pumping Water for Supply of District—Abstraction of Running Silt—Subsidence of Land—Compensation—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 6, 12.]**—The right to compensation given by sects. 6, 12 of the Waterworks Clauses Act, 1847, is not, by reason of the heading of the group of sections to which those sections belong, limited to compensation for damage caused during the construction of the waterworks, but extends to damage caused by the taking of water for the purposes of the waterworks after completion.

*In General—Continued.*

The defendants were empowered by a special Act, which incorporated the Waterworks Clauses Act, 1847, to construct waterworks for the purpose of supplying water in a certain district. By pumping water from a well for the purpose of supplying the district, the defendants abstracted wet running silt from under the plaintiff's land, with the result that his house and land were damaged by subsidence. The plaintiff claimed compensation under the Waterworks Clauses Act, 1847.

**HELD**—that the plaintiff was entitled to recover compensation under sects. 6, 12 of that Act.

*Hammersmith and City Ry. Co. v. Brand* (1869) L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238, 18 W. R. 12 distinguished.

Decision of *Pray, J.* ([1906] 1 K. B. 607; 75 L. J. K. B. 183; 70 J. P. 170; 94 L. T. 18; 22 T. L. R. 206; 4 L. G. R. 483) affirmed.

**FLETCHER v. BIRKENHEAD CORPORATION**, [1907] 1 K. B. 205; 76 L. J. K. B. 218; 71 J. P. 111; 96 L. T. 287; 23 T. L. R. 195; 5 L. G. R. 293—C. A.

**4. Pumping Operations by Waterworks—Withdrawal of Support of Subterranean Waters—Causing Water to Percolate Out of Stream—Pollution—Cause of Action—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1—Metropolis Water Act, 1902 (2 Edw. 7, c. 41), ss. 2 (1), 45 (a).]**—The defendants, the successors of the K. Waterworks Company, were owners of a well and pumping station situated in the vicinity of a natural stream. The well was lined with steel cylinders to a depth of seventy-six feet from the top, and no water from the adjacent soil could get into the well except below the cylinders. The plaintiff was a riparian owner lower down the stream. The defendants pumped water from the well, and thereby reduced the general level of the water in the surrounding soil, in consequence of which some of the water flowing down the stream leaked out through the bed and sides of the stream, and the volume of water in the stream which reached the plaintiff's property was diminished. None of the water which so escaped from the stream ever got into defendant's well. Defendants and their predecessors had also polluted the said stream by repeatedly pouring into it engine oil and grease when they were pumping, from the year 1902 down to the date of action.

The Kent Waterworks Company were empowered by the Kent Waterworks Act, 1888 (51 Vict. c. vi.), sect. 10, to make, maintain, and use the works specified in the Act, when and as they might find it expedient so to do. By sect. 8 of the said Act it was further provided that "... nothing in this section shall exonerate the company from any action, indictment, or other proceeding ... in the event of any nuisance being caused by them."

In an action for damages, (a) for withdrawal of water and (b) for pollution, and an injunction:

**HELD**—(1) that the abstraction or diminution of water flowing in a brook, if caused by an act in respect of which an action at common law could be maintained, is a nuisance, and that the company were not protected from an action in respect of such nuisance by their statutory powers to make and use as they might find expedient the works which were the cause of such nuisance.

(2) That with respect to the claim for damages for withdrawal of water, the plaintiff had no cause of action, as the defendants did not by their pumping appropriate any of the stream water, but only caused it to sink into the ground by withdrawing the support of subterranean water.

(3) That with respect to the claim for damages for pollution, the Public Authorities Protection Act, 1893, applied to the defendants, and prevented the recovery of damages for pollution caused by them more than six months before action brought; but that it did not apply to the Kent Waterworks Company, and that by reason of the Metropolis Water Act, 1902, sects. 2 (1), 45 (a), the defendants were liable for the acts of the Kent Waterworks Company, although such acts and their consequences took place more than six months before action brought.

**ENGLISH v. METROPOLITAN WATER BOARD**, [1907] 1 K. B. 588; 76 L. J. K. B. 361; 71 J. P. 513; 96 L. T. 573; 23 T. L. R. 313; 5 L. G. R. 384—Lord Alverstone, C.J.

**5. Rates—"Land covered with Water"—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b).]**—A reservoir of a water company held to be "land covered with water," within the meaning of these words in sect. 211, sub-sect. 1 (b) of the Public Health Act, 1875, and therefore assessable to general district rates at one-fourth of its annual value.

Decision of the Court of Appeal ([1899] 1 Q. B. 273; 68 L. J. Q. B. 207, 63 J. P. 100; 47 W. R. 177; 80 L. T. 1; 15 T. L. R. 95) affirmed in part.

**HAMPTON URBAN DISTRICT COUNCIL v. SOUTH WARK AND VAUXHALL WATER COMPANY**, [1900] A. C. 3; 69 L. J. Q. B. 72; 64 J. P. 260; 48 W. R. 209; 81 L. T. 547; 16 T. L. R. 60—H. L. (E.)

**6. Water Pipes—Right to Support—Minerals under pipe—Lapse of time—Presumption of due payment of Price, or Compensation for Wayleave—Edinburgh Water Act, 1819 (59 Geo. 3, c. cxvi.), s. 38.]**—In 1823 the Edinburgh Water Company laid a pipe through lands now belonging to the appellants: this they were empowered to do by sect. 38 of their special Act upon giving notice to the owners and occupiers and "making satisfaction to such owners and occupiers in manner hereinafter directed." In 1898 the appellants were working minerals in such a manner as to endanger the safety of the pipes, and the company thereupon sought to restrain them from so working. The pipe had been used continuously and without question from 1823 to 1898, but no evidence was forthcoming as to whether any "payment or satisfaction" was paid in respect of the laying of it.

**In General—Continued.**

**HELD**—that, after seventy-five years' enjoyment of the wayleave as of right, the company must be presumed to have done everything necessary to obtain in the first instance the right to lay their pipe and the right to subsequent support for it; and that they were entitled to an interdict.

*London and North Western Ry. Co. v. Erans* (1893) 1 Ch. 16, 62 L. J. Ch. 1, 41 W. R. 149; 67 L. T. 630—C. A.) approved.

Decision of Court of Session ([1900] 3 F. 156) affirmed.

*CLIPPENS OIL CO., LD. v. EDINBURGH AND [DISTRICT WATER TRUSTEES, [1904] A. C. 64; 73 L. J. P. C. 32; 89 L. T. 589—*

H. L. (Sc)

**II. CHARGES FOR WATER.**

*And see LANDLORD AND TENANT, 70, 71; RATES, 68, 69.*

**7. Arrears of Water Rate—Incoming Tenant—Trustee in Bankruptcy—Waterworks Clauses Act, 1847** (10 & 11 Vict. c. 17), ss. 43, 53, 70-74—*Metropolis Water Act, 1871* (34 & 35 Vict. c. 113), s. 48.]—A trustee in bankruptcy who takes over the bankrupt's premises is an "incoming tenant" within the meaning of sect. 48 of the *Metropolis Water Act, 1871*, and is entitled to a supply of water without being obliged to defray the arrears of water rate left unpaid by the bankrupt.

*IN RE FLACK, EX PARTE BERRY, [1900] 2 Q. B. [32; 69 L. J. Q. B. 458; 48 W. R. 446; 82 L. T. 503—Wright, J*

**8. Closet connected with Drainage System but without Water Supply laid on or Flushing Apparatus—Water-Closet—Section 33 of the South Essex Waterworks Act, 1861.**]—Section 33 of the *South Essex Waterworks Act, 1861*, provides. "The company may charge in any one year . . . in respect of every water-closet beyond the first . . . in or belonging to any private dwelling-house the sum of five shillings."

**HELD**, on a case stated for the opinion of the High Court—that a closet "beyond the first" connected with the drainage system of the premises where the closet was situate, and so with a sewer of an urban district council, constructed so as to require flushing with water when used, but without any water supply laid on or flushing apparatus, was not a water-closet within the section.

*ROBERTS v. SOUTH ESSEX WATERWORKS CO., [1903] 67 J. P. 404; 1 L. G. R. 719—Div. Ct.*

**9. Meter Rate or Domestic Water Rate—"Private dwelling house"—Public House—Local Acts.**]—A public-house had no sleeping accommodation, but water supplied to it was used mainly for purposes of a domestic character, i.e., cooking and sanitary purposes; a limited quantity was used for trade purposes, i.e., washing bottles and other trade utensils.

**HELD**—by Lords Kyllachy and Low, that the B.D.—VOL III.

public-house was not a "private dwelling house," but was "other premises" within the meaning of a *Local Waterworks Act*;

**HELD**—by the Lord Justice Clerk and Lord Stormonth Darling, that even if it were a "private dwelling house," it was used for a trade or business for which water is required.

*AIRDRIE, COATBRIDGE AND DISTRICT WATER [TRUSTEES v. FLANAGAN, (1906) 8 F. 932—* Ct. of Sess.

**10. Owner of House let on Weekly Tenancy under £10—Occupier—"Person supplied with Water"—Payment of Water Rate—Suffering Waste—Liability of Owner—Waterworks Clauses Act, 1847** (10 & 11 Vict. c. 17), s. 72.]—The appellant was the owner of a house let by her on a weekly tenancy under £10 per annum. She was summoned as the "person supplied with water," under a water company's special Act, for negligently suffering the water supplied to her to be wasted

**HELD**—that as the owner of a houselet at an annual rental under £10, under sect. 72 of the *Waterworks Clauses Act, 1847*, she was liable to pay the water rates instead of the occupier; the owner was a "person supplied with water" under the special Act, and the conviction was right.

*BROCK v. HARRISON, [1899] 1 Q. B. 958; 68 [L. J. Q. B. 730; 63 J. P. 455; 47 W. R. 541; 80 L. T. 568; 19 Cox C. C. 330—Div. Ct.*

**11. Recovery of Rate—Condition Precedent—Cutting Off Supply—Waterworks Clauses Act, 1847, (10 & 11 Vict. c. 17), ss. 70, 74, 85—Waterworks Clauses Act, 1863** (26 & 27 Vict. c. 93), s. 21.]—Under the *Waterworks Clauses Acts* it is not a condition precedent to the recovery of water rate that the water company should first cut off the supply of water.

*REG. v. HUTTON AND ANOTHER, [1907] 2 K. B. [578; 76 L. J. K. B. 1001; 71 J. P. 424; 97 L. T. 400; 23 T. L. R. 642; 5 L. G. R. 914—* Div. Ct.

**12 Water Rate—Costs of Recovering—Discretion of Justices—Ruabon Water Act, 1870** (33 & 34 Vict. c. lvi.), ss. 37, 38.]—By sect. 37 of the *Ruabon Water Act, 1870*, which incorporates the *Waterworks Clauses Acts, 1847 and 1863*, when a person neglects to pay a rate due to the water company, the latter may recover the same with full costs of suit, in any court of competent jurisdiction; and by sect. 38, after a defaulter has been summoned, water rates and costs ordered to be paid may be recovered by distress. Upon a summons before justices for payment of a water rate,

**HELD**—that the justices were not bound, on making an order for payment of the rate, to order the defaulter to pay the costs, but they had a discretion in the matter.

*RUABON WATER CO. v. EVANS, (1906) 22 T. L. R. [541—Div. Ct.*

**13. Water Rate—Premises let at Weekly Rent—Water Rate and other Rates payable by Owner—"Annual rack-rent or value of**

**Charges for Water—Continued.**

*premises*”—*Bury District Waterworks Act*, 1900 (63 & 64 Vict. c. cxiv.)—*Bury and Radcliffe Waterworks Act*, 1853 (16 Vict. c. xxxi.), s. 55—*Bury and District Joint Water Board Act*, 1903 (3 Edw. 7, c. ccxxxiv.), s. 48—*Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 68.]—The appellant was the owner of three cottages let at weekly rents to separate tenants, the appellant paying water and all other rates. By sect. 32 of the Bury and District Joint Water Board Act, 1903, the Board were to supply water at the rates specified, that is to say, “Where the annual rack-rent or value shall not exceed twenty pounds at a rate per cent. per annum not exceeding ten pounds.”

HELD—the appellant was entitled to deduct the general district rate, the poor rate and the water rate from the gross rent of the cottages so as to arrive at the “annual rack-rent or value” on which the water rate was to be assessed.

WILKINSON v. BURY WATER BOARD, [1905]  
[69 J. P. 214; 92 L. T. 417; 3 L. G. R. 715—  
Div. Ct.]

**14. Water Rate—Power to Charge at different Rates—Whether Water Rate is a “Rate”**—*Northampton Waterworks Act*, 1884—*Northampton (Extension) Order*, 1900.]—The corporation purchased the undertaking of the Northampton Waterworks Company under the provisions of the Northampton Waterworks Act, 1884, which by sect. 36 empowered them to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding  $7\frac{1}{2}$  per cent. per annum on the net rateable value of such dwelling-house. By the water company’s special Act of 1861 it was provided that “the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement,” and that power was by the Act of 1884 transferred to the plaintiffs. There was no express provision in either of the Acts requiring equality of rating in respect of the supply of water. The corporation charged for the supply of water for domestic purposes at the rate of  $7\frac{1}{2}$  per cent. upon the net rateable value of the dwelling-houses in one part of their district, and at the rate of 5 per cent in another part.

HELD—that the corporation were not bound under sect. 36 of the Act of 1884 to charge for water at an equal rate in the pound to all consumers.

Decision of Bigham, J. (66 J. P. 744; 87 L. T. 335, 18 T. L. R. 795), reversed.

By the Northampton (Extension) Order, 1900, the boundaries of the borough were extended, and it was provided by Art. 36 of that Order that the general district rate to be levied in the added part should not in any one year during a period of ten years exceed such an amount in the pound as, “when added to the poor rate, and

to the borough rate and any other rate made by the corporation” in the same year, would make up a total rate of 5s. 6d. in the pound.

HELD (affirming Bigham, J., *supra*)—that the water rate was not a “rate” within the meaning of the words “any other rate” in the Order.

NORTHAMPTON CORPORATION v. ELLEN, [1904]  
[1 K. B. 299; 73 L. J. K. B. 329; 68 J. P. 197;  
52 W. R. 305; 90 L. T. 71; 20 T. L. R. 168;  
2 L. G. R. 473—C. A.]

**15. Water Rate—Recovery of—Summary Proceedings—Limitation of Time—Demand—Summary Jurisdiction Act**, 1848 (11 & 12 Vict. c. 43), s. 11—*Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 56, 57, 256—*Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17).]—By an agreement between the appellants and the Corporation of Southampton, signed in March, 1901, it was provided that all charges for water should be paid quarterly. There was a demand in writing made on August 18, 1901, upon the appellants for payment of one quarter’s minimum charge for water supplied to them for trade purposes for the quarter ending on June 5th, 1901. The appellants having failed to pay the sum demanded, a summons was on January 31st, 1902, issued requiring the appellants to appear before a court of summary jurisdiction and answer the complaint.

HELD—that the rate was a “rate made under this Act,” within the words of sect. 256 of the Public Health Act, 1875; that it was a proceeding in respect of the appellants’ failure to pay within fourteen days after demand; that the matter of complaint did not arise until August 18th, 1901; and that the proceedings were within the time limited by sect. 11 of the Summary Jurisdiction Act, 1848.

ELLIOTT v. RUSSELL, [1902] 2 K. B. 748; 19  
[T. L. R. 5, 72 L. J. K. B. 15; 67 J. P. 158;  
51 W. R. 269; 88 L. T. 204—Div. Ct.]

**III COMPENSATION WATER.**

**16. Neglect to Supply—Right to Recover Penalties in High Court Action—Huddersfield Water Act**, 1869 (32 & 33 Vict. c. cx.), s. 32—*Railways Clauses Act*, 1845 (8 & 9 Vict. c. 20), ss. 140, 145.]—A local Water Act incorporated the provisions of the Railways Clauses Act, 1845, to the effect that every penalty or forfeiture, the recovery of which was not otherwise provided for, might be recovered by summary proceedings before two justices; it is also provided that, if the undertakers failed to supply certain “compensation water,” they should for every day forfeit and pay £5 to the millowners who might “sue for and recover the same”; in addition, they were to make compensation for any special damage due to their default, and such compensation might be sued for in any court of competent jurisdiction.

In an action to recover the £5 penalty,

HELD—that the action lay, the incorporated sections not applying, inasmuch as the Act itself “otherwise provided.”

**Compensation Water—Continued.**

Decision of Wright, J. (1903) 67 J. P. 424; 89 L. T. 168, affirmed.

MELTHAM SPINNING CO., LD. AND OTHERS v. [HUDDERSFIELD CORPORATION. (1903) 89 L. T. 403, 67 J. P. 445—C. A.]

17. *Neglect to Supply—Penalty or Compensation—Completion of Works—Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), ss. 4, 16—*Hawarden and District Waterworks Act, 1883* (46 & 47 Vict. c. clxxxii), ss. 44, 45, 47, 57.—The Hawarden and District Waterworks Company were, by their private Act, liable to a penalty of £5 a day on the complaint of the party interested for failing to deliver from and after the completion of the authorised works a certain number of gallons of compensation water into a certain stream.

The company made default, and on the complaint of the owner of a mill using the water flowing down the stream the justices imposed a nominal fine of 1s. a day.

HELD—that the Act imposed a penalty and not a liability to pay money compensation, and that the justices were entitled to reduce the penalty under either sect. 4 or sect. 16 of the Summary Jurisdiction Act, 1879, and that although the company had not constructed the authorised works in their entirety, they were liable to the penalty, as the proper interpretation of their private Act was that, if they interfered with the stream, they were under an obligation to send down the prescribed amount of compensation water.

DAVIES-COOKE v. HAWARDEN AND DISTRICT [WATERWORKS CO., (1907) 71 J. P. 223; 96 L. T. 906; 5 L. G. R. 731—Div Ct.]

18 *Obligation to Cause Water to Flow into Stream—"Neglect"—Penalties—Fixed Sum Payable per Day to Each Mill Occupier Affected—Huddersfield Water Act, 1869* (32 & 33 Vict. c. 110), ss. 28, 31, 32.—The defendants were empowered by a local Act of Parliament to construct and maintain certain waterworks, and to appropriate certain streams and waters. The Act provided that as compensation for the taking of the water from a certain dike the defendants should cause to flow from a reservoir into such dike a specified quantity of water per minute during every lawful working day; and further provided that in case of neglect on the part of the defendants, by, or in consequence of, which the specified quantity of water should not so flow, the defendants should for every day on which such neglect should occur forfeit and pay to the occupiers of each of the mills and works affected thereby the sum of £5, and should, in addition, make compensation for loss, damage or injury sustained by such occupiers in respect of which such penalties should be insufficient compensation. The plaintiffs, who were mill occupiers, alleged that by reason of the neglect of the defendants the specified quantity of water did not flow into such dike for a period including forty-three working days, and each plaintiff claimed £215, the amount of the penalties of £5 per day for forty-three days. At the trial of the action the

plaintiffs proved that there was sufficient water in the reservoir to enable the defendants to send down the statutory quantity, and that the pipes, if not defective, were sufficient in size to send down that quantity. It was further proved that such pipes require care and attention from time to time, but that the defendants' pipes had not been inspected for a period of thirty years.

HELD—that the defendants were under an obligation to use all reasonable care to send down the statutory quantity of water, and that the evidence given by the plaintiffs established a *prima facie* case of neglect, and cast upon the defendants the burden of proving that they had used reasonable care.

HELD ALSO—that in case of neglect the defendants were liable to pay a sum of £5 per day to each of the occupiers of the mills or works affected by such neglect, and that therefore each of the plaintiffs was entitled to recover the amount claimed.

Decision of Grantham, J. ((1902) 66 J. P. 506), affirmed.

BEAUMONT AND OTHERS v. HUDDERSFIELD CORPORATION, (1903) 67 J. P. 57; 19 T. L. R. 97, 1 L. G. R. 118—C.A.]

19. *Quality—Liability of Water Company for Pollution—Absence of Negligence.*—A water company were empowered to dam up and store the water of a stream, and in return were required to discharge as full compensation a specified minimum daily quantity of water; but nothing was said as to the quality of such compensation water.

HELD (Lords James of Hereford and Robertson dissenting)—that, in the absence of negligence, the water company were not liable for damage due to pollution of the compensation water from accidental causes.

Decision of Ct. of Sess (7 F. 1060) reversed.

EDINBURGH WATER TRUSTEES v. SOMERVILLE [& SON, (1906) 95 L. T. 217—H. L. (Sc)]

**IV. DIVIDENDS.**

20. *Prescribed Rate—Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), ss. 2, 75—*Companies Clauses Act, 1863* (26 & 27 Vict. c. 118), s. 13.—The appellant company was formed under a special Act which incorporated the Waterworks Clauses Act, 1847. Under later special Acts, which incorporated the Companies Clauses Act, 1863, it issued two kinds of preference stock bearing interest at  $4\frac{1}{2}$  and 5 per cent. respectively. None of the Acts contained a "prescribed rate."

HELD—that the rates of interest fixed by the company on its preference stock were "prescribed rates," and that with regard to the ordinary stock the prescribed rate, in the absence of one in the special Act, was the 10 per cent fixed by sect. 75 of the Act of 1847.

CHELSEA WATERWORKS CO. v. METROPOLITAN [WATER BOARD, [1904] 2 K. B. 77; 73 L. J. K. B. 533; 52 W. R. 449, 90 L. T. 831; 20 T. L. R. 433—C. A.]

**Dividends—Continued.**

**21. Prescribed Rate—Power to make up Deficiency of previous Dividends—Deficiency prior to incorporation of Waterworks Clauses Act, 1847** (10 & 11 Vict. c. 17), ss. 1, 75.]

—A waterworks company was incorporated by special Act in 1809, and its dividends for many years averaged about 6 per cent.; in 1864 it was amalgamated with another company by an Act incorporating the Waterworks Clauses Act, 1847. Section 75 of that Act limits the dividend to 10 per cent. in default (as in this case) of a "prescribed rate," but gives power to make up deficiencies of previous years.

The company, having lately become more prosperous, had paid up all deficiencies in previous years back to 1864, and was now proposing to make payments in respect of dividends prior to that date.

**HELD**—that such payment would be *ultra vires*; until 1864 there was no limit on "prescribed rate," and therefore there could be no deficiency within the meaning of the Act.

Decision of C. A. ([1903] 1 Ch. 575; 72 L. J. Ch. 418; 51 W. R. 535; 88 L. T. 485; 19 T. L. R. 329) affirmed.

**KENT WATERWORKS v. LAMPLOUGH**, [1904] [A. C. 27, 73 L. J. Ch. 96; 68 J. P. 361; 52 W. R. 401; 89 L. T. 704; 20 T. L. R. 107; 2 L. G. R. 403—H. L. (E.)]

**22. Prescribed Rate—Limitation to 10 per cent.—Undertaking in Existence before passing of Waterworks Clauses Act—Subsequent Special Act conferring further Powers—Incorporation of Waterworks Clauses Act in such Special Act—Whether Dividend thereupon Limited to 10 per cent.—Profits—Sinking Fund—New River Company's Act, 1852** (15 & 16 Vict. c. clx.)—*Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), s. 75.]—The New River Company, which was incorporated by a charter of Jas. 1, had conferred upon it by that charter an unlimited right to receive payments for water and an unlimited right to distribute profits. The New River Company's Act, 1852, authorised the company to construct certain waterworks, and provided that the Waterworks Clauses Act, 1847, except certain provisions thereof not including sect. 75, should be incorporated therewith.

**HELD**—that the application of the Waterworks Clauses Act, 1847, was not limited to the works authorised by the special Act of 1852, but extended to the whole undertaking; and that therefore sect. 75 of the Act of 1847 restricted the profits to be divided among the undertakers to 10 per cent. per annum.

**HELD ALSO**—that the "undertaking" of the New River Company, including its landed property, was all one undertaking, and that its rents formed part of its "profits" within the meaning of sect. 75.

**HELD LASTLY**—that the undertakings of the Metropolitan Water Companies, on their transfer to the New Water Board, ought to be valued as subject to the obligation to contribute to their respective sinking funds.

Decision of C. A. (68 J. P. 329; 20 T. L. R. 303) reversed on the first point.

**IN RE NEW RIVER CO. AND METROPOLITAN WATER BOARD**, (1904) 20 T. L. R. 687—H. L. (E.)

**V. SUPPLY OF WATER.**

**23. Agreement to Supply Water—Construction.**—An agreement to supply water in specified quantities to a district does not imply necessarily an agreement to supply water at such a pressure as will give a continuous supply at all parts of the district.

**SOOTHILL UPPER URBAN DISTRICT COUNCIL v. WAKEFIELD RURAL DISTRICT COUNCIL**, (1905) 69 J. P. 19, 93 L. T. 711—Eady, J.

**24. Agreement by Water Company to Supply Water for certain Purposes only—User for other Purposes by Ratepayers—"From the Undertakers"**—*Waterworks Clauses Act, 1863* (26 & 27 Vict. c. 93), s. 18.]—A rural district council owned water mains and standpipes, and a water company to whom the mains and standpipes were demised agreed to supply the standpipes with water sufficient for purposes of domestic use and the washing of carts, as well as in the case of fire, but not for street-watering or sewer-flushing purposes. The respondents—ratepayers—used water for trade purposes.

**HELD**—that the second part of sect. 18 of the Waterworks Clauses Act, 1863, applied to the respondents, who were persons who had a supply of water "from the undertakers."

**ANDREWS v. WITTS AND HOLLY**, (1901) 65 J. P. [281; 84 L. T. 124; 19 Cox, C. C. 633—Div. Ct.]

**25. Constant Supply—Right to Demand—Liverpool Waterworks Acts, 1862 and 1866.**—The respondent occupied a house in a street, which so far as the supply of water was concerned had been appropriated by the Liverpool Corporation.

**HELD**—that sect. 32 of the Liverpool Waterworks Act, 1866, had rendered sect. 25 of the Liverpool Waterworks Act, 1862, inapplicable, and that the respondent was entitled to a constant supply of water.

**LIVERPOOL CORPORATION v. BRADY**, (189 ) 14 [T. L. R. 11—Div. Ct.]

**26. Cutting Off Water—House-owner's Communication Pipes Lawfully Connected with Company's Main—Communication Pipes Cut Off by Company—Trespass—Action for Damages and Injunction—Right of Action—Waterworks Clauses Act, 1847** (10 & 11 Vict. c. 17), ss. 43, 53.]—The builder and owner of a row of houses laid down communication pipes for the supply of water to the houses from the main of a waterworks company which had been incorporated by special Act incorporating the Waterworks Clauses Act, 1847. The pipes were laid down with the approval of the company. The company afterwards refused to make the connection between the pipes and the main, and the owner there-

**Supply of Water—Continued.**

upon lawfully made the connection, which was then immediately cut off by the company.

In an action by the house-owner against the company claiming damages and an injunction to restrain the company from preventing him from again connecting the pipes with the main, and from severing such connection if so made again by the plaintiff,

**HELD**—that the company had committed a trespass, and that there was nothing in sects. 43 and 53 of the Waterworks Clauses Act, 1847, which disabled the plaintiff from bringing such an action.

**GALE v. RHYMNEY AND ABER VALLEYS GAS [AND WATER CO.]**, (1903) 67 J. P. 430; 89 L. T. 399; 2 L. G. R. 80—C. A.

**27. "Domestic Purposes" — Boarding-house Keeper**—"Trade, Manufacture or Business."—The appellant received into his house for reward persons to board and lodge therein, who used the respondents' water, and the appellant carried on therein the business of a boarding-house keeper, and used the respondents' water for the purposes before stated in connection therewith; the appellant and his wife and family also resided upon the premises.

Sect. 30 of the Special Act (The Great Yarmouth Waterworks Act, 1853) provided that the company "shall at the request of the owner or occupier of any house or part of a house . . . or on the application of any person who . . . shall be entitled to demand a supply of filtered water for domestic purposes, furnish to such owner, occupier, or other person, a sufficient supply of such water for domestic use" (at rates therein specified). Sect. 32 provided that a supply of water for domestic purposes should not include a supply of water for any "trade, manufacture, or business."

**HELD**—that the appellant was not using the water for the purposes of his business in any proper or just sense, or in any other sense than that the water had been supplied for the domestic use of inmates of the house, and that the appellant was entitled to have water supplied to him on the scale applicable to a supply for "domestic purposes."

**PIDGEON v. GREAT YARMOUTH WATERWORKS [Co.]**, [1902] 1 K. B. 310; 71 L. J. K. B. 61; 66 J. P. 309; 85 L. T. 632; 18 T. L. R. 97—Div. Ct.

**28. Domestic Purposes — Pauper School — Trade, Manufacture, or Business**—*Waterworks Clauses Act, 1847, ss. 48, 50, 53, 55*—*Waterworks Clauses Act, 1863, s. 12*.—The carrying on of a pauper school by guardians is a "business" within the meaning of sect. 12 of the Waterworks Clauses Act, 1863; but the guardians are nevertheless entitled to a supply of water for domestic purposes to the school premises.

They must, however, put themselves in a position to receive such a supply in accordance with the water company's regulations, and if they desire a supply for non-domestic purposes,

they must provide a separate apparatus to receive it. This latter supply they can only obtain by agreement with the water company.

The use of boilers to supply power for driving laundry machinery and for pumping water from wells is not a domestic purpose.

**Barnard Castle Urban District Council v. Wilson** ([1902] 2 Ch. 746; 71 L. J. Ch. 825; 66 J. P. 120; 51 W. R. 102; 87 L. T. 279—C. A., *infra*), discussed.

The owner or occupier of a dwelling-house may have as many communication pipes of the bore allowed by sect. 50 of the Waterworks Clauses Act, 1847, as are necessary to give him a sufficient supply for domestic purposes.

**SOUTH WEST SUBURBAN WATER CO. v. ST. MARYLEBONE GUARDIANS**, [1904] 2 K. B. 174; 73 L. J. K. B. 347; 68 J. P. 257; 52 W. R. 378; 20 T. L. R. 299—2 L. G. R. 567—Buckley, J.

**29. Domestic Purposes — Swimming-Bath — Charity School**—"Domestic Purposes"—"Trade, Manufacture, or Business"—*Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 53*—*Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12*—*Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 51, 56, 57*.—The defendants were the governors of a school which was a charity administered under a scheme settled by the Charity Commissioners in 1882. Under this scheme the school was not carried on for purposes of profit. The school had accommodation for 300 boarders and 50 day boys, and was supplied with water by the plaintiffs. In 1895 the governors erected on their premises a swimming bath, with a cubical capacity of 35,000 gallons. The bath was in a building outside the main building of the school, but was connected therewith by a corridor, and was separately rated for poor rate. The prospectus of the school stated that a swimming-bath was provided, and that the swimming-bath fee was 8s. 6d. a term, payable by every boarder. A swimming-master was kept to instruct the boys, and a fee was paid by such day boys as used the bath. The plaintiffs were the urban sanitary authority, authorised to provide water to the urban district of Barnard Castle.

**HELD**—that the swimming bath was used for the purpose of making the teaching of the school more effectual, and not for the purpose of making the occupation of the house more convenient; and that the water for the bath was not required for "domestic purposes" within the meaning of sect. 12 of the Waterworks Clauses Act, 1863.

Decision of Buckley, J. ([1901] 2 Ch. 813; 70 L. J. Ch. 859; 50 W. R. 92; 85 L. T. 481; 17 T. L. R. 754), reversed.

**BARNARD CASTLE URBAN DISTRICT COUNCIL [v. WILSON]**, [1902] 2 Ch. 746; 71 L. J. Ch. 825; 51 W. R. 102; 87 L. T. 279; 18 T. L. R. 748—C. A.

**30. Domestic Purposes — Water Used for Physician and Surgeon's Motor Car**—*Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12*.—Water supplied to a physician and

**Supply of Water—Continued.**

surgeon and used by him for the purpose of washing a motor car, which he uses for the purposes of his profession, is not water supplied for other than a domestic purpose within sect. 12 of the Waterworks Clauses Act, 1863.

**HARROGATE CORPORATION v. MCKAY**, [1907] 2 K. B. 611; 76 L. J. K. B. 977; 71 J. P. 458; 23 T. L. R. 632; 5 L. G. R. 876—Div. Ct.

**31. Domestic Purposes—Workhouse—Trade or Business for which Water is Required—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 48, 50, 53—Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12—Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), ss. 1, 4.**—The plaintiffs, a water company, were bound by their special Act to supply water to dwelling-houses in their district for domestic purposes at certain rates based on the annual value of such dwelling-houses, but were not bound to supply any dwelling-house with water, otherwise than by meter or special agreement, where any part of such house was used for any trade or business for which water was required.

On August 8th, 1901, the defendants, as occupiers of a workhouse within the district supplied by the plaintiffs, demanded a supply of water for domestic purposes at a rate based on the annual value of the said workhouse. The plaintiffs refused to supply on such terms, on the ground that the workhouse was a dwelling-house which (or some part of which) was used for a trade or business for which water was required. Up to the said date the defendants had been taking water from the plaintiffs by meter. After the said date the plaintiffs continued to supply, and the defendants to take and use, water for the workhouse through the existing meter, until the commencement of this action on July 6th, 1904; but the defendants declined to pay, except on the annual value basis, for water so taken since January 1st, 1902. The plaintiffs claim a declaration and damages for wasting water passing through the meter; but at the trial the statement of claim was amended, by consent, by the addition of a claim for money due for water supplied by contract.

**HELD**—(1) that the whole of the workhouse premises must be considered as one dwelling-house, though comprising several buildings used for subsidiary purposes;

(2) that the maintenance of and provision for paupers in the workhouse was a trade or business for which water was required; but

(3) that the plaintiffs' ground of action was an implied contract to pay for water supplied and was not in tort, and that, therefore, sects. 1, 4, of the Poor Law (Payment of Debts) Act, 1859, applied; and that as the plaintiffs had commenced their action in July, 1904, and had not amended their claim until after the expiry of the time limited by the said Act, they could not recover payments for any of the water which was the subject of the action.

**CHESTER WATERWORKS CO. v. CHESTER UNION** [(1907) 71 J. P. 133, 96 L. T. 566; 23 T. L. R. 245; 5 L. G. R. 215—Jelf, J.

**32. Extinguishing Fire—Gratuitous use of Private Pipe and Fire-plug—Company's Pipe to which Fire-plugs are fixed—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 42.**—Section 42 of the Waterworks Clauses Act, 1847, provides that—"The undertakers shall at all times keep charged with water . . . all their pipes to which fire-plugs shall be fixed, . . . and shall allow all persons at all times to take and use such water for extinguishing fire, without making compensation for the same."

The water which may be taken by all persons at all times for extinguishing fire without compensation under the section is the water from undertakers' pipes to which fire-plugs are fixed.

The undertakers' water was used to extinguish fire on a man's haystack from his own fire-plug, situate in his own field, 180 yards from the undertakers' main and connected therewith by his own pipe. There was no evidence that the main was a pipe to which fire-plugs were fixed. The water from the pipe was ordinarily used by verbal agreement with the undertakers for agricultural purposes at the price of 16s. a year.

**HELD**—that the undertakers were entitled to charge for the water so used as there was no evidence that it was taken from pipes to which fire-plugs were fixed, and the water was not used for an agricultural purpose under the agreement.

**WEARDALE AND CONSETT WATERWORKS CO. v. CHESTER - LE-STREET CO - OPERATIVE SOCIETY, LD.**, [1904] 2 K. B. 240; 73 L. J. K. B. 659; 68 J. P. 386; 52 W. R. 684; 91 L. T. 293, 20 T. L. R. 464, 2 L. G. R. 805—Div. Ct.

**33. Pressure—Supply in Bulk—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35.**—The statutory requirements as to the supply of water at pressure contained in sect. 35 of the Waterworks Clauses Act, 1847, do not apply to the supply of water in bulk, and the duty of the waterworks company ends with the supply of water at a given point.

**WOMBWELL URBAN DISTRICT COUNCIL v. [DEARNE VALLEY WATERWORKS CO.]**, (1907) 71 J. P. 415; 5 L. G. R. 1132—Eady, J.

**34. Providing Water Supply—Part of Contributory Area—Capital Expenditure—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 51, 229, 233—Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), ss. 9 and 10.**—A rural district council provided a water supply to part of a contributory place. On the petition of certain ratepayers under sect. 10 of the Public Health (Water) Act, 1878, the council imposed water rates and water rents upon those liable to such rates and rents under sect. 9 of that Act. These rates and rents, however, were limited to the extent of providing for the cost of maintaining the supply, not of providing for the repayment of the capital expenditure upon the construction of the works.

**HELD**—that the council had a discretion to fix the water rates and water rents as they pleased. The whole cost of providing and main-



**Supply of Water—Continued.**

taining the water supply, whether the supply extended to the whole or only part of the contributory place, was a special expense within sect. 229 of the Public Health Act, 1875, and as such charged on the whole contributory district, and the actual consumers were liable only for such part of such expense as the council thought just.

**HORN v. SLEAFORD RURAL DISTRICT COUNCIL**, [1898] 2 Q. B. 358; 62 J. P. 502; 67 L. J. Q. B. 724; 78 L. T. 722; 46 W. R. 555—Div. Ct.

**35. Pure and Wholesome Water—Waterworks Clauses Act, 1847** (10 & 11 Vict. c. 17, s. 35).—An area containing between 50,000 and 60,000 persons was supplied by a water company from unfenced reservoirs, without filtration, the water being obtained from streams which received the drainage of farmyards. Samples analysed showed in one case an excess of absorbed oxygen and albuminoid ammonia, and in others bacilli indicative of sewage pollution.

**HELD**—that the water company was not supplying pure and wholesome water as required by sect. 35 of the Waterworks Clauses Act, 1847.

**ATTORNEY-GENERAL v. RHYMNEY AND ABER [VALLEY GAS AND WATER CO.]** (1907) 7 J. P. 435—Eady, J.

**36. Supply from Reservoir—Easement—Reservoir held on Yearly Tenancy—House Supplied Demised with General Words by Yearly Tenants of Reservoir—Right to Water Passing under General Words.**—By a lease made in 1880 lessors demised to the plaintiff's predecessor in title a dwelling-house together with "all waters and watercourses, liberties, privileges, easements and appurtenances thereto belonging or in any wise appertaining, or usually held and occupied therewith, or reputed to belong or be appurtenant thereto . . ." for the residue of a term of ninety-nine years (except the last ten days of the term). At the date of the lease, and for eighteen years previously, this dwelling-house had received a water supply from iron pipes which conducted water from a reservoir held by the before-mentioned lessors as lessees on a yearly tenancy. In 1885 the representatives of one of the lessors, who then held the yearly tenancy of the reservoir, were authorised by Act of Parliament to become undertakers for the supply of water in the district, and in 1902 by the Ystradfellte Water Act, 1902, the undertaking, including the yearly tenancy of the reservoir, became vested in the defendants, who threatened to cut off the supply of water unless the plaintiff who held the house under the above-mentioned lease paid a water rate for such supply. On a claim by the plaintiff for an injunction to restrain the defendants from cutting off this supply of water, and for a declaration that she was entitled to a continuance of this supply free of charge,

**HELD**—that the general words in the lease gave the plaintiff a right to the supply of water, and that the defendants were not entitled to cut it off.

Decision of the Div. Ct. ((1905) 69 J. P. 356; 93 L. T. 507; 3 L. G. R. 902) affirmed.

**KEY v. NEATH RURAL DISTRICT COUNCIL** [(1907) 71 J. P. 57; 95 L. T. 771; 4 L. G. R. 1174—C. A.]

**WAYS.**

*See EASEMENTS; HIGHWAYS*

**WEIGHTS AND MEASURES.**

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**I. INSPECTORS.**

*And see RAILWAYS, No 66.*

**1. Prosecution—"Consent" of Local Authority—Special or General—Weights and Measures Act, 1904** (4 Edw. 7, c. 28, s. 14).—The appellant, an inspector of weights and measures, preferred an information against the respondent for having in his possession a two-pound weight which was unjust. He had no specific "consent" to prefer the information, but acted under a general resolution of the local authority consenting to him prosecuting any information, complaint or proceeding arising under the Weights and Measures Act, or in discharge of his duties as inspector.

**HELD**—that under sect. 14 of the Weights and Measures Act, 1904, a separate consent by the local authority to each prosecution was unnecessary, and that the general consent to conduct all such proceedings was sufficient.

**TYLER v. FERRIS**, [1906] 1 K. B. 64; 75 L. J. K. [B. 142; 70 J. P. 88; 54 W. R. 469; 93 L. T. 843; 22 T. L. R. 181; 4 L. G. R. 201, 21 Cox, C. C. 73—Div. Ct.]

**2. Unjust Weights—Detection by Inspector—Verification by Local Standard—Defacing of Weights by Inspector—Misconduct—Weights and Measures Act, 1878** (41 & 42 Vict. c. 49), s. 49—*Weights and Measures Act, 1889* (52 & 53 Vict. c. 21) s. 7.—A coal carman was stopped by the respondent, an inspector of weights and measures, in order to weigh the coal contained in the van. The respondent noticed that the weighing machine carried in the van gave variations. He thereupon fixed up his official scale beam (duly certified by the Board of Trade), and found two of the 56 lb. weights carried by the carman to be deficient. He accordingly informed the carman that he rejected the weights as unjust; but, instead of seizing them, defaced the official stamp thereon with a chisel.

**HELD**—that the justices were right in refusing to convict the respondent of "misconduct" within the meaning of the Acts of 1878 and 1889.

**WEDDERBURN v. SMITH** (1), (1905) 69 J. P. [217; 92 L. T. 853; 3 L. G. R. 533; 20 Cox, C. C. 855—Div. Ct.]

**Inspectors—Continued.**

**3. Verification and Stamping Fees—Resolutions of Local Authority that Fees shall cease in County—Validity—Non-collection by Inspector—Surcharge—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 13.**—By sect. 13 of the Weights and Measures Act, 1889, "an inspector of weights and measures may take . . . the fees specified in the first schedule to this Act, and no others," and the first schedule is headed, "Fees to be taken," &c.

**HELD**—that sect. 13 did not give a discretion to the county council to say whether the fees should be taken or not, the express power given in the Weights and Measures Act, 1878, having been repealed; that the word "may" in the section is only used to indicate that the inspector may take the fees specified in the schedule, and pay them over, and may not take any others; and that the inspector had an obligation imposed upon him by the statute to take those fees, and could be surcharged for sums which he, as the agent of the local authority, did not include in his account because the local authority told him not to collect them.

**REX v. ROBERTS**, [1901] 2 K. B. 117; 70 L. J. K. B. 590; 49 W. R. 488; 65 J. P. 359; 84 L. T. 530, 17 T. L. R. 426—Div. Ct.

**4. Weighing Machine—Test with Local Standard—Seizure of Unjust Machine—Misconduct of Inspector—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 48, 49—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), ss. 7, 29.**—The respondent, an inspector of weights and measures, tested a weighing machine on a coal van with some 56 lb weights which were on the van, and which had already been tested by him with his own official scale beam (duly certified by the Board of Trade), and nine small local standard weights. The weighing machine was found to be unjust, and seized by the inspector.

**HELD**—that the respondent, in testing the machine with such weights, had not been guilty of misconduct under the Weights and Measures Act, 1878.

**WEDDERBURN v. SMITH (2)**, (1905) 69 J. P. 218. [92 L. T. 854; 3 L. G. R. 533; 20 Cox, C. C. 855—Div. Ct.]

**II. SALE OF COAL**

**5. Bye-laws—"Correct" Weighing Instrument to be carried in Vehicle—Bags of Coal up to one hundredweight—Only 56 lb. Weight carried—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 28.**—A bye-law made under sect. 28 of the Weights and Measures Act, 1889, by the local authority provided that: "Every coal dealer and every person employed by him who shall carry out coal for sale by retail or for delivery to a purchaser from or out of any vehicle shall constantly carry therewith a correct weighing instrument stamped by an inspector for the purpose of weighing any coal not exceeding two hundredweight."

The respondent, carrying out coal for sale in a vehicle in bags some weighing one hundredweight and others half a hundredweight, had in his vehicle a correct weighing instrument, but only one half-hundredweight weight.

**HELD**—that although it was possible for him to ascertain, by a cucuitous method, accurately the weight of one of the larger bags, he had committed an offence against the bye-law.

**CRICK v. NICHOLS**, [1905] 1 K. B. 501; 74 L. J. [K. B. 283; 69 J. P. 144; 53 W. R. 431; 92 L. T. 169; 21 T. L. R. 235; 3 L. G. R. 277; 20 Cox, C. C. 777—Div. Ct.]

**6. Correct Weight—When to be ascertained—Weights and Measures Acts 1889 (52 & 53 Vict. c. 21), s. 22.**—Upon a sale of coal, exceeding two hundredweight, in a vehicle in bulk, the "correct weight" of the vehicle and of the coal, which, by sect. 22, sub-sect. 2, of the Weights and Measures Act 1889, is to be inserted in the ticket required by the Act to be given by the seller to the purchaser, is the correct weight as previously ascertained under sect. 22, sub-sect. 1, by a weighing instrument being at or near the place from which the coal is brought, and not the correct weight at the time the coal is delivered to the purchaser.

**KNOWLES & SON, LD. v. SINCLAIR**, [1898] 1 Q. B. 170; 18 Cox, C. C. 681; 62 J. P. 102; 67 L. J. Q. B. 67; 77 L. T. 624; 46 W. R. 188—Div. Ct.

**7. Delivery of Ticket or Note—Penalty—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), ss. 21, 22.**—Sect. 21, sub-sect. 1, of the Weights and Measures Act, 1889, enacts that "where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall deliver, or cause to be delivered . . . to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the third schedule to this Act, or according to a form to the like effect."

A penalty for non-compliance with the section is provided by sub-sect. 2.

Sect. 22, sub-sect. 1, enacts that "where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures, and being on or near to the place from which the coal is brought."

A quantity of coal exceeding two hundredweight was conveyed for delivery on sale in bulk in a vehicle belonging to the seller. The coal and vehicle were weighed by the seller's servant and the purchaser's servant on a weighing machine on the purchaser's premises, and a ticket in the form given in the third schedule of the Act was filled in by the purchaser's servant at the request of the seller's servant.

Before delivery of the coal was accepted, or any part of it was unloaded, the ticket was delivered by the seller's servant to another servant of the purchaser.

**Sale of Coal—Continued.**

HELD—that the seller, having complied with the requirements of sect. 21, sub-sect. 1, was not liable to a penalty under sub-sect. 2.

EDWARDS v. PURNELL, [1899] 1 Q. B. 449; 68 [L. J. Q. B. 272; 63 J. P. 249; 47 W. R. 380; 79 L. T. 737; 19 Cox, C. C. 236—Div. Ct.

8. *Delivery of Ticket—Insertion of Seller's Name—Trade Name—Weights and Measures Act, 1889* (52 & 53 Vict. c. 21), s. 21, sched. 3.]—The appellant, F. B. Cameron, carried on business as a coal merchant under the style of the Co-operative Coal Company, Limited. There was in fact no registered company.

HELD—(in the absence of any fraud)—that the provisions of the Weights and Measures Act, 1889, were carried out by the name of the company as that of the seller being entered on the ticket delivered to the purchaser.

CAMERON v. TYLER, [1899] 2 Q. B. 94; 68 L. J. [759; 63 J. P. 567; 47 W. R. 559; 80 L. T. 764; 15 T. L. R. 369; 19 Cox, C. C. 353—Div. Ct.

9. *Weight of Vehicle*—“*Previously ascertained*”—*Weights and Measures Act, 1889* (52 & 53 Vict. c. 21), s. 22.]—The respondents were summoned for unlawfully failing to insert or cause to be inserted on a ticket the correct weight of the vehicle in which a quantity of coal exceeding two hundredweight in bulk, was conveyed for delivery on sale by them, the weight of such vehicle not having been “previously” ascertained in compliance with sect. 22 of the Weights and Measures Act, 1889. The coal was delivered on October 23rd, and the vehicle was weighed by the appellant on the same day, after the sale, and was found to weigh eleven hundredweight. It was not weighed on October 23rd, previous to the delivery of coal on that day, but was weighed on October 20th, on the occasion of a previous delivery of coal, and then weighed ten and a half hundredweight. The justices held that the respondents were not obliged to take the weight of the waggon previous to each delivery of coal, but only at reasonable intervals, and dismissed the summons.

HELD—that, as there was evidence that the weight of the waggon might vary, the true test was not whether the waggon had been weighed at reasonable intervals, but whether (although it was not necessary that the waggon should be weighed immediately before each delivery) it had been weighed so recently and under such circumstances that the correct weight had been ascertained.

BEARDSLEY v. PIKE & SON, (1904) 68 J. P. 273; [90 L. T. 652; 20 Cox, C. C. 648—Div. Ct.

### III. WEIGHING AND WEIGHING MACHINES.

And see TRADES MARKS, Nos. 179, 185.

10. *False or Unjust Weighing Machine—Weighing Tea—Piece of Paper stuck in Machine—Legality of—Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 25.]—In order to facili-

tate the process of weighing large quantities of tea into small packets, the respondent's servant placed a piece of paper, weighing not quite so much as the bag in which the tea was afterwards wrapped, in the weighing machine beneath the scoop in which the tea was weighed, and kept it there while the tea was being weighed.

HELD—that the machine was false or unjust within the meaning of sect. 25 of the Weights and Measures Act, 1878.

LANE v. RENDALL, [1899] 2 Q. B. 673; 69 L. J. [Q. B. 8; 63 J. P. 757; 48 W. R. 153; 81 L. T. 445; 16 T. L. R. 4—Div. Ct.

11. *Paper Wrapper—Sale of Tea by Weight over Counter—Short Weight—Paper Wrapper and Tea included in Weight—Evidence of Custom—Fraud Wilfully Committed in use of Scale—Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 26.]—By sect. 26 of the Weights and Measures Act, 1878, “Where any fraud is wilfully committed in the using of any weight . . . scale . . . or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine . . .” X., acting on behalf of the respondent, an inspector of weights and measures, entered a shop and asked for four ounces of tea. The appellant's assistant in the presence of X. put some tea into a paper wrapper, weighed the tea and the wrapper together and handed both to X. The gross weight was four ounces twenty grains; the net weight, that of the tea only, was three drams less than four ounces; and the difference between the gross and net weight was three drams twenty grains, the weight of the paper wrapper. The scales were just and accurate. The appellant admitted that when his tea was made up in packets, and they were marked, “Tea net weight without the paper,” the weight of the paper was not included, and that when tea was sold over the counter he had instructed his assistants to include the weight of the paper in the weight asked for. On an information against the appellant under sect. 26 the justices refused to admit evidence of a custom to so include the weight of the paper and convicted the appellant.

HELD—that the fact that the tea and paper were so weighed together, in the presence of the purchaser, so that the purchaser instead of obtaining four ounces of tea for which he had asked, received three drams less than four ounces, did not alone constitute a wilful commission of fraud under sect. 26. Evidence as to the alleged custom so to weigh tea and paper together was material on the question of fraud and ought to have been admitted. Case remitted to justices with direction to find if there were other circumstances in the sale which would constitute fraud and to admit evidence of the custom alleged.

KING v. SPENCER, (1904) 68 J. P. 530; 91 L. T. [470; 2 L. G. R. 979; 20 Cox, C. C. 592—Div. Ct.

12. *Paper Wrapper—Fraud wilfully Committed in the use of Weighing Machine—Article weighed with Paper and done up in Packages of One Pound Weight in all—Package subsequently sold as One Pound Weight of Article—Weights*

**Weighing and Weighing Machines—Continued.**

*and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 26.*]—By sect. 26 of the Weights and Measures Act, 1878, where any fraud is wilfully committed in the using of a weighing machine, the person committing, and every party to, the fraud is liable to a fine. The appellant, or his servants weighed separately each of a number of packages of loaf sugar, so that the weight of the sugar together with the paper in which it was wrapped was exactly one pound. The scales were just and accurate, and each package was correctly weighed. The sugar without the paper was three-quarters of an ounce less than one pound in weight. The respondent entered the appellant's shop and asked for one pound of loaf sugar and paid 2½d., the price of such weight. He was handed one of the said packages previously weighed, and the appellant knew the respondent was obtaining less than one pound of sugar. The appellant was convicted and fined as for an offence under sect. 26.

HELD—that the conviction was wrong, as no fraud had been “wilfully committed in the using of any . . . weighing machine” within the meaning of sect. 26.

STONE *v.* TYLER, [1905] 1 K. B. 290; 74 [L. J. K. B. 18; 69 J. P. 4; 92 L. T. 83; 21 T. L. R. 33; 20 Cox C. C. 763; 2 L. G. R. 1363—Div. Ct.

13. *False or Unjust Scale—Weighing Tea to include Weight of Paper Bag at request of Customer—Brass Clip fastened to Balance—Paper Bag placed under the Scale—Having in their possession a Scale which is False or Unjust—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25.*]—The respondents were wholesale dealers in tea. They received orders from certain customers to weigh tea in quarter-pound packets, such weight to include the weight of the paper bag. The bags were supplied by the customers and had printed on them an intimation that the weight of the bag was included. In order to carry out the orders, the respondents had on their premises, among others, two weighing machines; to the arm of one was affixed a small brass disc, equivalent to the weight of the paper bag, and the other had a folded paper bag placed under the scoop in which the tea was weighed, so that the effect in each case was to weigh out such a quantity of tea as with the bag, in which it was put, would weigh a quarter of a pound. The respondents were summoned under sect. 25 of the Weights and Measures Act, 1878, for having in their possession a scale which was false and unjust.

HELD, reversing the decision of the magistrate—that the respondents should have been convicted.

LONDON COUNTY COUNCIL *v.* PAYNE & Co. [(No. 1), [1904] 1 K. B. 194; 73 L. J. K. B. 192; 68 J. P. 21; 52 W. R. 299; 89 L. T. 632; 20 L. L. R. 93; 20 Cox, C. C. 580—Div. Ct.]

14. *Paper Wrapper—Weighing Machine—Weighing Tea with Paper Bag under the Scoop—Request of Customer—Paper Bag given out by*

*Forewoman and taken away at the end of the Operation—“Weighing Machine False or Unjust”—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25*]—The respondents, who were wholesale tea merchants, were charged under sect. 25 of the Weights and Measures Act, 1878, with using a weighing machine which was false and unjust. The facts were as follows: When an order was given by a customer to weigh out tea in small quantities to include the weight of the paper bag, one of the paper bags supplied by the customer was given by the forewoman to the girl employed to weigh out the tea, and was folded up and placed under the scoop. When the operation was finished, the forewoman removed the paper bag from under the scoop. No use was made of the machine from the time the operation was finished till the bag was removed by the forewoman. No two weighings-out with a bag were allowed to be consecutive, a full-weight order always being interposed.

HELD—that the statute was intended to prevent the use in weighing of a balance which is at the time as a balance unjust, and which will not hang true with nothing in either scale, and that the respondents ought to be convicted.

LONDON COUNTY COUNCIL *v.* PAYNE & Co. (No. 1) [(1904] 1 K. B. 194; 73 L. J. K. B. 192; 68 J. P. 21; 52 W. R. 299; 89 L. T. 632; 20 T. L. R. 93—Div. Ct., *supra*) *dicta* in, explained.

LONDON COUNTY COUNCIL *v.* PAYNE & Co. [(No. 2), [1905] 1 K. B. 410; 74 L. J. K. B. 108; 69 J. P. 80; 53 W. R. 319; 92 L. T. 120; 21 T. L. R. 162; 3 L. G. R. 118; 20 Cox, C. C. 768—Div. Ct.]

**IV. MISCELLANEOUS.**

15. *Beer Barrel used as a Measure—Unstamped—No Facilities to have Weights and Measures Verified and Stamped—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 29, 44.*]—Justices held that a beer barrel had been used as a measure, and was such within the meaning of the Weights and Measures Act, 1878, but that as sect. 4 of that Act cast on the county council the duty of providing facilities to have weights and measures verified and stamped, and as they had failed to discharge that duty as far as regards beer barrels, they were not entitled to prosecute the respondent for using an unstamped measure of that description.

HELD—that the county council were entitled to prosecute, and the justices were bound to convict upon their own finding.

HAYLEY *v.* TAYLOR, [1900] 82 T. L. 803; 16 [T. L. R. 447—Div. Ct.]

*And see* INTOXICATING LIQUORS, 100.

**WESTERN AUSTRALIA,**

*See* DEPENDENCIES AND COLONIES.

**WHARVES.**

*See* MASTER AND SERVANT; SHIPPING AND NAVIGATION.

**WILD BIRDS PROTECTION.**

See ANIMALS, Nos. 28, 29.

**WILLS.**

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(e) "Money" . . . . .	1118	See also title LUNATICS, No. 26.	
(f) Real or Personal Estate . . . . .	1120	1. <i>Eccentricity.</i> —Eccentricity alone does not prevent a man from disposing of his property.	
(g) "Securities" . . . . .	1124	PILKINGTON v. GRAY, [1899] A. C. 401; 68 [L. J. P. C. 63—P. C.	
(h) "Survivor" . . . . .	1125	2. <i>Insane Delusions</i> —Direct Communications from the Deity.]—Where it was averred that a testator believed he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he had received from the Deity by direct communication upon various occasions, and these insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will:—	
(i) "Unmarried" . . . . .	1128	Held (Lord Davey dissenting)—that a substantial issue was raised by the appellants' averment that the motives were due to insane delusions	
(k) "Wife" . . . . .	1129	The decision of the First Division of the Court of Session ((1896), 23 R. 513) reversed.	
(l) "Without Child" . . . . .	1131	HOPE v. CAMPBELL, [1899] A. C. 1—H. L. (Sc.)	
(m) Words of Relationship . . . . .	1132		
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**Testamentary Capacity—Continued.**

3. *Married Woman—Assent of Husband—Reversionary Interest.*—When a married woman dies entitled to a reversionary interest, the right to it vests in her surviving husband, and he is entitled to take it, and is master of it, and can give a discharge for it if he takes out letters of administration to his wife's estate. If he does not take out administration to his wife's estate, but somebody else does, the person who so takes out administration will be a trustee for him.

A husband is at liberty during the life of his wife to license her to make a will and to revoke that licence, but if after her death he has really assented to her will he cannot revoke it. The construction of the will is not affected by the husband's assent.

*Ex parte Fane* (1848) 16 Sim. 406) followed.

*ELLIOT v. NORTH* [1901] 1 Ch. 424; 70 L. J. [Ch. 217; 49 W. R. 247—Buckley, J.

4. *Married Woman—Probate—Assent of Husband.*—Under the present practice the assent of a husband to his wife's will (if necessary) is not implied by reason of his having obtained probate of such will in common form.

*IN RE NATHAN*, (1907) 51 Sol. Jo. 428—  
[Warrington, J.

**II. EXECUTION.****(a) Attestation.**

5. *Affidavit by one Attesting Witness that Will not duly Attested—Holograph Will Regular on face of it—Presumption—Citing Next-of-Kin.*—The various bequests of a holograph will were written on the first page of the paper, at the foot of which there was a space. Overleaf, on the second page, the signature appeared in the attestation clause, which stated that it was "signed and delivered" in presence of the two witnesses. The attesting witness who made an affidavit for probate said that the will was not signed in the presence of witnesses but the affidavit proved acknowledgment.

**HELD**—that the probate would be allowed to go, but with a serious doubt whether the next-of-kin ought not to have been cited.

*IN THE GOODS OF MOORE*, [1901] P. 44; 70 [L. J. P. 16; 84 L. T. 60—Jeune, P.

6. *Attestation by Legatee—Devise to Daughter or her Children—Daughter's Husband Attesting Will—Intestacy—Wills Act, 1837 (1 Vict. c. 26), s. 15.*—By sect. 15 of the Wills Act a devise to the wife of an attesting witness is invalid; but the devise must not be treated as struck out for the purpose of construing the will.

A. left property to his daughter E. or her children. E.'s husband attested the will.

**HELD**—that the devise to E., though invalid, could not be treated as struck out; that, as E. was alive, her children could not take under the alternative gift, as they would have done had she been dead; and that therefore there was an intestacy.

*In re Townsend* ([1886] 34 Ch. D. 357) followed.

*In re Clark* ([1885] 31 Ch. D. 72) distinguished.

*APLIN v. STONE*, [1904] 1 Ch. 543; 73 L. J. Ch. [456; 90 L. T. 284—Eady, J.

7. *Gift to Attesting Witness—Codicils—Republishing—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15.*—The effect of a codicil to republish a will, and thus validate a gift under the will to a witness attesting such will, but not attesting the codicil, will not be rendered void by the attestation by such witness of a second codicil to such will, such witness being able to point to a proper instrument under which he takes the benefit, not attested by himself.

*Gurney v. Gurney* ((1855), 3 Drew. 208; 24 L. J. Ch. 656, 1 Jur. (n.s.) 298) and *Re Marcus* ((1887), 57 L. T. 399) applied.

*IN RE TROTTER; TROTTER v. TROTTER*, [1899] 1 [Ch. 764; 68 L. J. Ch. 363; 47 W. R. 477; 80 L. T. 647; 15 T. L. R. 287—Byrne, J.

8. *"In the Presence of the Testator"*—*Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9*—Where a will after being signed by the testator in his bedroom, in the presence of one of the witnesses, was taken into the adjoining dressing-room, the door between the two rooms being open, and was there signed by both the attesting witnesses out of the testator's sight,

**HELD**—that the will was not duly executed, as the will was neither signed nor acknowledged by the testator in the presence of both witnesses, nor attested and subscribed by them in his actual presence.

*CARTER AND ANOTHER v. SEATON AND OTHERS*, [(1901) 85 L. T. 76; 17 T. L. R. 671—  
Barnes, J.

9. *"In the Presence of the Testator"*—*Wills Act, 1837 (1 Vict. c. 26), s. 9*—The Wills Act, 1837, makes no provision for the acknowledgment of their signatures by witnesses, as it does in the case of testators. A testator, having signed his will in the presence of two witnesses, was taken ill, and the two witnesses went into the adjoining room, the door between the two rooms being open, and signed their names to the will there. At the time when they signed they could not see the testator nor could he see them. Subsequently the witnesses returned to the testator's room with the will, and in their presence he was shown the will, and was told that the document had been completed.

**HELD**—that as the attesting witnesses had not subscribed the will "in the presence of the testator," as required by sect. 9 of the Wills Act, 1837, the will was not validly executed.

*BETTS v. GANNELL AND OTHERS*, (1903) 19 T. L. R. [304—Barnes, J.

**Execution—Continued.**

10. "*In the presence of*" *Two or More Witnesses—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 9.]—The testatrix prepared a will herself and then took it to a shop. She proceeded to the left-hand counter where J. was, and asked her to witness her will. The testatrix signed her name at that counter, over which J. was leaning, and then J. signed her name on the document. R. had been engrossed with a commercial traveller at the right-hand counter, and had not the slightest idea of what was going on at the left-hand counter. J. then marched round the shop and asked R. to come from his counter and go round to where the testatrix was, J. taking up the position R. vacated. The testatrix said to him, "This is my will." R. then signed his name to the document.

**HELD**—(1) That it was not a good acknowledgment, as the acknowledgment must be made in the presence of two witnesses; (2) that it was not a good execution, as the testatrix's signature was not affixed to the document in the presence of R.; (3) that, consequently, the will was invalid.

*BROWN v. SKIRROW*, [1902] P. 3; 71 L. J. P. [19; 85 L. T. 645; 18 T. L. R. 59—Barnes, J.

11. *Regular Attestation Clause—Presumption of Due Execution.*]—If a will is on the face of it duly signed and attested, due execution of it will be presumed, even though the attesting witnesses may afterwards be in doubt as to whether they were both present at the same time and saw the testator actually sign the document.

*WHITING v. TURNER*, (1903) 89 L. T. 71—

[Bucknill, J.

12. *Signature of Witnesses in Body of Will.*]—The attesting witnesses to a will (already signed by the testator) signed their names in a blank space left in the body of the will for the names of the executors, the testator having acknowledged his signature in their presence, and directed them to sign in the blank space. It was proved that the witnesses had so signed with the intention of attesting the testator's signature.

**HELD**—that this was a valid subscription by the witnesses within sect. 9 of the Wills Act, but that there was no appointment of executors, as the testator had signed the will before the witnesses had inserted their names in the body of it.

*IN THE GOODS OF ELLISON*, [1907] 2 Ir. R. 480—[Andrews, J.

13. *Witnesses Dead—Informal Holograph Will—No Attestation Clause—Handwriting of one Witness Not Proved*—"Omnia præsumuntur rite esse acta."—The Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes. The Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled.

An informal holograph document was signed by an illiterate testatrix, and there were upon it the signatures of two persons who were both dead, one of whom, at any rate, was a person who was not unlikely to be a witness to a document for the deceased, but her handwriting was not proved, and the signature of the other of whom was proved. There was no attestation clause whatever.

**HELD**—that notwithstanding the irregularity and informality of the document, the testatrix did intend it for her will; and that, on the principle of law, "*omnia præsumuntur rite esse acta*," it was signed first by the testatrix and then by the two other persons as witnesses, all three being present at the same time.

*IN THE GOODS OF PEVERETT*, [1902] P. 205; 71 [L. J. P. 114, 87 L. T. 143—Jeune P.

**(b) Generally.**

14. *Interlineation—Codicils to Will.*]—A testator who had made a codicil to his will on the back of the sheet of paper on which the will was written, desiring to revoke certain legacies, wrote in the space between the last words of the codicil and his signature to the codicil words to the effect that he revoked the legacies. Immediately after having done that, without any interval of time, the testator wrote a second codicil immediately underneath the signature to the first codicil, and this codicil was duly signed and witnessed.

**HELD**—that the interlined words formed part of the second codicil.

*IN THE ESTATE OF LUNN; OLDROYD v. HARVEY*, [1907] P. 326; 23 T. L. R. 728—Deane, J.

15. *Legatee Preparing Will of Illiterate Testator in his own Favour—Finding of Jury—New Trial.*]—The Court below granted probate in solemn form of a document propounded as the will of James Corrigan, excluding from probate a bequest of £4,000 to one W. F.

James Corrigan was a person of little or no education. W. F. acted as the testator's confidential agent. The document propounded was in W. F.'s handwriting. It was prepared by him without any written instructions and without the intervention of any other adviser. The jury found that the document was not read over to the testator before he signed the same and that the testator before and at the time he signed his name knew and approved of the contents of the document with the exception of the words four thousand pounds, which words he did not know and approve of. And they added a rider that they believed the testator's intention was to leave half his property to W. F. A new trial was moved for and refused.

**HELD**—that the application for a new trial

*Execution—Continued.*

was properly refused, and that the rider was irrelevant and immaterial

*FARRELLY v. CORRIGAN*, [1899] A. C. 563; 68 [L. J. P. C. 133—P. C.

16. *Reading Over Will to Testator—Approval of Contents—Will not Read Over in a Proper Way.*—Without impugning the general rule of law that a competent testator to whom a will is read over is to be held to have approved its contents, the door is still left open to the tribunal before whom the consideration of the document may come to find as a fact that the will was not read over in a proper way. If there are strong reasons for supposing that the will or any particular part of it does not meet the testator's intentions, then it is always open for the tribunal which is called upon to deal with the question of the reading over of a will to consider as a fact whether it was read over.

Rules in *Guardhouse v. Blackburn* ((1866) L. R. 1 P. & M. 109; 12 Jur. (N.S.) 278; 35 L. J. P. 116; 14 W. R. 463, 14 L. T. (N.S.) 69) and *Fulton v. Andrew* ((1875) L. R. 7 H. L. 448; 44 L. J. P. 17; 23 W. R. 566; 32 L. T. (N.S.) 209) commented on.

*GARNETT-BOTFIELD v. GARNETT-BOTFIELD*, [1901] P. 335; 71 L. J. P. 1; 85 L. T. 641—*Jeune, P.*

17. *Undue Influence—What Is.*—In order to constitute undue influence which will impeach a will there must be coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence.

If the act is shown to be the result of the wish and will of the testator at the time, then, however reprehensible may be the persuasion which brought it about—apart from fraud—it is not undue influence.

*Boyse v. Rossborough* ((1856) 6 H. L. C.; 3 Jur. (N.S.) 373) approved and followed.

*BAUDAINS AND OTHERS v. RICHARDSON AND [ANOTHER]*, [1906] A. C. 169; 5 L. J. P. C. 57; 94 L. T. 290; 22 T. L. R. 333—P. C.

18. *Will on Separate Sheets—Attached Together—Due Execution.*—A testator wrote his will on two separate sheets of paper, stating at the top of the first and at the bottom of the second that the writing was his will. He held both sheets together whilst he and the witnesses signed the second sheet.

*HELD*—that the two sheets were sufficiently attached at the time of execution, and must be admitted to probate.

*LEWIS v. LEWIS AND OTHERS*, (1907) 24 T. L. R. 45—*Deane, J.*

(c) *Signature of Testator*

*Acknowledgment in Presence of Witnesses—Wills Act, 1837* (7 Will. 4 & 1 Vict.

c. 26), s. 9.]—Where the signature of a testator is placed so that the witnesses can see it, and what takes place involves an acknowledgment by the testator that the signature is his, it is enough. It is a question for the jury to decide whether or not the testator's signature was on the will at the time the attesting witnesses signed.

*PASCOE v. SMART*, (1901) 17 T. L. R. 595—*[Barnes, J.]*

20. *Part of Will Subsequent to Signature.*—A testator executed a testamentary document, which consisted of two pages, and the whole of which was written before execution. The first page, which alone was signed by the testator and the witnesses, contained the major part of the will. It concluded with an unfinished sentence continued on the second page. The second page also contained bequests.

*HELD*—that the first page only could be admitted to probate.

*IN THE GOODS OF GEE*, (1898) 78 L. T. 843—*[Barnes, J.]*

21. *Position of Signature—15 Vict. c. 24.*—Though certain pages of a testamentary document are materially subsequent to the signatures of the testator and witnesses, it may be held that the other pages of the document are substantially a part of the will, and that they can be construed for purposes of probate as anterior to the signatures.

*IN THE GOODS OF GILBERT*, (1898) 78 L. T. 762—*[Jeune, P.]*

22. *Position of Signature—Separate Pieces of Paper Pinned Together—Signature and Attestation Clause on First Sheet.*—Upon a testatrix's death a holograph will was found consisting of separate sheets of paper pinned together, the signature, &c., being on the top sheet.

*HELD*—that the sheets had been misplaced by accident, that the sheet bearing the signature and attestation clause had been written last, and that the will should be admitted to probate.

*IN THE GOODS OF MADDEN*, [1905] 2 Ir. R. 612—*[K. B. D.]*

23. *Signature on First Page of Will only—Wills Act, 1837* (1 Vict. c. 26), s. 9.]—A will which was written on three pages of paper, was signed by the testatrix and by the attesting witnesses on the first page only.

*HELD*—that the first page of the will ought to be admitted to probate.

*MILLWARD v. BUSWELL*, (1904) 20 T. L. R. 714—*[Barnes, J.]*

(d) *Soldiers' and Seamen's Wills.*

24. *“Actual Military Service”—Letter Written on Day of Departure from England*



**Execution—Continued.**

*for the Front.*—War broke out in South Africa on October 11th, and on October 21st (the same day that he sailed with his battalion for the front) an officer wrote the following letter to his solicitor:—

"My dear Mr. K.,—I'm off to-day to South Africa. I won't anticipate evil, but if by any chance I should not come back, I should like you please to arrange my affairs, so that Mrs Horace and my children should be properly looked after. I really have nothing to leave, but what there is in the way of goods, plate, pictures, &c., I should like my wife to have; also any money or property that may be left to me I wish her to have."

He was subsequently killed in action.

**HELD**—that he was on October 21st "in actual military service" within the meaning of sect. 11 of the Wills Act, 1837, and that the letter should be admitted to probate, although letters of administration had been granted already to his widow, as if he had died intestate.

**STOPFORD v. STOPFORD**, (1903) 19 T. L. R. 185—  
[Jeune, P.]

25. "*Actual Military Service*"—In *Expeditione—Wills Act, 1837* (1 Vict. c. 26), s. 11.]—A sergeant in the Army Ordnance Corps, who was stationed at Woolwich, received, on August 15th, 1899, orders from the War Office to proceed in marching order, on the 19th inst., to Fermoy, where he was to report himself to the Commanding Officer of the Munster Fusiliers, and proceed with the regiment to South Africa on the 24th inst. for special service. On August 17th, while still at Woolwich, the sergeant wrote a letter to a friend of his *fiancée* in which he stated that if anything happened to him she would come in for everything he had. He died while serving in South Africa.

**HELD**—that the letter should be admitted to probate as a soldier's will.

**IN THE GOODS OF GORDON**, (1905) 21 T. L. R. 653—  
[Barnes, P.]

26. *Nuncupative Will—Volunteer—"In Actual Military Service"—Test to be Applied—First Step—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 11.]—A printer's apprentice, who was a member of a volunteer battalion, volunteered for active service in the Transvaal War and was accepted. He accordingly assembled under orders with the other volunteers who were going on active service, at the military barracks, and while there, and before the embarkation order arrived, he, being under twenty-one years, made his will. He was killed while on active service at the front two months after he came of age.

**HELD**—that assuming a state of war existed, the test to be applied to the construction of the words "in actual military service" in sect. 11 of the Wills Act, 1837, is whether the soldier has done something—has he taken

some step at the time when he made his will to bring himself within the words of the section, that the volunteer had, by taking the first step of going into barracks with a view of being drafted to the front, brought himself within those words, and that he was, at the time he made his will, "in actual military service," and that probate of his will should be granted.

**Bowles v. Jackson** ((1854) 1 Spinks' Ecc. & Adm. 294) followed.

**IN THE GOODS OF HISCOCK**, [1901] P. 78; 70 L. J. [P. 22; 84 L. T. 61; 17 T. L. R. 110—  
Jeune, P.]

27. *Nuncupative Will—Soldier—Volunteer—In Expeditione—Letter to his Mother—Probate granted to Widow—Sufficient Cause.*—The deceased was a trooper in the Imperial Yeomanry, who sailed for South Africa in the steamship "Cymric" in February, 1900. He left behind him his wife and one daughter, Doris. On the 6th March, 1900, he wrote, whilst on his way to South Africa, to his mother a letter in which were the following words: "In case anything happens to me, I wish the whole of any property I may leave or become entitled to be left to Doris." He died near Bloemfontein on the 4th September, 1900.

**HELD**—that the letter constituted a good soldier's will, since the deceased was in *expeditione* at the time he made it.

**HELD ALSO**—that there was no sufficient cause shown why the widow should be passed over and probate granted to the mother of the deceased.

**IN RE GOODS OF CORY**, (1901) 84 L. T. 270—  
[Barnes J.]

28. *Administration with Will Annexed—Nuncupative Will—In Expeditione—Order to Mobilise—Letter—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 11.]—If an order for mobilisation has been received, although the soldier himself may have done nothing under it, yet that order so alters his position as practically to place him in *expeditione*. A private was in the 2nd Battalion of the King's Royal Rifles, stationed at Fort William, Calcutta. On September 7th, 1899, this battalion was warned for service, and two days later was ordered to mobilise for active service in South Africa, and they sailed from India in the steamship "Purana" on September 18th, 1899, bound for South Africa. In September, 1899, he wrote a letter to a friend, the plaintiff, in which he said: "I am sending a box of things for you. . . . If you have a letter to say that I am killed, then the lot is for you. . . . You will receive the lot if I am killed in action, for I shall make my will in your favour." The private died of enteric fever on February 9th, 1900, during the siege of Ladysmith, in Natal, South Africa.

**HELD**—that this letter was a testamentary disposition; that the writer meant that it should take effect if he died, and did not

**Execution—Continued.**

mean to draw any distinction between being killed in action and dying from fever in South Africa; that it was a soldier's will within the meaning of sect. 11 of the Wills Act, 1837; that the letter must have been written between September 8th and 19th, 1899, after the formal order to mobilise had been received and in view of the embarkation, and that a grant of letters of administration with the will annexed could be taken out.

GATTWARD v. KNEE, [1902] P. 99; 71 L. J. P. 34; [86 L. T. 119; 18 T. L. R. 163—Jeune, P.

29. *Nuncupative Will*—"Soldier being on Active Military Service"—*Letter—Wills Act*, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11]—A quartermaster and hon. lieutenant in the Grenadier Guards sailed under orders for South Africa. He wrote to his wife saying, "As regards my will, I am sorry I have not made one. . . . I will write and ask Mr. H. to draw me up a will and send it to me for signature. Of course, dear, I leave every thing to you." The widow, who was in receipt of a pension from the War Office, propounded this letter as the will of the deceased, who had died in his tent from apoplexy whilst on active military service.

HELD—that the letter should be admitted to probate, as it was not displaced by the expressed intention to make a formal will.

GATTWARD v. KNEE ([1902] P. 99; 71 L. J. P. 34; 86 L. T. 119; 18 T. L. R. 163—Jeune, P., *supra*) followed.

MAY v. MAY, [1902] P. 103, n; 71 L. J. P. 34; [86 L. T. 120; 18 T. L. R. 184—Barnes, J.

30. "Effects to be Credited."—A soldier on active service made a declaration to his superior officer to the effect that in the event of his death he wished his "effects to be credited" to his sister.

He made such declaration at the request of the War Office.

HELD—that the official record of his wish was a valid testamentary instrument.

IN THE GOODS OF SCOTT, [1903] P. 234; 73 [L. J. P. 17; 89 L. T. 588—Jeune, P.

31. *Seaman's Will*—"At Sea"—*Voyage not yet Begun—Probate*—29 Car. 2, c. 3, s. 23—1 Vict. c. 26, s. 11.]—A letter containing testamentary dispositions written on a ship lying within a river, and before the ship has actually sailed, may be a valid will as made by a seaman at sea.

IN THE GOODS OF PATTERSON, (1898) 79 L. T. [123—Barnes, J.

**(e) Testamentary Documents.**

32. *Attested Nominated Paper—Invalid as Nomination—Admitted as a Will.*—Deceased executed a nomination paper under sect. 25 of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39); it was attested

by two witnesses, who signed it in the presence of the deceased and of each other. The document was invalid as a nomination, because more than £100 was standing to the deceased's credit on the books.

HELD—that the document was valid as a will, and must be admitted to probate.

IN THE GOODS OF JOSEPH BAXTER, [1903] P. 12; [72 L. J. P. 2; 51 W. R. 302; 87 L. T. 748—Barnes, J.

33. *Inconsistent Testamentary Documents—Simultaneous Execution—Partial Inconsistency—Both Admitted to Probate.*—Where two testamentary documents executed simultaneously, or of uncertain priority, are partially inconsistent, but contain no express words revoking prior testamentary documents, the proper course is to admit both to probate, and give effect to them so far as they can be reconciled.

Lemage v. Goodban ((1865) L. R. 1 P. & M. 57, 162; 35 L. J. P. 28, 13 T. L. R. 508) and *In the goods of Petchell* (1874) L. R. 3 P. & M. 153, 156; 43 L. J. P. 22; 22 W. R. 353; 30 L. T. 74) followed.

TOWNSEND v. MOORE, [1905] P. 66; 74 L. J. P. [17, 53 W. R. 338, 92 L. T. 335—C. A.

34. *Document Partly Testamentary Admitted to Probate.*—Where a document duly executed as a will is partly testamentary and partly not testamentary, the Court has jurisdiction to admit the testamentary part of the document to probate.

WOLFE v. WOLFE, [1902] 2 Ir. R. 246—K. B. Div.

35. *Signature—One Witness.*—A testatrix died leaving a will and an undated testamentary document, signed by her, containing a list of articles, with pencil notes as to her wishes for their disposal. The document was only witnessed by one witness, as the second person who purported to be a witness had not seen the testatrix sign, although she subsequently heard her acknowledge that she had signed the document.

HELD—that the document was not admissible to probate.

Hindmarsh v. Charlton ((1861) 8 H. L. C. 160; 1 S. & T. 433; 9 W. R. 521; 4 L. T. (N.S.) 125) followed.

IN THE GOODS OF SWIFT, (1901) 17 T. L. R. 16—[Jeune, P.

**III. INCORPORATION OF DOCUMENTS.**

36. *Draft Will—No Evidence of any such Will having been Executed—Referred to in Codicil.*—A solicitor testator made a will in 1894 and a codicil in 1898. In 1897 he instructed his conveyancing counsel, who had drafted the will of 1894, to prepare the draft of a new will.

In 1902, when on his death-bed, the testator gave this draft to his confidential clerk, told him that a will of which it formed the draft had been duly executed, and instructed him to prepare a codicil to such will.

**Incorporation of Documents—Continued.**

A codicil was accordingly prepared, and duly executed, carrying out the testator's wishes, but leaving some of the points indicated by him open for future consideration. Shortly afterwards the testator died.

The draft will handed to the clerk was very incomplete and with a number of marginal notes; it bore no date beyond that of the year 1897, and, consequently, the clerk in drawing the codicil referred to it only as "my last will."

**HELD**—that the statement of the deceased that he had executed the will of 1897 could not be accepted as evidence that he had done so, or that any such will existed.

*Atkinson v. Morris* ([1897] P. 40; 66 L. J. P. 17; 45 W. R. 293; 75 L. T. 440—C. A.) followed.

And that, as the codicil did not purport to set up the draft as a will and did not incorporate the draft in itself, the draft must be neglected entirely.

That the will of 1894 and the codicils of 1898 and 1902 must all be admitted to probate, even though the whole of the latter could not be read with the will of 1894.

*In the Goods of Mercer* ((1870) L. R. 2 P. & M. 91; 39 L. J. P. 43; 18 W. R. 1040; 23 L. T. 195) distinguished.

*In the Goods of Elizabeth Watkins* ((1865) L. R. 1 P. & M. 19, 35 L. J. P. 14; 13 L. T. 445) approved.

*Eyre v. Eyre, Booker and Eyre Intervening*, [1903] P. 131; 72 L. J. P. 45; 51 W. R. 701; 88 L. T. 567; 19 T. L. R. 380—Bucknill, J.

**37. Reference—Identity.]**—The testator made a will by which he gave to the University of Wales £10,000 for the foundation of scholarships and prizes upon terms contained in any memorandum amongst his papers written or signed by him relating thereto. He also gave £10,000 to the University College of North Wales upon the same terms. A memorandum was then in existence in which the testator referred to the bequests he had made to the above-mentioned objects, and he attached two conditions of a theological nature to be obligatory on every winner of a prize in a competition—(1) the belief in God, and (2) the acceptance of and belief in the Protestant faith; and it went on to state that every winner of a prize or scholarship in any competition was to be of Welsh birth.

**HELD**—that the reference in the will to "any memorandum" included future as well as existing memoranda, and was too vague for the admission of parol evidence to show what memorandum was referred to; and, further, that the evidence which had been admitted, proved that the testator intended to include any future memorandum.

Decision of Barnes, P. ([1907] P. 229; 76 L. J. P. 49; 96 L. T. 587; 23 T. L. R. 395) reversed.

UNIVERSITY COLLEGE OF NORTH WALES AND [OTHERS v. TAYLOR AND OTHERS, (1907) 24 T. L. R. 29—C. A.]

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**38. Reference in Will to Future Document—Incorporation of Unattested Document—Republication of Will by Codicil without Reference to Document.]**—A testatrix by her will directed her trustees to give to such of her friends as "I may designate in a book or memorandum that will be found with this will the different articles specified for such friends." There was no such book or memorandum as that mentioned in the will then in existence; but after the date of the will there was such a book. After the date at which this book appeared to have been written up, a codicil was made in which no reference was made to the book.

**HELD**—that the terms of the reference in this case indicated a document of a future character; that the will must be treated as speaking at the date of the codicil, and the reference was therefore still in terms to a document which even then was future, and therefore did not comply with one of the necessary conditions, that it must refer to a document as existing at the date when the will is executed; and that there ought to be no incorporation of the book, or that part of it which it was sought to incorporate.

*IN THE GOODS OF SMART*, [1902] P. 238; 71 [L. J. P. 123; 87 L. T. 142, 18 T. L. R. 663 —Barnes, J.]

**39. Republication of Will by Codicils—Unexecuted Paper referred to.]**—A testatrix died in 1899 leaving a will executed in 1888, together with four codicils executed in 1890, 1891, 1893 and 1894 respectively. The will of 1888 referred to "articles specified in the list which I have made out, and sent to my executors and trustees."

**HELD**—that the list, though signed by the testatrix in the presence of two witnesses, in accordance with the method of execution prescribed by the Wills Act, 1837, ought not to be admitted to probate as a testamentary document, as it was not in its terms of a testamentary character.

**HELD ALSO**—that the will and codicils should be admitted to probate, together with such portions of the list as should appear to have been signed and attested before the date of the last codicil.

*In the Goods of Lady Truro* ((1866) L. R. 1 P. & D. 201; 35 L. J. P. 89; 14 W. R. 976; 14 L. T. (N.S.) 893) followed.

*IN THE GOODS OF RENDLE*, (1899) 68 L. J. P. 125 [—Barnes, J.]

**40. Testamentary Document described as Last Will—Operating as Codicil—Intention—Consent of all Parties.]**—A document described as the testatrix's last will, but which did not appoint executors, and which was fully intended by her to operate as a codicil only and not to revoke her former will, was admitted to probate as being a codicil to her will, all parties interested raising no objection.

*IN THE GOODS OF SUMMERS*, (1901) 84 L. T. 271; [17 T. L. R. 325—Barnes, J.]

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## Incorporation of Documents—Continued.

41. *Testamentary Documents—Evidence of Intention of Testator that one should include the other.*—A master mariner, who formerly had charge of a river dredger, executed a testamentary document. On the front side of the document he made a bequest saying (*inter alia*): "This is the last will and testament of me . . . &c. I hereby revoke all wills and testamentary instruments . . . &c. I appoint J. C. and G. H. executors . . . &c. I give and bequeath all my worldly goods to M. A. . . . &c." That was all that was written on the front side of the document, a half-page being left blank. On the back was written (*inter alia*) "This is the last will and testament . . . &c. I revoke all wills and testamentary instruments, &c. I appoint J. C. and G. H. . . . executors, &c. . . ." Then came the testator's signature, attested by J. C. and G. H.

HELD—that evidence to show that the testator intended, when he executed the testamentary document on the back, to include what was written on the front was admissible, and therefore both sides of the document might be admitted to probate.

*Gould v. Lakes* ((1880) 6 P. D. 1; 49 L. J. P. 59; 44 J. P. 698; 29 W. R. 155; 43 L. T. 698) followed.

IN THE GOODS OF HUTCHINSON, (1902) 18 T. L. R. [706—Jeune, P.

## IV. REVOCATION.

## (a) Destruction.

42. *Cutting or Destroying Animo Revocandi—Previous Settlement—Erroneous Belief—Cut or Destroyed Will Admitted to Probate.*—A testator by his will of 1895 did not in terms revoke his will of 1882, but cut off his signature to the will of 1882 under the erroneous belief that the funds comprised in an indenture of settlement dated 6th June, 1855, would in consequence be divided amongst the children of his first marriage in equal shares. The testator intended all along that the children of his first marriage should be provided for substantially in the way that this was done under the will of 1882, by the exercise of the power to appoint by will the settled funds or as they might have been benefited under the trustees of the settlement but for the gift over in default of appointment being void for remoteness. In 1896 he executed another will which, though not expressly, admittedly revoked the will of 1895. He also in 1896 executed two codicils. The will and two codicils of 1896 contained no exercise of the power of appointment, nor did they or the will of 1895 contain any express revocation of previous wills.

HELD—that all the documents, with the exception of the will of 1895, should be admitted to probate.

STAMPFORD v WHITE, [1901] P. 46, 70 L. J. P. 9; [84 L. T. 269—Jeune, P.

43. *Dependent Relative Revocation—Animo revocandi.*—The doctrine of dependent relative revocation is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. If the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, there is no absolute *animus revocandi*.

*Powell v. Powell*, ((1866) L. R. I. P. & D. 209; 35 L. J. P. 100; 14 L. T. (N.S.) 800) followed.

*Cossey v. Cossey*, (1900) 69 L. J. P. 17; 64 J. P. [89; 82 L. T. 203; 16 T. L. R. 133—

Bucknill, J.

44. *Dependent Relative Revocation—Intention to Execute New Will—Never Fulfilled.*—A testator cut the signature off his will with (as a jury found) the intention of executing a new one, and of revoking the old one conditionally upon his executing such new one. The new will was prepared, but the testator died before he could execute it.

HELD—that the doctrine of dependent relative revocation may apply to a case where the document intended to be substituted for the existing one never comes into existence, and that the old will must be admitted to probate.

*DIXON v. SOLICITOR TO THE TREASURY*, [1905] P. [42; 74 L. J. P. 33; 92 L. T. 427; 21 T. L. R. 145—Barnes, J.

45. *Directions to Destroy Will.*—A testatrix, in a letter addressed to her daughter, which was signed by her in the presence of two witnesses, directed her will to be destroyed.

HELD—that the letter was a writing declaring an intention to revoke the will, though, not being of a testamentary character, it should not be admitted to probate. Liberty was given to a next-of-kin to apply for a grant, as in the case of intestacy.

IN THE GOODS OF EYRE, [1905] 2 Ir. R. 540—[Andrews, J.

46. *Later Document in the Form "All for Mother"—Whether a Valid Will.*—A testator made a will and codicil in 1896 by which he left his widow a life interest in his estate, with remainder to his children, and appointing executors and guardians of his children. On March 16, 1905, the day before his death, he signed a document (undated) containing the words "All for mother." Two of his sons witnessed the execution. It was admitted that "widow" meant

*Revocation—Continued.*

"mother." The first will and codicil were proved in common form, but subsequently the widow asked the Court to pronounce for the second document.

HELD—that the second document was a will covering all the property of the deceased; that the probate of the first two documents should be revoked, and that the widow might apply for a grant of administration with the undated document annexed.

THORN v. DICKENS, [1906] W. N. 54—  
[Barnes, P.]

47. *Revocation of Will—Mistaken Belief as to Effect of Codicil—Wills Act (1 Vict. c. 26), s. 20—No Revocation—Probate*—A testator, who had made a will in December, 1891, leaving his property amongst his six children, executed a codicil in 1895, wherein, after reciting the bequest in the will, he cut out one of the children, and gave that child's share among the other five. He, thereupon, having read over the codicil, put the will in the fire, saying it was "no good," and adding that there were now five to take the money. The codicil was admitted to be entitled to probate, apart from the will.

HELD—that the Wills Act only expressed the old law, applied in analogous cases, as expounded in *Perrott v. Perrott* (14 East, 423); that this was a case of mistake, and not a case of dependent relative revocation; that the testator, when he destroyed the will, entertained a belief that the codicil would effect all that he wished in regard to the disposal of the whole of his property; and that, as this was a mistaken belief on his part, the *animus revocandi* did not accompany the physical act of destruction, and the contents of the will should be admitted to probate along with the codicil.

BEARDSLEY v. LACEY, (1898) 67 L. J. P. 35; 78 L. T. 25; 14 T. L. R. 140—Jeune, P.

48. *New Will—Codicil to and Confirming the Destroyed Will—Revival—Words of Reference to Earlier Will Omitted from Probate*—A testator made a will and two codicils in 1895 and destroyed them in 1898 on making another will revoking all wills. In 1899 he made a codicil to the will of 1898. In 1900 he made a codicil to and confirmed the will of 1895, this codicil being prepared by the solicitor who prepared the first of the two codicils in 1895.

HELD—that the last codicil did not disclose an intention to revoke the latter of the two wills, and that the words of reference to the earlier will might be left out, the codicil would then run "Codicil to my will . . ." and that probate of the will of 1898 with the codicils of 1899 and 1900 might be granted.

Rogers v. Goodenough ((1862) 2 Sw. & Tr. 342; 31 L. J. P. 49; 8 Jur. (N.S.) 391; 5 L. T. (N.S.) 719) followed.

IN THE GOODS OF READE, [1901] P. 75; 71 L. J. P. 45; 86 L. T. 258—Barnes, J.

49. *Several Sheets of Paper—Destruction of first two—Effect of—Substitution of two other Sheets signed by Testator—Effect of—Validity of Sheets as a Will*—The deceased apparently executed a will consisting of five sheets of paper fastened together on June 16, 1900. After the deceased's death a document was found which had five sheets of paper, each with writing on one side only. It was found by the Court as a fact that sheets 3, 4 and 5 were three of the original sheets of the will executed on June 16, 1900; that sheets 1 and 2 were signed by the deceased and witnesses on or about December 9, 1901; and that the deceased destroyed the first two sheets of the will as it was originally executed before the date when sheets 1 and 2 as they then appeared were signed by him and by the witnesses.

HELD—that from an examination of the last three sheets, 3, 4, and 5, they were practically unintelligible and unworkable as a testamentary document in the absence of the original sheets 1 and 2; that the destruction of the original sheets 1 and 2 must be taken as having had the effect of destroying the validity of the whole will; that the signatures were only put on the two sheets in December, 1901, to identify them, and to make them valid if the will was valid at the end, but that was an abortive act, and the sheets 3, 4, and 5 had no effect by themselves, and had no effect to render sheets 1 and 2 operative; that none of the sheets could be treated as a valid document of a testamentary character; and that the will must be pronounced against.

LEONARD v. LEONARD, [1902] P. 243; 71 L. J. P. 117; 87 L. T. 145; 18 T. L. R. 747—  
Barnes, J.

50. *Will Torn in Pieces—Afterwards Pasted together—No Intention to Revoke—Children Interested under an Intestacy—No Guardian ad litem—Consent*—The testator—a publican—by his will appointed his wife sole executrix and gave and bequeathed to her "all moneys, property, and effects" of which he was possessed for her own disposal as she may desire." One night, while under the influence of drink and not responsible for his actions, he went to a tin box, took out therefrom his will, and tore it in pieces. He afterwards stuck the pieces together on to a newspaper. The widow applied for probate at once, as the licensing sessions would be held in two days. The two children appeared by their paternal grandmother (not appointed *ad litem* by any order) and consented.

HELD—that probate of the will might be allowed.

IN THE GOODS OF BRASSINGTON, [1902] P. 1; 71 L. J. P. 9; 85 L. T. 644; 18 T. L. R. 15—  
Barnes, J.

51. *Will not Forthcoming—Presumption—Evidence to Rebut—Presumption of Fraudulent Abstraction—Destruction animo revo-*  
35—2

**Revocation—Continued.**

*candi—Concurrent Judgments* ]—If a will, traced to the possession of the testator and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it.

There is a presumption against the hypothesis of fraudulent abstraction. In order to find for the will the Court must be morally satisfied that it was not destroyed by the testator *animo revocandi*.

ALLAN v. MORRISON, [1900] A. C. 604; 69 [L. J. P. C. 141—P. C.

52. *Will Not Forthcoming—Presumption—Rebuttal—Declaration of Testator.* ]—If a will duly executed was in the testator's possession when last seen, and is not forthcoming after his death, there is a presumption of law that he destroyed it *animo revocandi*, but that presumption may be rebutted by evidence of facts.

A letter written by the testator after the will that he had cancelled it is not evidence of an effective revocation, but it is admissible in evidence as showing the state of mind and intention of the testator.

The evidence in the particular case held, by Fletcher Moulton and Buckley, L.JJ.,—Vaughan Williams, L.J., dissenting—not to be sufficient to rebut the presumption.

Decision of Barnes, P., (22 T. L. R. 741) affirmed.

IN RE SYKES; DRAKE v. SYKES, (1907) 23 T. L. R. [747—C. A.

**(b) Generally.**

53. *Inconsistent Wills—Intention—Extrinsic Evidence.* ]—Whether a later will is, or is not, intended to revoke earlier wills, must be decided from a consideration of their contents, aided if necessary by extrinsic evidence of the testator's surroundings.

A later will, not containing any express clause of revocation and leaving a certain residue undisposed of, may yet revoke an earlier will disposing of all the testator's property.

So HELD—where to admit both documents to probate would have made cumulative most of the legacies, in which case the estate would have been insufficient to pay them.

IN RE THE ESTATE OF BRYAN, [1907] P. 125; 76 [L. J. P. 30; 96 L. T. 584—Barnes, P.

54. *Intention to Vary Will—Codicil—Will not Varied Further than Actually Expressed* ]—A testator declared his intention by a codicil to his will to vary and alter the trusts in accordance with the necessity of the case arising from the bankruptcy of his son. He repeated in effect the same trusts, but stopped short at the end and made no reference to the power given by the will to his son to appoint to his widow.

HELD—that the codicil did not vary the trusts in the will further than was actually expressed

IN RE WOOD; WOOD v. WOOD, (1900) 83 L. T. [157—Farwell, J.

55. *Omission of Words—Revocatory Clause Introduced per incuriam.* ]—A testator executed a will, drawn by a lawyer, disposing of his real estate, but leaving some personal property undisposed of. He expressed an intention of disposing of the latter by a future instrument. Subsequently he bought a printed form, and, without legal advice, disposed of his personal property, inserting a clause revoking all former dispositions.

HELD—that the second document was intended to be supplemental to the prior one; that the revocatory clause did not represent the testator's wishes, and that both documents would be admitted to probate, the revocatory clause in the second being omitted.

In the Goods of Oswald ((1874) L. R. 3 P. & M. 162; 43 L. J. P. 24; 30 L. T. (N.S.) 344—followed

MARKLEW v. TURNER, (1901) 17 T. L. R. 10—[Jeune, P.

56. *Revocation by Marriage—Scotch Law as to—Englishwoman Marrying Domiciled Scotsman—Wills Act, 1837 (1 Vict. c. 26), ss. 18, 35* ]—The Wills Act, 1837, does not apply to Scotland, and therefore a will dealing with movable property executed in England by an Englishwoman is not revoked by her subsequent marriage in England to a domiciled Scotsman.

WESTERMAN'S EXECUTOR v. SCHWAB, (1906) 8 F. [132—Ct. of Sess.

57. *Words of Revocation—Several Testamentary Documents—"Last and Only Will"—Previous Will* ]—A testator by will disposed of his property, and subsequently he executed another document as his "last and only will," disposing of a policy of insurance only. These documents appointed different executors. He subsequently made a codicil to his will. If the second will revoked the first the testator would have died intestate as regards a large part of his property.

HELD—that the testator's intention must be gathered from all the documents, and all three documents should be admitted to probate.

Lemage v. Goodban ((1867) L. R. 1 P. & M. 57; 35 L. J. P. 28; 13 L. T. 508) followed.

SIMPSON v. FOXON, [1907] P. 54; 76 L. J. P. 7; [96 L. T. 473; 23 T. L. R. 150—Barnes, P.

**(c) Revocation of Gift.**

58. *Devise of Real Estate Prior to Completion of its Purchase—Subsequent Conveyance—Revocation of Devise.* ]—A testator devised certain real estate, including a certain

*Revocation—Continued.*

public-house and other premises which he had contracted to purchase, but the purchase whereof had not been completed, and all other his real estate wheresoever and whatsoever to his three sons. In November, 1834, he took a conveyance of the public-house and other premises to himself in fee to uses to bar dower.

He died on October 28th, 1835.

HELD—that the conveyance operated as a revocation of the devise

*Rawlins v. Burgis* ((1814), 2 V. & B. 382) followed.

Decision of Court of Appeal ((1898) 78 L. T. 825) affirmed.

JACOB AND OTHERS *v.* JACOB, (1900) 82 L. T. [270—H. L. (E.).

59. *Gift of Personality to Legatee Absolutely—Codicil—“Instead of Bequest in the Manner Expressed by Will”—Gift of Personality to same Legatee for Life, with Remainder to Children—Revocation pro tanto only.*—A testator by his will bequeathed his personal estate to his two daughters S. and H. equally. By a codicil thereto he directed that, “instead of such bequests in the manner expressed in my said will to such daughters absolutely,” his executors should stand possessed of his personal estate upon trust to pay the income of one moiety to each daughter for life, and, on their deaths respectively, to pay the respective moieties to their respective children as the daughters respectively should by deed or will appoint, and in default to such children equally. The codicil contained no provision for the event of a daughter dying without issue.

H. died without having had any issue.

HELD—that there was no intestacy as to the moiety of the personal estate given to H.

IN RE WILCOCK; KAY *v.* DEWHIRST, [1898] 1 Ch. [95; 67 L. J. Ch. 154; 79 L. T. 679; 46 W. R. 153—Romer, J.

60. *Gift to Son and his Children—Codicil Revoking Son's Interest—Effect on Children's Interest.*—W. by his will left his business to trustees to carry it on for the benefit of G. and his other three sons until the youngest attained twenty-one, and subject as aforesaid in trust for his four sons equally when the youngest attained twenty-one.

There was a provision for any one son selling his share to another or others, and also for the employment of the sons in the business. The trustees and sons were to pay a specified rent for the business premises, and G. was to pay a specified rent for a house occupied by him. Such rents were payable to his widow or daughters, and subject as aforesaid, both premises were devised to the trustees upon trust as to one-fourth share for G. for life and then for his children.

By a codicil, after expressing his dissatisfaction with G., and reciting that he had ceased to employ him in the business, and

had caused him to vacate the house in question, W. revoked the trust as to permitting him to occupy such house, “and each and every devise, bequest, &c.” and “every provision and benefit . . . to or for him,” directing that “every clause of my said will purporting to entitle him to share any part or parts of my estate or of the proceeds, income or profit thereof with any other person shall be construed . . . as if the name of my son G. had never appeared therein.”

He further directed that G. should not be employed in the business, and left a legacy of £500 in trust for G.'s children, the *interim* interest not, however, to be paid to G.

HELD—that only G.'s own interest was revoked; that the children's interests were not revoked, but were accelerated, and that they were in addition entitled to the legacy of £500.

*Green v. Tribe* ((1878) 27 W. R. 39) and *Alt v. Gregory* ((1856) 8 D. M. & G. 221) followed.

*Tabor v. Prentice* ((1884) 32 W. R. 872) distinguished.

IN RE WHITEHORNE; WHITEHORNE *v.* BEST, [1906] [2 Ch. 121; 75 L. J. Ch. 537; 51 W. R. 580; 94 L. T. 698—Buckley, J.

## V. ALTERATIONS AND ERASURES

61. *Alteration of Words—Strict Settlement of Real Estate—Heirlooms to devolve therewith—Defeasance Clause—Construction—Alteration of Words—“Or” read as “Of.”*

—A testator devised land in strict settlement, and left heirlooms in trust to be enjoyed (so far as law and equity would permit), by the person or persons for the time being in possession of the land, yet so that they should not vest absolutely in “a son or any person” thereby made tenant for life, unless such “son or other person” should attain the age of twenty-one

HELD—(1) that “or” must be read “of”; and that the heirlooms did not vest absolutely in the first tenant in tail who died an infant;

And (2) that they did not fall into the residuary bequest of personality, but were carried over to the next person entitled to the land till some tenant in tail by purchase attained twenty-one.

IN RE DAYRELL; HASTIE *v.* DAYRELL, [1904] 2 Ch. [496; 73 L. J. Ch. 795; 91 L. T. 373—Joyce, J.

62. *Erasures in duly-executed Codicils—Codicil Undated—Interests of Infants—Admittance to Probate without Action.*—A testatrix left a will and two codicils thereto. The first codicil was on three different sheets of paper, but not fastened together, otherwise the codicil was duly executed. Certain erasures were made after the date of the execution. Another codicil was undated, but the date was shown by affidavit. There were nine children of the universal legatee for life, six of whom were under age, and their interests were affected by the codicils.

## Alterations and Erasures—Continued.

HELD—that as the codicils were duly executed it was reasonable the codicils should be admitted to probate without the expense of a probate action.

IN THE GOODS OF MARY O'BRIEN, [1900] P. [208; 69 L. J. P. 55—Jeune, P.

63. *Obliteration*—"Apparent" Words—*Evidence*—*Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 21.—A holograph will originally contained two devises and gift of a legacy to the testator's son "Daniel." The name had been obliterated in all three places, but where there was nothing to show, and the testator had written in the names of Daniel in one, and of another son Thomas in two other places.

The Court, on the evidence of an expert that, with the aid of a magnifying glass, he could read the original name Daniel in all three places, on motion by consent of all parties interested, granted administration with the will annexed, with the original word "Daniel" substituted in all three places, on the ground that the original words were "apparent" within the meaning of sect. 21 of the Wills Act, 1837.

IN THE GOODS OF BRASIER, [1899] P. 36; 68 L. J. [P. 6; 47 W. R. 272; 79 L. T. 472—Barnes, J.

64. *Unattested Erasure*—*Subsequent Confirmation by Codicil*—*Wills Act, 1837* (1 Vict. c. 26), s. 21.—A testatrix by a will dated February 1st, 1901, gave a number of legacies, including £200 to C., £500 to M., and £3,000 to S. On October 19th a servant, by the direction of testatrix, struck out these three legacies, but the alteration was not attested.

On October 21st she executed a codicil to her will "bearing date February 1st, 1901," and revoked "the legacy of £500, which I have given to M.", the codicil concluded by ratifying and confirming the will in other respects.

HELD—that the document confirmed by the codicil was the will in its unaltered state, and that therefore the legacies to C. and S. stood unrevoked.

IN RE HAY; KERR v. STINNEAR, [1904] 1 Ch. 317; [73 L. J. Ch. 33, 52 W. R. 492—Buckley, J.

65. *Bequest of Adjoining Houses*—*Leasehold and Freehold*—"Leasehold" House by Name—*Additions made to it*—*Purchase of Freehold*.—The testator in 1842 owned the Bristol Hotel in fee and the lease (with an option to purchase the freehold) of certain premises known as Hampden House. Down to 1852 he occupied both houses, which adjoined together, but in that year he let a large portion of the hotel to a tenant for 21 years, while he himself lived at Hampden House, having incorporated such portion of the hotel as was not let with Hampden House. In 1861 he exercised his option of purchasing the freehold of Hampden House. He died in 1862, and by his will, made in the same year, he devised "all that his lease-

hold messuages and premises known as 142, Marine Parade, Brighton" (i.e., Hampden House) "with the appurtenances" to his wife for life; and to his wife for life, with remainder to his children "all that his freehold estate known as the Bristol Hotel."

HELD—that the descriptive words used by the testator of Hampden House, though containing the word "leasehold," were clearly applicable to the premises in their enlarged condition and passed to his widow the additions which were freehold.

Decision of Barnes, J., reversed.

HALLETT v. HALLETT, (1898) 14 T. L. R. 420—[C A.

66. *Adjoining Houses and Land*—*Occupation by Testator of the Whole of one House and Land and Part of the Land of the other House*—*Devise of the Properties by Name*—*Will speaking from Date of Testator's Death*.—A testator prior to his death purchased two adjoining freehold houses known as Broad Green Lodge and The Cedars, each having a garden and piece of meadow land at the rear appurtenant thereto. He granted a lease of The Cedars with its garden, but without the piece of meadow land in the rear, which at some prior date he had thrown into the grounds of Broad Green Lodge, and had remained in the occupation thereof until his death. The testator by his will gave to one of his daughters the income to arise from (*inter alia*) his "Freehold property known as The Cedars."

HELD—that the will, as to the property comprised in it, spoke from the date of the testator's death, and the gift to his daughter did not comprise the piece of meadow land at the rear, which was occupied by the testator as part of Broad Green Lodge, but it formed part of the testator's residuary estate.

IN RE POTTER, STEVENS v. POTTER, (1901) 83 [L. T. 405—Cozens-Hardy, J.

## VI. MISTAKE AND AMBIGUITY.

## (a) Ambiguity.

67. *Description of Legatee*—*Gift of Residue to Trustees of a Society*—*No Trustees of Society*—*Person Entitled to give Discharge*.—A testator gave the residue of his personal property to the trustees of the British and Foreign Schools in the Borough Road, London. At the date of the will the British and Foreign School Society, in which the testator took a great interest, had a school, a training college, and offices in the Borough Road, as well as schools in other parts of the country, but after the date of the will and before the testator's death the society sold their property in the Borough Road, discontinued the school, and removed the college to Isleworth and the offices to London, but the society had schools in other parts of the country. There were no trustees of



**Mistake and Ambiguity—Continued.**

the society. The testator had given various sums to the society from time to time and had been one of its life governors.

HELD—that there was an ambiguity; that in the circumstances the society to which the testator had subscribed—viz., the British and Foreign School Society—was entitled; and, as there were no trustees of it, the testator must be taken to have meant the person who was entitled on behalf of the society to give a discharge for the money.

IN RE VAUGHAN; SCOTT v. BRITISH AND FOREIGN [SCHOOL SOCIETY, (1901) 17 T. L. R. 278—Buckley, J.

68. *Explanation by reference to Recital in Codicil.*—In case of an ambiguity in a will the Court may look for guidance to a recital in a codicil, unless such recital be obviously incorrect.

*Darley v. Martin* ((1853) 13 C. B. 683—C. P.) and *Grover v. Raper* ((1856) 5 W. R. 134—Kindersley, V.-C.) followed.

A testatrix gave property upon trust for her niece for life and then for equal division amongst the brothers and sisters of such niece living at her death, and A., B., and C. in equal shares. In a codicil she recited that by her will she had divided her estate between the persons named, and declared that a certain great-niece was to share equally with the others.

HELD—that the estate went not in equal moieties between the named persons and the brothers and sisters of the life tenant, but equally between them all.

IN RE VENN, LINDON v. INGRAM, [1904] 2 Ch. [52; 73 L. J. Ch. 507; 52 W. R. 603; 90 L. T. 502—Joyce, J.

69. *Insufficient Description.*—A testator bequeathed “twenty Northern Bank shares” to a legatee. At the date of his death the testator was possessed of fifty-one “A” Northern Bank shares of the value of £26 each, and seventy-two “B” Northern Bank shares of the value of £13 each.

HELD—that the legatee was entitled to select twenty of the “A” shares as constituting her legacy.

O'DONNELL v. WELSH, [1903] 1 Ir. R. 115—[M. R.

**(b) Clerical Error.**

70. *Omission—Miscopying—Omission supplied by Inference.*—Where it is clear that words have been omitted from a will by a copyist's slip, and it can be inferred from other parts of the will what words have been so omitted, the Court will read them into it.

A testator left different estates to his two sons, in each case for life with remainder to their respective children in tail. In the case of the first son the last limitation ran “and, in case there shall be but one daughter of

the body of my said son, then to the use of such one or only daughter and the heirs of her body, and in default of such issue to the use of my own right heirs for ever.” In the case of the other son the limitations were similar, but the italicised words were omitted.

HELD—that they should be supplied.

*Key v. Key* ((1853) 4 De G. M. & G. 73—*Dictum* of Bruce, L.J.) approved.

PHILLIPS v. RAIL, (1906) 54 W. R. 517—Eady, J.

71. *Omission—Supplying Words from Context.*—M. by his will gave property to his daughter for life with a power of appointment in case of her death unmarried or without issue. There was no gift over in default of appointment, but the power was expressly given “subject as hereinafter set forth.” Later on he provided that, if his “daughter under the circumstances above detailed in case of non-marriage or no issue,” the property should go to X.

HELD—that in the last provision there was clearly an omission, and that the Court would insert the words “failed to exercise the power of appointment.”

MUNRO v. HENDERSON, [1907] 1 Ir. R. 440—[Barton, J.

72. *Rectification—Striking out Words—Refusal to Insert Anything.*—The testator by his will left all his property to trustees, who, after paying all expenses and legacies, were “to stand possessed of the nett revenue of the said proceeds.”

The Court refused to substitute the word “residue” for “revenue,” but allowed the words “revenue of the said” to be struck out.

*In the Goods of Bushell* ((1887) 13 P. D. 7; 57 L. J. P. 16; 51 J. P. 806; 36 W. R. 528; 58 L. T. 58—Butt, J.) and *In the Goods of Huddleston* ((1890) 63 L. T. 255—Butt, J.) disapproved.

IN THE GOODS OF SCHOTT, [1901] P. 190; 70 [L. J. P. 46; 84 L. T. 571; 17 T. L. R. 476—Jeune, P.

73. *Rectification—Striking out a Word.*—The word “real” had crept into the residuary clause of a will by mistake before the word “property,” and the word “said” had become transformed into “real” in the process of copying.

HELD—that it was an obvious mistake, and although the Court could not substitute the word “said” for “real,” it could and would strike out the latter word, so as to give effect to the testator's wishes. The grant of probate would accordingly be revoked and a fresh grant issued.

VAUGHAN AND OTHERS v. CLERK AND OTHERS, [(1902) 87 L. T. 144; 18 T. L. R. 704—Jeune, P.

**(c) Evidence of Intention.**

74. *Absolute Gift of Life Estate with Power of Appointment—Obscurity or Am-*

**Mistake and Ambiguity—Continued.**

*biguity.*—A testator, by his will dated the 30th day of April, 1894, gave, devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his wife for her absolute use and benefit, subject to the payment of his debts, funeral and testamentary expenses and legacies. By a codicil to his will, after reciting that circumstances had occurred affecting his property devised and appointed by his will, he deemed it advisable to revoke it; he did thereby revoke the same, and he bequeathed, devised and appointed to his wife, in the event of her surviving him, all his property of whatsoever kind, whether real or personal, or in possession, reversion, remainder, or expectancy, for, to, or over which he might be at his death seised or entitled or have any power of disposal, so that his wife "may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of his said wife "not surviving me or dying without having devised or appointed the whole or any part of my said property, then my said will dated the 30th day of April, 1894, shall take effect as if this my said codicil had not been made." The testator died on 14th November, 1899, and his widow died on 17th July, 1900, having by her will dated 28th October, 1864, devised and bequeathed all her property to the testator absolutely.

**HELD**—that the widow took a life estate with a power of appointment, that she died without making any effectual appointment of the property in question, and it passed upon her decease as under the will of her husband.

**IN RE SANFORD; SANFORD v. SANFORD**, [1901] 1 [Ch. 939; 70 L. J. Ch. 591; 84 L. T. 456—Joyce, J.]

**75. Bequest of "All the Residue and Remainder" of Specific Mortgage Debts—No General Residuary Bequest—Charge of Debts and Funeral and Testamentary Expenses—Exoneration of Specifically Bequeathed Mortgage Debts.**—A testator, after giving the usual direction as to the payment of his debts, and funeral and testamentary expenses, and after bequeathing a number of general pecuniary legacies, gave and bequeathed "all the residue and remainder of the sum of £9,187 lent on mortgage to Sir J. L., the deeds being in the keeping of Messrs. Blount, Lynch and Petre, of Fitzalan House, Arundel Street, Strand, and of the sum of £4,000 lent on mortgage to Mrs. A. K., of . . . the deeds being in the keeping of the same firm, after payment of my just debts and funeral expenses and the expense of proving this my will, I give and bequeath unto the . . . Canons Regular of, etc." There was no general residuary bequest. Extrinsic evidence was offered to show that the testator possessed, at the time of making his will, no residuary property out of which to provide for the general pecuniary legacies

already referred to. It appeared, however, that at the date of his death the testator's undisposed of personal estate was insufficient for the payment of the debts, funeral and testamentary expenses, and the pecuniary legacies and an annuity bequeathed by his will. The question arose, on an originating summons, in what order the assets should be applied.

**HELD**—that no extrinsic evidence was admissible, as the words "residue and remainder" related to a particular thing and were not absolute, and no ambiguity existed; and that upon the true construction of the will the testator's undisposed of personal estate was liable for the payment of his debts and funeral and testamentary expenses, and the pecuniary legacies and annuity bequeathed by his will in exoneration of the specifically bequeathed mortgage debts.

**Decision of the Court of Appeal (sub nom. In re Grainger; Dawson v. Higgins**, [1900] 2 Ch. 756; 69 L. J. Ch. 789; 48 W. R. 673; 83 L. T. 209—C. A.) reversed.

**HIGGINS v. DAWSON**, [1902] A. C. 1; 71 L. J. [Ch. 132; 50 W. R. 337; 85 L. T. 763—H. L. (E)]

**76. Bequest to Nephews and Nieces—Children of Named Persons—Named Person a First Cousin—Evidence to Show Mistake Inadmissible.**—A testator devised and bequeathed the residue of his real and personal estate upon trust for his nephews and nieces, children of William Harris Dwelley, living at his death. He never had any nephews or nieces. He had a first cousin named William Harris Dwelley.

**HELD**—that extrinsic evidence of the circumstances to show that a mistake had been made in the will was inadmissible, and that the gift failed, and the property went to the heir-at-law and next-of-kin.

**IN RE CHENOWETH; WARD v. DWELLEY**, (1901) 17 [T. L. R. 515—Farwell, J.]

**77. Blank in Will—Bequest to Granddaughter—Name left Blank.**—A complete blank in a will may not, but a partial blank may, be explained and filled up by extrinsic evidence.

A testatrix by will left all her property "unto my granddaughter —, whom I appoint sole executrix." The testatrix had three granddaughters who survived her.

**HELD**—that evidence was admissible to show which granddaughter was intended by the testatrix.

**IN THE GOODS OF HUBBOK**, [1905] P. 129; 74 [L. J. P. 58; 54 W. R. 16; 92 L. T. 665; 21 [T. L. R. 333—Barnes, P.]

**78. Devise of Real Estate—Testatrix Having no Real Estate—Entitled to Proceeds of Sale of Realty under Trust.**—A. devised real estate upon trust for sale, his daughter B. to be entitled during his widow's life to

**Mistake and Ambiguity—Continued.**

one half of the income from the proceeds, and after his widow's death to one half of the capital. He directed that before sale such realty was to be regarded and be transmissible as personalty.

During the widow's life and before any of the property had been sold, B. devised all her real estate to trustees; she in fact had no real estate strictly so-called.

**HELD**—that upon the construction of the will aided by admissible extrinsic evidence, the Court could say that B. intended to bequeath her interest under her father's will.

The admissibility of extrinsic evidence discussed.

**IN RE GLASSINGTON; GLASSINGTON v. FOLLETT**, [1906] 2 Ch. 305; 75 L. J. Ch. 670; 95 L. T. 100—Joyce, J.

**79. Erroneous Recitals.**—A testatrix by her will left £250 to the "*British Home for Incurables, Streatham, S.W.*," adding the correct name of its secretary and address of its office. In a codicil she incorrectly recited two different legacies of £500 to the "*British Home for Incurables, Streatham, S.W.*," and correctly recited other legacies including one of £100 to St. M.'s Orphanage, Bayswater; she then revoked all such legacies and gave £500 each to the "*Royal Home for Incurables, Streatham, S.W.*," and to St. M.'s Orphanage aforesaid."

The first legacy was claimed both by the British Home and Hospital for Incurables, Streatham, and by the Royal Hospital for Incurables, Putney Heath.

**HELD**—that, having regard to entries in a book of subscriptions kept by the testatrix, she always distinguished the two institutions as the "*Royal*" and "*British*," and that therefore the Royal House was entitled to the legacy.

Decision of Kekewich, J. (89 L. T. 495) reversed.

**BRITISH HOME AND HOSPITAL FOR INCURABLES v. [ROYAL HOSPITAL FOR INCURABLES]**, (1904) 90 L. T. 601—C. A.

**80. Mere Equivocation—Right of Selection.**—A testatrix by her will gave "my 140 shares in the Crown Brewery Company . . . unto my trustees" in trust to pay the income thereof to the plaintiff during her life and after her decease in trust for certain persons. At the date of the will and of her death the testatrix had 280 shares in the Crown Brewery Company of which 40 were fully paid up, and the other 240 were paid up to the extent of £2 10s. per share.

**HELD**—that this was not a case in which the right of selection arose; that an affidavit made by the solicitor who prepared the will as to the intention of the testatrix was not admissible; that having regard to the surrounding circumstances, the intention of the testatrix, as manifested by her will, was to give 140 of the shares upon which only £2 10s. had been paid.

**Tapley v. Eagleton** ((1879), 12 Ch. D. 683; 28 W. R. 239—Jessel, M.R.) and **Asten v. Asten** ([1894] 3 Ch. 260; 63 L. J. Ch. 834; 71 L. T. 228; 8 R. 496—Romer, J.) considered.

**IN RE CHEADLE, BISHOP v. HOLT**, [1900] 2 Ch. [620; 69 L. J. Ch. 753; 48 W. R. 88; 83 L. T. 297—C. A.

**81. Name and Description of Beneficiary.]**

—A testator gave property on trust for "his grandsons Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or he shall attain twenty-one years." One of the testator's grandsons was named Robert William Henderson, son of Oliver Henderson. The testator left two other grandsons (the sons of a deceased son) named William Robert Henderson and John Barnett Henderson.

**HELD**—that extrinsic evidence was admissible to show that William Robert Henderson was the person really intended in the will.

**HENDERSON v. HENDERSON**, [1905] 1 Ir. R. 353—[Kenney, J.

**82. Previous Will—Latent Ambiguity—Misdescription of Legatees—Evidence of Testator's Previous Will.]**

—A testator by his will bequeathed legacies to such of the daughters of his late friend, I. S., as should survive the testator and be unmarried. The testator's friend, I. S., survived the testator, and had never been married. I. S. had five unmarried sisters, daughters of J. J. S., deceased.

**HELD**, on the construction of the will and on the evidence of a previous will of the testator, which gave legacies to the daughters of J. J. S. by a correct description—that those daughters were entitled to the legacies.

Decision of Kekewich, J. (68 L. J. Ch. 107; 47 W. R. 182; 79 L. T. 723) reversed.

**IN RE WALLER; WHITE v. SCOLES**, (1899) 68 [L. J. Ch. 526; 47 W. R. 563; 80 L. T. 701—C. A.

**83 Previous Wills—Mistake in Description of Subject-matter.]**—By his will made in 1902 the testator bequeathed to his daughter "all my consolidated ordinary stock in the Midland Railway Company," and in the same will bequeathed "all my preferred and deferred ordinary stock in the Midland Railway (but not any consolidated ordinary stock in such company) to my trustees upon trust" as therein mentioned. The testator, at the date of his will and at the time of his death, held 2½ per cent. perpetual preference stock, and preferred and deferred converted ordinary stock in the company. He had before 1897 held 4 per cent. preference stock and ordinary stock in the company. By the Midland Railway Act, 1897, the preference stock was converted into 2½ per cent. preference stock, and the ordinary stock into preferred and deferred converted ordinary

**Mistake and Ambiguity—Continued.**

stocks. Evidence of former wills made by the testator was admitted to explain the mistake in the description of the subject-matter of the gift.

HELD—that the testator intended by the first gift to pass the ordinary stock, and by the second gift the preference stock.

IN RE SMITH; SMITH v. JOHNSON, (1904) 20 [T. L. R. 287—Byrne, J.

**84. Tenancy in Common—Whether still Existing—Shares in New River Company—Separate Receipt of Dividends—No Formal Partition—Extrinsic.]**—R. devised to his brother C. all his share and interest of and in the real estate derived under their father's will, and held by him as tenant in common with C., and which should not have been partitioned at the date of his death.

R. and C. had taken as tenants in common under their father's will a quantity of real estate, including an interest in the New River Company. The company had paid the dividends separately to R. and C., regarding them each as the owner of half the interest. In 1898 by a deed, which recited that they had agreed for the present not to partition their interest in the company, they partitioned some of the other property, but the remainder was unpartitioned at R.'s death, and would be acted on by the devise.

HELD—(1) that the recital in the deed of 1898 was not admissible as evidence of R.'s intention, and (2) that the interest in the New River Company had been partitioned as far as it was capable of partition, and that R.'s share did not pass under the devise, but fell into residue

IN RE TRIMMER, CRUNDWELL v. TRIMMER, (1904) [91 L. T. 26—Joyce, J.

**(d) Misdescription.**

**85. Christian Name of Legatee.]**—A testatrix gave by her will a number of legacies, and amongst them, "To Percy H., son of C. A. H., £200."

C. A. H., who was her husband's nephew, had no son Percy, but one of his sons was usually called Bertie. Two other nephews of her husband had each a son bearing the name Percy, but neither of these claimed the legacy.

HELD—that a mistake had probably arisen from the similarity in sound, and that the legatee was sufficiently identified as Bertie H.

IN RE HOOPER; HOOPER v. WARNER, (1903) 51 [W. R. 153; 88 L. T. 160—Byrne, J.

**86. Legatee.]**—A testator devised his property in trust to pay, *inter alia*, a legacy of £500 to his "godson, the Hon. H. A. J. P., son of Lord G." His godson was in reality the Hon. R. M. P., another son of Lord G.

HELD—that the legacy passed to the godson, the Hon. R. M. P.

IN RE BLAKE'S TRUSTS, [1904] 1 Ir. R. 98—[V.-C.

**87. Specific Legacy — Deemed General Legacy.]**—A. lent £21,000 to a firm of which S. and W. were the only partners. In 1899 a limited company took over the business of the firm, and A. received debentures and shares in respect of her debt.

In 1903 A. made a will containing the following bequest: "To S. and W. I forgive the sum of £20,000 now owing to me jointly by them or any members of the firm."

HELD—that S. and W. were entitled to £20,000 out of A.'s general assets.

LINDGREN v. LINDGREN (1846) 9 Beav. 358 and SELWOOD v. MILDMAY ((1755) 3 Ves. 306) followed.

FINDLATER v. LOWE, [1904] 1 Ir. R. 519—M. R.

**(e) Mistake of Fact.**

**88. Gift of Legacy "in addition to" sums owing by Testatrix's Husband—Falsa demonstratio]**—By her will, dated the 1st April, 1895, a testatrix, among other legacies, bequeathed to A. "the sum of £300 in addition to the sums owing to her from my late husband's estate," and she appointed A. and another person executrix and executor. The testatrix died on the 11th April, 1895. A. alone proved the will. The estate of the testatrix consisted almost entirely of property derived by her under the will of her deceased husband.

A was a grandniece of the testatrix, and for many years had resided with her and her husband and had assisted them in household matters. She was paid a nominal salary of £8 per annum, it being, as she alleged, always understood that she should be provided for by the sums of money given or secured to her by the testatrix's husband. These sums were represented by an I O U for £500 and a promissory note for the same amount. In her administration accounts she included the payment to herself of the two sums of £500.

HELD—that the testatrix being the person to pay, and having the whole estate of her husband in her hands, her intention was that A. should receive thereout the two sums of £500 plus the £300 expressly bequeathed to her, the reference to such sums as debts of her husband being a mere *falsa demonstratio*.

Decision of Romer, J., reversed.

IN RE ROWE; PIKE v. HAMLYN, [1898] 1 Ch 153; [67 L. J. Ch. 87; 77 L. T. 475; 46 W. R. 357—C. A.

**89. Solicitor Mistaking Testatrix's Interest in Certain Estates—Draft Will Submitted to Testatrix—Execution of Will—Confirmation—Revocation of Probate—Fresh Grant with Omission of Words of Limitation or Restriction]**

**Mistake and Ambiguity—Continued.**

tion.]—A mistake arose from the family solicitor who drew the will of the testatrix having inadvertently overlooked the fact that the testatrix and her sister were, under the will of their father, joint tenants of certain estates and not tenants in common, as was the case with certain other estates owned by them. There was no evidence that she had, in fact, ever read over or had read to her either the draft or the will.

HELD—that a mistake was made by the insertion of the words “undivided moiety of and in certain” in the will; that it was clearly shown that the testatrix never intended to impose any limitation or restriction upon the particular bequest; that this particular portion of the will was not brought to the knowledge of the testatrix in such a way that she must be assumed to have confirmed it by her subsequent execution of the will, although the draft was sent to her; and that there must be a revocation of the original probate and a decree of a fresh grant of probate with the omission of the said words.

BRISCO v. BAILLIE HAMILTON, [1902] P. 234; 71 [L. J. P. 121, 87 L. T. 746—Jeune, P.

**VII. INTERPRETATION OF TERMS.****(a) Furniture and other Effects.**

90. “*All the Furniture and other Personal Effects*”—*Effects used in Business—Trade and Tenant's Fixtures—Hotel.*]—A testator who carried on the business of an innkeeper at the Roebuck Hotel, which he held upon a yearly tenancy, bequeathed “all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel aforesaid, to G. A. W., who is now residing at the said hotel.” G. A. W. was the manageress of the hotel. She brought furniture with her when she came to live there. She had no salary, but was entitled to a share of the profits of the business. As regards the furniture, some was used by the testator, some by G. A. W., and some by guests.

HELD—that all the furniture, linen, plate, china, glass, and other effects belonging to the testator, and which at the date of his death were at the Roebuck Hotel, whether they were used in the business or not, passed under the bequest to G. A. W., but that neither the trade nor the tenant's fixtures passed under that bequest.

Finney v. Grice ((1878) 10 Ch. D. 13; 48 L. J. Ch. 247; 27 W. R. 147), considered.

IN RE SETON-SMITH; BURNAND v. WAITE, [1902] 1 Ch. 717; 71 L. J. Ch. 386; 50 W. R. 456; 86 L. T. 322—Buckley, J.

91. “*Furniture and Contents*”—*Devise of a Freehold House “together with the Furniture and Contents therein and Appertaining thereto”*—*What Property such Words in-*

clude.]—A testator devised to his widow his freehold house, No. 11, St. James Square, “together with all the furniture and contents therein and appertaining thereto.”

HELD—that under these words the widow was entitled to a collection of medals and coins in the house, a quantity of yacht linen from a yacht formerly owned by testator (also in the house), and three carriages used by the testator during the London season, but at the time of his death stored at a London coachbuilder's.

That she was not entitled to some money, guns, debentures, promissory notes, and other *choses in action*, which were in the house at the time of testator's death.

IN RE McCALMONT; ROOPER v. McCALMONT, (1903) [19 T. L. R. 490—Eady, J.

92. “*Household Furniture, Books, &c., and other Effects*”—*Jewellery—Horses and Carriages.*]—A testator bequeathed his “household furniture, books, pictures, paintings, engravings, plate, linen, china, and other effects.”

HELD—that the will was so worded as to show that according to a reasonable construction of it the testator must have intended to use the term “other effects” in a limited and restricted sense; that the only limitation which could be suggested was that of the same kind as previously enumerated, namely, such thing as were about the house. Jewellery, therefore, did not, but carriages, horses, and pictures, whether in the house or elsewhere, did fall under the designation “effects.”

Parker v. Marchant ((1842), 1 Y. & C. 290; 11 L. J. Ch. 223—Knight-Bruce, V.-C.) followed.

IN RE HAMMERSLEY; HEASMAN v. HAMMERSLEY, [1899] 81 L. T. 150—Stirling, J.

93. *Household Property—Residuary Gift—What constitutes.*]—A. by her will appointed executors and trustees, and, after giving certain specific legacies, continued: “With the exception of the above legacies, I direct that the remainder of my household property, including house in M., should be sold, and, after paying funeral, testamentary expenses, and debts, be divided as therein mentioned. Her personal estate comprised two leasehold houses, shares, money on deposit at the bank, and household furniture.

HELD—that under the above bequest the entire residue of her personal estate passed.

IN RE JOHNSON; SANDY v. REILLY, (1905) 92 [L. T. 357—Farwell, J.

94. “*Other Articles of Household or Domestic Use and Ornament*”—*Words ejusdem generis—Cultivation and Use for Ornamentation.*]—A testator by his will bequeathed “All my household furniture, plate, linen, china, glass, printed books, musical instruments, wines, liquors, horses, carriages, and other articles of household or

**Interpretation of Terms—Continued.**

domestic use or ornament" to his widow; he gave the residue of his property to trustees upon trust for sale and conversion, and to hold the proceeds of sale upon trust to provide an annuity for his widow, and subject to such annuity to divide the same among certain children of his deceased sisters. The testator died possessed of a large and valuable collection of orchids, which were kept outside the curtilage of his dwelling-house. It was proved that from time to time some of the plants were brought into the dwelling-house for ornament, and such plants were from time to time replaced by others. The orchids were sold for £3,271.

**HELD**—that an inquiry must be directed as to what plants were from time to time used for ornament, and that the testator's widow was entitled to the proceeds of the sale of such plants.

**IN RE OWEN; PEAT v. OWEN**, (1898) 78 L. T. 463—  
[Stirling, J.]

**95. Pictures—Bequest of Pictures for Use and Enjoyment during Life—Letting Flat containing Pictures.**—A testator left certain pictures on trust to permit L. to have the use and enjoyment thereof during her life. L. had some of the pictures in a flat which she let furnished for a short term.

**HELD**—that she was entitled to do so.

*Marshall v. Blew* (2 Atk. 217) followed.

**IN RE WILLIAMSON, MURRAY v. WILLIAMSON**,  
[(1906) 94 L. T. 813—Eady, J.]

**96. Plate in one Mansion House at Testator's Death given to one Legatee—Similar Gift to another Legatee of Plate in another Mansion House—Plate usually in one House Temporarily in the other at Testator's Death.**—A testator by his will gave all his pictures, plate, &c., in each of his two mansion houses, E. and B., to trustees upon trust to permit the same respectively to go along with and be used and enjoyed by the persons respectively for the time being entitled under the will to the possession of the respective mansion houses in or about which the said pictures, plate, &c., should be at the time of the testator's death. The testator directed an inventory to be made of the said pictures, plate, &c., belonging to each of the mansion houses, one copy to be kept by the trustees of the will and the other by the person entitled for the time being to the enjoyment of the same. E. was the testator's principle place of residence, B. being used by him during the hunting and shooting season. It was the testator's custom when he went to take a quantity of plate with him, and at the end of his residence at B. the plate was returned to E. The plate taken on these occasions was not always the same. A large quantity of plate which had been taken from E. was in this way in B. at the date of the testator's death, which took place at B. Soon after the testator's death the plate was sent back to E. and kept there.

**HELD**—on the construction of the will, that the whole of the plate actually in B. at the date of the testator's death passed to the devisee of that house.

**Decision of Warrington, J.** (22 T. L. R. 81) affirmed.

**IN RE THE EARL OF STAMFORD; HALL v. LAMBERT**,  
[(1906) 22 T. L. R. 632—C. A.]

**97. Sum of Money in Box—Ejusdem generis Rule—Bequest of House Furniture and Whatever is in House—Bequest of Residue.**—A testator bequeathed to R. "my house furniture and whatever is in the house I now dwell in, and in the house adjoining." There was a residuary bequest.

After his death a sum of £320 was found in his house in a box, in which he was in the habit of keeping money.

**HELD**—that the money did not pass under the bequest to R., but fell into residue.

**IN RE O'BRIEN; O'BRIEN v. O'BRIEN**, [1906] 1  
[Ir. R. 649—M. R. and C. A.]

**98. Wool in Store forming part of Residence—"Household Furniture and Effects in my Residence."**—A testator bequeathed his house in A. street to his son for life, and bequeathed to him "all my household furniture and effects in my residence, A. street aforesaid." At the time of the testator's death there was a large quantity of wool, part of his stock-in-trade, stored in a store which was at the rear of and admittedly formed part of his residue. The will contained a residuary bequest.

**HELD**—that the wool did not pass under the bequest to the son, but was included in the residuary gift.

**MACPHAIL v. PHILLIPS**, [1904] 1 Ir. R. 155—  
[Barton, J.]

**(b) Illegitimate Children.**

**99. Bequest to Nephews and their Issue—Illegitimate Son of a Nephew—Included in Other Passages with the Nephew's Legitimate Children—Held Entitled to Share.**—A testator left property in trust for his niece M. for life, and, after her death, for such of his eight other nephews and nieces as should be alive and the issue of such of them as might predecease M. One of the nephews G. died in M.'s lifetime leaving an illegitimate son S. In three earlier passages of the will the testator had used the following expressions: "G. . . and his issue (including S. hereinafter named);" "Children and child of G. . . including amongst such children and child S. the illegitimate son of my said nephew;" "if there shall be no child of my said nephew, including the same S., living at my death."

**HELD**—that the testator had for the purpose of his whole will recognised S. as a child

**Interpretation of Terms—Continued.**

of G, and that S was entitled to share on M.'s death as "issue of G."

IN RE SMILTER; BEDFORD v HUGHES, [1903] 1 Ch 198; 72 L. J. Ch 102, 51 W. R. 231, 87 L. T. 644—Kekewich, J

100. "*Children*"—*Children born of a Woman with whom Testator was Living as his Wife.*—The testator went through a form of marriage with his sister's daughter, and they lived together as husband and wife, she taking his name. Three weeks before a daughter was born to them he made a will in which, after giving legacies to the lady's brothers, he gave the residue of his property to a trustee upon trust for the lady, describing her by his own name and also by her maiden name, for her life, and from and after her death "in trust for all her children living at my decease, who, being sons, shall attain the age of 21 years, or, being daughters, shall attain that age or marry under that age, in equal shares; and, if there shall be only one such child, the whole to be in trust for that one child." The testator then went abroad and died abroad. Before the testator died a daughter was born, of which fact the testator was made aware.

HELD—(1) that a gift by will (*secus* by deed) to a woman's future illegitimate children born in the donor's lifetime and not defined by reference to paternity is not void for uncertainty or contrary to public policy.

*Occleston v Fullalove* ((1874) L. R. 9 Ch. 147) and *In re Hastie* ((1887) 35 Ch. D. 728; 56 L. J. Ch. 792; 35 W. R. 692, 57 L. T. 168—Stirling, J.) followed.

(2) that, upon the true construction of the will, the testator intended to use the word "children" as including illegitimate children, and that, therefore, the daughter was entitled to the residue contingently upon attaining 21 or marrying.

IN RE LOVELAND; LOVELAND v. LOVELAND, [1906]

[1 Ch. 542; 75 L. J. Ch. 314; 94 L. T. 336; 22 T. L. R. 321—Eady, J

101. "*Children belonging to me*" — *Will of Mother—Future Illegitimate Children—Validity of Provision for*—A spinster made a will leaving her property in trust for all the children who might belong to her at the date of her death. Two years later she had an illegitimate child who survived her

HELD—(1) that there is a distinction between a provision for future illegitimate children made by a man and by a woman, the question of immoral consideration not arising in the latter case; and, therefore,

(2) that the child took under the will and was entitled to probate.

IN THE GOODS OF FROGLEY, [1905] P. 137, 74

[L. J. P. 72, 54 W. R. 48; 92 L. T. 429; 21 T. L. R. 341—Dean, J.

102. *Children of a Daughter — Treated as Grandchildren.*—A testatrix left property

to her daughter M. for life for her separate use, so that she could not have power while under coverture to dispose of the same, and after her death to her children.

M. had children by a man with whom she had lived without marriage, and who had died before testatrix. Her children had been much in her mother's house and had been treated by her as her grandchildren.

HELD—that they were entitled to the property in remainder to M.

O'LOUGHLIN v. BELLEW, [1906] 1 Ir. R. 487—[Walker, L. C

103. *Gift to Children by Name of Legacy and Share of Residue—Gift to Next-of-Kin of Children in Default—Illegitimate Children—Persons Entitled under the Statute of Distribution.*—A testator bequeathed a pecuniary legacy to each of his seven children by name, and he directed his trustees to stand possessed of his residuary estate after the death of his wife in trust in equal shares for such of his seven children thereinbefore named as should be then living and should have attained, or should attain, the age of twenty-one years. And the testator directed his trustees to retain the legacy, and the share of his residuary estate which any daughter of his might take under the provisions thereinbefore contained, and to hold the same upon trust to pay the income of each such daughter's legacy and share to her during her life for her separate use, and from and after her death upon trust to pay the income to her husband for life or any less period, if she should so direct or appoint, and subject thereto in trust for her children, and in default of children then to persons entitled under the Statute of Distribution, in case she had died possessed thereof without having been married. One of the daughters was one of three illegitimate children, and died leaving a husband surviving her, but without having had any issue; she never in any way exercised the power of appointment in favour of her husband.

HELD—that the testator treated all his children as akin to one another, and that the persons intended to take the gift over were the next of kin, not on the footing that the illegitimate children were of kin to nobody, but on the footing that they were of kin to those described by the testator as their brothers and sisters.

*In re Stanley's Estate* ((1866) L. R. 5 Eq. 303—Page Wood, V.-C.) overruled.

Decision of Kekewich, J. ([1901] 2 Ch 578; 70 L. J. Ch. 856, 50 W. R. 102, 85 L. T. 447), reversed

IN RE WOOD; WOOD v WOOD, [1902] 2 Ch 542;

[71 L. J. Ch. 723, 50 W. R. 695; 87 L. T. 316,

18 T. L. R. 710—C. A.

104. *Reputation as Children at Date of Will—Gift of Residuary Estate to Children—Child Born after Date of Will but before*

*Interpretation of Terms—Continued.*

*the Death of Testatrix—Exclusion.*—A testatrix by her will made on 17th July, 1876, bequeathed her residuary estate "in trust equally for all such of the children (being daughters) of" her nephew R. Du B., her niece A. A., wife of J. A. and her niece J. H., wife of G. H., "as shall live to attain the age of twenty-one years or marry under that age, and each child shall be paid her share on attaining that age or marrying under it." The testatrix died on 2nd July, 1883. R. Du B. was then, as he had been for many years previously, living with a person reputed and believed by the testatrix and the rest of the family to be his lawful wife, and there was issue of this union three daughters, Gertrude and Alice, born before the date of the will, and Jessie, born after that date on 8th April, 1879. It was proved that the testatrix died in the full belief that the three reputed daughters of R. Du B. were included as children, being daughters of R. Du B. in the class among whom she had directed her residuary estate to be divided. It was contended that they were not so included, and that none of them took a share.

HELD—that the children Gertrude and Alice must be treated and share as daughters of R. Du B. in the distribution of the residuary estate; that, as Jessie was not in existence at the date of the will, and not having been a reputed child of Du B. at the date of the will, she was not entitled to any share under the residuary gift.

*Holt v. Sindrey* ((1868) L. R. 7 Eq. 170; 38 L. J. Ch. 126; 17 W. R. 249; 19 L. T. 609), and *Hill v. Crook* ((1873) L. R. 6 H. L. 265; 42 L. J. Ch. 702; 22 W. R. 137—H. L.) discussed.

*In re Bolton* ((1886) 31 Ch. D. 542; 55 L. J. Ch. 398; 34 W. R. 325) followed.

*IN RE DU BOCHET; MANSELL v. ALLEN*, [1901] 2 Ch. 441; 70 L. J. Ch. 647; 49 W. R. 588, 84 L. T. 710—Joyce, J.

105. *Gift to Specified Number of Illegitimate Children—Benefit of Illegitimate Child of whose Existence Testator was Ignorant—Presumption—Evidence of Intention.*—A testator gave a share of the residue of his estate to the three children respectively of C. L., born prior to her marriage with him, knowing that she had three illegitimate children of whom he was the father.

HELD—that in the absence of proof that the testator knew of an illegitimate daughter by another man, there was no ground for holding that the testator intended to include her in the gift.

*IN RE MAYO; CHESTER v. KEIRL*, [1901] 1 Ch. 404; 70 L. J. Ch. 261; 84 L. T. 117—Farwell, J.

106. *Illegitimate Son recognised as a "Son"—His Children therefore included in Grandchildren*—A testatrix appointed "my son

G. K. and my son-in-law L. G." trustees and executors. She gave her residuary estate for division "between all my grandchildren."

G. K. was illegitimate.

HELD—that as she had recognised him as her "son," the term grandchildren would include his children.

*IN RE KIDDLE; GENT v. KIDDLE*, (1905) 53 W. R. 616; 92 L. T. 724—Kekewich, J.

107. *Intention of Testatrix Mistaken as to Legitimacy—Roman-Dutch Law.*—Effect given to the express intention of a testatrix to benefit a specified class of children, even where she was in error in believing that as a fact they had been legitimated by the Roman-Dutch law, which legitimates children born out of wedlock when the parents are subsequently married by lawful ceremony.

*IN RE PLANT; GRIFFITH v. HILL*, (1899) 47 W. R. 183—Kekewich, J.

## (c) "Issue."

108. *"Gift over to Other of my Children and their Issue"—Issue of Children not Predeceasing Testatrix.*—A will contained a gift over, upon failure of the line of one of testatrix's children, in favour of her other children and their issue, subject to the condition that only those who took under the original gift should share in such gift over.

One of the children died without issue, and the question now arose as to whether A. and B. (two of the grandchildren) were entitled to share in the distribution of such child's original legacy.

A. and B. took original shares under the will in substitution for their mother, who was alive, but received no legacy.

HELD—that A. and B. were entitled to share in the distribution; the word "issue" must receive its plain and ordinary meaning, and could not be restricted to the issue of those children who died in the lifetime of the testatrix, unless the rest of the will clearly required such a restricted meaning; and in the present case there was nothing inconsistent with the ordinary meaning.

*EDDYVEAN AND OTHERS v. ARCHER AND OTHERS*, [1903] A. C. 379; 72 L. J. P. C. 85; 89 L. T. 4; 19 T. L. R. 561—P. C.

109. *Legacies to be Settled on Marriage on Daughters, and on their Demise on their Issue—Issue read as Children.*—A testator bequeathed to each of his four unmarried daughters £10,000 New Government Stock, to be paid and assigned to each as a marriage portion on their respective marriages, and £20,000 Old Government Stock, to be settled on each marriage strictly on his said daughters, and on their demise on their lawful issue, share and share alike, not to be subject to the control of any husband his daughters might marry, and in case of any of his said daughters dying and leaving no



### Interpretation of Terms—Continued.

lawful issue<sup>1</sup> to attain twenty-one or get married, then such share of Old Stock to be divided, share and share alike, between the survivors of his said four daughters.

HELD—that the word “issue” should be restricted to children.

HARRIS v. LOFTUS, [1899] 1 Ir. R. 491—V. C.

110. *Several Gifts over to Issue restricted to Children—One Gift over not so restricted—Uniform Meaning.*—Whenever in a deed, or will, or other document, it is found that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear.

A testator bequeathed twelve distinct legacies, with gift over to the issue of the legatee dying in his lifetime. In the case of eleven of the legacies the gifts over contained words restricting, either expressly or by the application of the principle of *Sibley v. Perry* ((1802) 7 Ves. 522; 6 R. R. 183), the class of issue to children. The word “issue” in the gift over of the remaining legacy was not qualified by any such restriction.

HELD—that as regards the solitary case where the testator had not clearly defined his meaning of the word “issue,” he had, from the use which he had made of the word in other parts of his will, shown that he meant it to have the more limited meaning—that is, that in that case also the word “issue” was to have the common significance of “children.”

Decision of Kekewich, J. ((1899) 1 Ch. 703; 68 L. J. Ch. 319; 47 W. R. 374; 80 L. T. 257), reversed.

IN RE BIRKS; KENYON v. BIRKS, [1900] 1 Ch. [417; 69 L. J. Ch. 124; 81 L. T. 741—C. A.]

### (d) Miscellaneous.

111. *“Lessees or Holders of the Present Leases.”*—A testator by his will left his real estate “to the lessees or holders of the present leases in the quantities, dimensions, and measurements set forth in their respective leases.”

HELD—that the words should not be confined to the original lessees, but included the assignees of the original leases.

KING v. RYMLL, (1898) 67 L. J. P. C. 107; 78 [L. T. 696—P. C.]

112. *Locality of Property—Personal Property “in United Kingdom”—“In South Africa”—Shares and Bonds in Foreign Companies—Shares Transferable in London and Abroad—Locality—“Home” Trustees—“Foreign” Trustees.*—A testator left to “home” trustees all his personal estate in the United Kingdom, and to “foreign” trustees all his personal estate in South Africa upon different trusts. He possessed—

(a) Bonds in a South African Water Company, which had no office in England; the bonds were at his London Bank, but were only payable in South Africa

(b) Shares in mining companies constituted under the colonial laws, and having their head offices in South Africa; they had also duplicate registers and offices in London where shares could be transferred; the certificates were at the testator’s London Bank.

HELD—that the bonds passed to the “foreign” trustees, but the shares to the “home” trustees.

IN RE CLARK; McKECKNIE v. CLARK, [1904] 1 [Ch. 294; 73 L. J. Ch. 188; 52 W. R. 212; 89 L. T. 736; 20 T. L. R. 101—Farwell, J.]

113. *“Domestic Servant”—Laundress.*—The plaintiff had been over ten years in a testator’s service as laundress; she received £60 per annum, paid quarterly, and worked in a laundry in a yard adjoining his house, but supplied her own food and lived in her own house some distance away.

HELD—that she was not entitled under his will to a legacy as a “domestic servant.”

Ogle v. Morgan ((1852) 1 De G. M. & G. 359) followed.

IN RE OGILBY; COCHRANE v. OGILBY, [1904] 1 [Ir. R. 525—M. R.]

114. *Servants—Legacy of “One Year’s Wages”—Only Servants Hired by the Year, or whose Wages Calculated by the Year.*—A legacy to servants of “one year’s wages” does not extend to servants whose wages are calculated by the week or month.

Blackwell v. Pennant ((1932) 22 L. J. M. C. 155; 9 Hare 551), followed.

Decision of Joyce, J. ((1904) 73 L. J. Ch. 847), affirmed.

IN RE RAVENSWORTH; RAVENSWORTH v. TIN-DALE, [1905] 2 Ch. 1; 74 L. J. Ch. 353; 92 L. T. 490; 21 T. L. R. 357—C. A.]

### (e) “Money.”

115. *“Any Money . . . that may be in my Possession at my Death”—Reversionary Interest—Residuary Personal Estate*—The only clause in her will by which a testatrix disposed of her residuary personal estate was this: “Any money not mentioned in the aforesaid bequests that may be in my possession at my death, after payment of my debts, funeral and testamentary expenses, I give absolutely to C. T. W. P.”

HELD—that it was obvious from the nature of the previous bequests [investments] that the testatrix did not use the word “money” in the strict literal signification of the word as denoting cash; that the word “money” as it is given in the form of money remaining after payment of debts and funeral and testamentary expenses, meant the residuary personal estate; the words “that may be in my possession” were not used with reference to the distinction which lawyers draw be-

**Interpretation of Terms—Continued.**

tween interests in possession and in reversion, that the testatrix intended to dispose of her whole personal estate which was not specifically given, and, therefore, included a reversionary interest in personality.

*IN RE EGAN, MILLS v PENTON*, [1899] 1 Ch. 688, [68 L. J. Ch. 307, 80 L. T. 153—Stirling, J.]

116. "*Balance*"—*Gift to Widow—Gift Over of "Balance," if any, of Money, &c, if any, on her Re-marriage.*—A testator gave the residue of his estate to his wife for her sole use and benefit so long as she should continue his widow. Should she marry again, then the "*balance*," if any, of the money and farm stock, not to exceed £400, should be divided between his brothers and sisters, if any should be living. The widow married again on June 1st, 1901, and alleged that at that date £150 only of the residue remained in her hands unexpended.

**Held**—that that "*balance*" meant the balance of residue unexpended on the day of the second marriage, and that an inquiry must be directed what was the amount of the balance, if any, of money and proceeds of sale of farm stock, part of the residuary estate of the testator remaining unexpended, in the hands of the plaintiff on the 1st June, 1901, the date of her second marriage.

*IN RE ROWLAND, JONES v. ROWLAND*, (1902) 86 [L. T. 78—Eady, J.]

117. "*Book Debts*"—*Balance on Business Account at Bank—Construction*—A bequest of the "*effects used in the business carried on by me . . . and all book-debts owing to me, and the benefit of all contracts entered into by me in respect of the said business at the time of my decease,*"

**Held**—not to include a balance on the business account at a bank.

*IN RE HAIGH*, (1907) 51 Sol. Jo. 343—Parker, J.

118. "*Money in Bank*"—*Money upon Deposit*—A testator left to his wife "*all moneys . . . in any other banks in my name.*"

**Held**—that this phrase included a deposit receipt for £2,000, repayable four years after its date.

*RUSSELL v. BAIN*, (1903) 5 F. 716—Ct. of Sess.

119. "*Money in Banks*"—*Legacy due to Testatrix, but not Known of by her—Paid into a Bank in Trust for her.*—A testatrix at the time of her death was entitled to a legacy (of which owing to her illness she knew nothing) from a brother, the executors' agents paid it into a bank in their names in trust for her.

**Held**—that it did not pass under the bequest by her of "*any money in banks after paying my lawful debts, &c.,*" but passed to her next-of-kin, her will containing no other directions as to the disposition of her estate.

*MASSON v. SNEELIE*, (1904) 6 F. 148—Ct. of Sess.

120. "*Moneys Owing*"—*Money on Deposit at Bank—Payable only after Notice.*—A bequest of "*moneys owing to*" a testator carries money standing in his name at the bank on deposit account and bearing interest, whether it be withdrawable upon demand or only after seven days' notice.

*IN RE DERBYSHIRE, WEBB v. DERBYSHIRE*, [1906] [1 Ch. 135; 75 L. J. Ch. 95, 54 W. R. 135; 91 L. T. 138—Buckley, J.]

121. "*Ready Money*"—*Money on Deposit.*—Money on deposit at a bank, withdrawable upon fourteen days' notice, does not pass under a gift of "*ready money.*"

*Mayore v. Mayore* ([1897] 1 Ir. R. 321) followed.

*IN RE WHEELER, HANKINSON v. HAYTER*, [1904] [2 Ch. 66, 73 L. J. Ch. 576; 52 W. R. 586, 91 L. T. 227—Warrington, J.]

122. "*Ready Money*"—"*Pecuniary Investments*"—*Money on Deposit at Bank*—A bequest of "*ready money*" will not include money on deposit at a bank and subject to more than twenty-four hours' notice of withdrawal, nor, in the absence of special indication, will a bequest of pecuniary investments include such money.

*IN RE PRICE; PRICE v. NEWTON*, [1905] 2 Ch. [55; 74 L. J. Ch. 437; 53 W. R. 600; 93 L. T. 44—Farwell, J.]

123. "*The Rest of My Money*"—*No Executor Appointed—No Gift of Residue*—There is no absolute technical meaning given to such a word as "*money*" in a will, but its meaning in every case must depend upon the context, if there is any, which can explain it, and those surrounding circumstances which the Court is bound to take into consideration in determining the construction.

A testator by his will appointed no executor, but after revoking all former wills and codicils, he bequeathed £100 to his brother, and left "*the rest of my money*" to be equally divided amongst six persons, whom he named. There was no gift of residue. The estate consisted of money, personal effects, and a policy of insurance.

**Held**—that the use of the term "*money*" in the will was intended by the testator to cover all his personal estate.

*Prichard v. Prichard* ((1870) L. R. 11 Eq. 232; 40 L. J. Ch. 92; 19 W. R. 226; 24 L. T. (N.S.) 259), and *In re Cadogan* ((1883) 25 Ch. D. 154, 53 L. J. Ch. 207; 32 W. R. 57; 49 L. T. 666) followed.

*IN THE GOODS OF BRAMLEY*, [1902] P. 106; 71 [L. J. P. 32; 85 L. T. 645—Barnes, J.]

**(f) Real or Personal Estate**

124. *Adwosons in Gross*—"*Real Estate in the County of L.*"—*Apt Words—Surrounding Circumstances*—G. H., who owned two adwosons, both situate in the county of L., and close to an estate which he had purchased

**Interpretation of Terms—Continued.**

there, gave one of his sons the option of acquiring this estate, "and all other my real estate in the county of L." at a certain price, as part of his share under the will, and in the event of his exercising that option devised to him the said estates absolutely. The son having exercised the option, the question was now raised whether these advowsons, which were in gross, passed under the will.

HELD—that upon the general tenor of the will construed with reference to the surrounding circumstances, the advowsons passed under these words.

*Grompton v. Jarratt* (30 Ch. Div. 298) considered.

IN RE HODGSON; *TAYLOR v. HODGSON*, [1898] 2 Ch. 545; 67 L. J. Ch. 591; L. T. 345; 47 W. R. 44—Romer, J.

125. "*Chattels Real*"—*Rent Charge issuing out of Leaseholds*.]—A rent charge issuing out of leaseholds held for a term of years is a "chattel real" passing under a devise of real estate and chattels real.

Decision of Byrne, J., [1904] 1 Ch. 111; 73 L. J. Ch. 98; 20 T. L. R. 71—affirmed.

IN RE FRASER; *LOWTHER v. FRASER*, [1904] 1 Ch. 726; 73 L. J. Ch. 481; 52 W. R. 516; 91 L. T. 48; 20 T. L. R. 414—C. A.

126. "*Devise*"—"*Personal Estate and Effects*"—*Real Estate held to be Included*.]—Subject to payment of his debts, W. gave, devised and bequeathed his "personal estate and effects whatsoever and wheresoever and of what nature or kind soever . . ." to his wife, "her heirs, executors, . . . &c."

HELD—that, having regard to the charge of debts, and the use of the words "devise" and "heirs," the real estate must be taken as included in the gift to his wife.

IN RE WASS, IN RE CLARK, (1907) 95 L. T. 758—[Neville, J.

127. "*Estate and Effects*" — *Residuary "Gift and Bequest" of—Trusts pointing to Personalty—Whether Real Estate included*.]—The Court always leans against an intestacy.

A will contained the following words: "As to all my ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give and bequeath the same and every part thereof" to executors upon certain trusts. In describing the trusts the testator used the words "income," "interest, dividends, and annual proceeds," "produce," and "the said trust moneys, stocks, funds, and securities." He had not otherwise disposed of his real estate.

HELD—that, "effects" being sufficient to pass all the personal estate, *prima facie* B. D.—VOL. III.

"estate" must be taken to refer to realty; that "give" is effective to pass realty; and that the inappropriateness of some of the language used was not sufficient to prevent the Court treating the "gift" as a good residuary devise.

*D'Almaine v. Moseley* ((1853) 1 Drew 629; *Fullerton v. Martin* (1853) 22 L. J. Ch. 893; and *Saumarez v. Saumarez* (1839) 4 My & Cr. 331; 48 R. R. 116) followed.

KIRBY-SMITH *v.* PARNELL, [1903] 1 Ch. 483; 72 [L. J. Ch. 468; 51 W. R. 493—Buckley, J.

128. "*Freehold Lands and Hereditaments at M.*"—*Two Freehold Fields—Two Fields "Customary Freehold"*—*Latter held to be Included*.]—In 1886 testatrix inherited from a brother, who died intestate, four fields at M.; two of these fields only were really freehold, the others being privileged copyholds, but it was proved that land of this tenure was locally known as "customary freehold," or merely "freehold"; the testatrix was never admitted, nor did she ever pay any customary rent, and there was no reason to suppose that she was aware of any distinction of tenure.

By her will, made in 1899, she devised her "freehold land and hereditaments at M." to the defendant, who had for many years rented from her all the four fields.

HELD—that under the circumstances all the four fields passed under the devise of freeholds in spite of the fact that there was a residuary devise.

IN RE STEEL; *WAPPETT v. ROBINSON*, [1903] 1 Ch. 135; 72 L. J. Ch. 42; 51 W. R. 252; 87 L. T. 548—Eady, J.

129. *Gift of Life Interest in Real Estates and Personal Estate followed by Gift of "Personal Estates"*—"*Personal Estates*"—*Held to Include Real Estate*.]—A testator, after giving and bequeathing his real estates and all his personal estate and effects to his wife for her life, after her death gave to certain relatives "an equal share of my personal estates, etc., etc."

HELD—that the gift after the death of the wife included the real estate of the testator.

IN RE ANDREW'S ESTATE; *CREASY v. GREAVES*, [(1902) 50 W. R. 471—Buckley, J.

130. "*Hereditaments*" — *Condition as to Re-settling—Money held upon Trust for Investment in Land*.]—G. by will settled realty upon his son in strict settlement upon condition that the son should deal in a certain way with and re-settle all hereditaments in which he had an estate tail under an ancestor's will. Part of such hereditaments had been sold, and at the time of G.'s death the proceeds were held by trustees subject to a trust for reinvestment in land.

HELD—that these proceeds were included  
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in the word "hereditaments," and must be re-settled in order to comply with the condition.

IN RE GOSSELIN, *GOSSELIN v. GOSSELIN*, [1906] 1 Ch. 120, 75 L. J. Ch. 88; 54 W. R. 193—Farwell, J.

**131. Mortgagee in Possession—Specific Devise of Freeholds—Devisee entitled to Mortgage Debt—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30**—A devise of land is only a devise of such estate or interest as the deviser has in the land, and *primâ facie* whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specially referred to so as to show that the testator had that particular land in his mind, and if there is nothing else to answer the description.

A mortgagee in possession of two freehold houses died having by his will devised and bequeathed all his real and personal estate to his wife and appointed her sole executrix. She died having by a codicil to her will devised these two houses by name to her friend J. D. in fee simple.

HELD—that the testatrix intended to give to J. D. all her interest in the two houses the rents and profits of which were being received by her, and there was no rigid rule of law precluding the Court from giving effect to her intention, and that J. D. was entitled to the mortgage debt.

IN RE CARTER; *DODDS v. PEARSON*, [1900] 1 Ch. 801, 69 L. J. Ch. 426; 48 W. R. 555; 82 L. T. 526—Cozens-Hardy, J.

**132. Real Estate and Leaseholds—Freeholds Subject to Lease—Leasehold Interest.**—A testator by his will gave and devised "all my real estate whether in possession, reversion, or remainder, to" W. G., his heirs and assigns. He bequeathed all his leasehold estate to other persons. He died entitled to houses in fee subject to a lease, and also entitled to a sublease of them. He had other freeholds and leaseholds.

HELD—that the testator could not have intended to split up his property into two parts, when it had been for many years enjoyed and dealt with as a freehold estate in possession; and that the devise passed all his interest in the houses, which were his freehold, and not merely his freehold interest in those houses subject to his leasehold interest therein.

IN RE GUYTON AND ROSENBERG'S CONTRACT, [1901] 2 Ch. 591; 70 L. J. Ch. 751; 50 W. R. 38; 85 L. T. 66—Cozens-Hardy, J.

**133. Residuary "Legatee"—Whether Entitled to Undisposed of Realty—Such Realty Acquired Since Date of Will—Extrinsic Evidence.**—A testatrix gave a pecuniary legacy "free of income tax," specifically disposed of all her real estate except a cottage "free of

legacy duty," and "bequeathed" the said cottage to E. She directed her furniture, etc., to be sold, E having the option to retain specific articles. "All else to be sold . . . I leave E my residuary legatee." After the date of her will she purchased other real estate.

HELD—that there were no sufficient indications in the will, or the testatrix's surroundings, to displace the *primâ facie* meaning of *legatee*, and that the after-acquired real estate did not pass to E. but was undisposed of.

IN RE GIBBS, *MARTIN v. HARDING*, [1907] 1 Ch. 465; 76 L. J. Ch. 238, 96 L. T. 423—Joyce, J.

**(g) "Securities."**

**134. Primary and Secondary Meaning—Railway Stocks, &c.**—A testatrix made a bequest of "all securities for money standing invested in my name." Her personal property comprised the following items: Mortgage bonds, India stock, perpetual debenture stocks, perpetual preference stocks, and shares in a limited company.

After the testatrix's death a list in her handwriting, containing the above items and headed "securities," was found.

HELD—upon the construction of the will as a whole that the secondary or popular meaning of the word "security" should be applied to it, and that the bequest included all the items mentioned above.

Decision of Kekewich, J. (89 L. T. 84), affirmed.

IN RE JOHNSON, *GREENWOOD v. GREENWOOD*, [(1904) 89 L. T. 520—C. A.]

**135. Primary and Secondary Meanings—Stocks and Shares—Context—Admissibility of Extrinsic Evidence.**—The word "securities" has a strict and primary meaning, *i.e.*, money secured upon property, and also a popular and wider meaning, which includes other investments.

A general broker in his will declared that moneys "may be invested in such securities as my trustees in their absolute discretion shall think fit, and I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities."

HELD—that it was apparent from the context that "securities" meant investments, and included stocks and shares in companies.

*Semble*, apart from any context, the word "securities" in a legal document ought to be still construed in its strict sense.

Extrinsic evidence is admissible to show that expressions used in a will have acquired a secondary meaning if any doubt arises as to their true meaning or any difficulty as to their application under surrounding circumstances.

*Ogle v. Knipe* ((1869) L. R. 8 Eq. 434; 38 L. J. Ch. 692) considered.

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Decision of Farwell, J. (89 L. T. 85 (n)) reversed.

IN RE RAYNER, *RAYNER v. RAYNER*, [1904] 1 Ch [176; 73 L. J. Ch. 111; 52 W. R. 273; 89 L. T. 681—C. A.

(h) "Survivor"

136. *Gift to Several Daughters of Shares for Life—"Surviving"—Remainder to Respective Children at Twenty-one—Gift over of Share of Daughter Dying without Issue—Ultimate Gift over to Third Persons Contingently on all Daughters Dying without Issue who attained Twenty-one—Stirpital Survivorship*—A testatrix gave one-third of the income of a money fund to her daughter M. for her life, and after her death one-third of the capital to the children of such daughter whom she might leave her surviving, and having attained or who should attain twenty-one, share and share alike. The testatrix made a similar gift to her daughter C. and her children, and also to her daughter E. and her children. Then followed a gift over of the share of such of the daughters as might die without leaving issue her surviving who attained twenty-one, unto the testatrix's "surviving" daughters, practically in the same manner as their original shares, with an ultimate gift over to third persons to take effect in the contingency of all the testatrix's said daughters dying without leaving issue who attained twenty-one. C. died in 1888, leaving two children who attained twenty-one, but both of them died before December, 1900, at which date there was no issue living of C. M. died in 1899, leaving two children, both of whom were defendants. E. died in December, 1900, without leaving any issue her surviving, although she had had issue (among other children) a daughter F., who attained twenty-one, and died a spinster in the year 1889. The question to be determined was who, upon the death of E., became entitled to her share.

HELD—that there was no actually "surviving" daughter of the testatrix at that time, and the only one who survived by her children was M.; that it was immaterial whether the survivorship was by children or issue; and that the children of M. were alone entitled to the one-third of which E. received the income during her life.

Dictum of Cotton, L.J., in *Lucena v. Lucena* ((1877) 7 Ch. D. 255, 269, 47 L. J. Ch. 203; 26 W. R. 254; 37 L. T. 420—C. A.) followed.

*O'Brien v. O'Brien* ([1896] 2 I. R. 459) not followed.

IN RE BILHAM; *BUCHANAN v. HILL*, [1901] 2 Ch. [169, 70 L. J. Ch. 518; 49 W. R. 483; 84 L. T. 499—Joyce, J.

137. *Gifts to Several Sons Equally for Respective Lives—Remainder to Respective Issue—On Death of any Son without Children, then to "Survivors" and Respective Issue upon like Trusts—No Ultimate Gift Over—Death of Surviving Son without Issue*

—*Intestacy—Stirpital Survivorship*.]—A testator bequeathed his eight and half-sixteenth shares in business upon trust as to three-and-a-half-shares to his son M. B. H. for life, and after his death for his children and remoter issue (such issue to be born in his lifetime). He also bequeathed in the same way two other shares in trust for his son W. H., and three other shares in trust for his son B. H. After these gifts the will directed that in case any of his said sons respectively should die, and no child or other issue of them so dying should acquire a vested interest in the shares settled upon them respectively, that the respective shares of such of his said sons as should so die, and the annual income thereof, should be held for the benefit of the survivors or survivor of them and their or his respective issue, in equal shares upon such and the like trusts as were declared with respect to their respective original share or shares. There was no gift over on death of all three sons without issue, either as to the business or as to the residue. The testator died in 1863; M. B. H. died in 1879, having had three children; W. H. died in 1889, having had five children; and B. H. died in 1900, without issue.

HELD—that on the death of B. H. without issue, his share in the business fell into the residue, and that there was an intestacy as to his share of residue thus augmented.

HELD ALSO—that the third proposition in *In re Bowman* ((1889) 41 Ch. D. 525, 532; 37 W. R. 583; 60 L. T. 898—Kay, J.) was not warranted by the authorities.

*HARRISON v. HARRISON*, [1901] 2 Ch. 136; 70 [L. J. Ch. 551; 49 W. R. 613; 85 L. T. 39—Cozens-Hardy, J.

138. "Survivor" — "Other"—*Gift Over—Context*.]—By his will a testator gave legacies in trust for his three illegitimate children, £400 for T., £300 for R., and £400 for E., a married woman, for her separate use. The will then provided as follows. "And in case of the decease of any or either of them, the said T., R., and E., without issue, or leaving issue who shall not live to attain his, her, or their age of twenty-one years, I order and direct that the said several and respective sum and sums of money so hereby left and bequeathed to and for them, the said T., R., and E., shall go and be equally divided between the survivors and survivor of them, for and during the term of their natural lives, and to their issue after their respective deaths who shall live to attain the age of twenty-one years." There was no gift over in the event of all the three legatees dying without issue. The will appointed a brother of the testator (who predeceased him) residuary legatee. R., who was unmarried, predeceased the testator. A suit was brought for the administration of testator's estate, and the assets were lodged in Court, and proved insufficient to pay the legacies, which had to abate rateably. E. died in 1865, leaving children, all of whom attained twenty-one. T. died in 1900 unmarried. At the date of

*Interpretation of Terms—Continued.*

T.'s death the funds in Court represented a moiety of the legacy of £300 given to R., with a bequest over, and the legacy of £400 originally bequeathed to T. with a gift over. The children of E. applied for payment out of the funds in Court.

**HELD**—on the construction of the will, that the children of E. took no interest in the funds in Court, in which T. had a life interest, because their mother did not survive him, and that the word "survivor" must be read in its ordinary signification, and not as meaning "other," with the result that there was an intestacy as regards these funds.

GARLAND v. SMYTH, [1904] 1 Ir. R. 35—C. A.

139. "*Survivors*"—*Life Estate—Absolute Gift.*—A testator bequeathed to each of his four daughters £10,000, to be paid to them upon marriage, and also £20,000 to go into strict settlement; if any of the daughters died without issue, her £20,000 was to be divided between the survivors of his four daughters. The only daughter now living was a widow, aged eighty-one, and childless. The ultimate trust under her marriage settlement of her £20,000 was for the persons who, by virtue of the will, should be entitled to the same.

**HELD**—that, in the events which had happened, she was absolutely entitled to such £20,000.

OLPHERT v. OLPHERT, [1903] 1 Ir. R. 326—M. R.

140. "*Then Surviving*"—*Ordinary and Natural Meaning—No Ambiguity.*—A testator left property in trust for his seven children for their lives, and after their respective deaths, in trust for their respective children then living in equal shares; if any of his children should die without leaving children entitled to take under the will, then the shares of the children so dying—both their original shares and shares accruing to them under the present clause—were to pass to their "then surviving" brothers and sisters in equal shares, and after their respective deaths to their respective children in the manner thereinbefore provided with respect to his children's original shares.

After the testator's death three of his seven children died without issue, and their shares were divided equally among the survivors, then E. died leaving children, and upon L. dying subsequently without issue, E.'s children claimed to participate in her original and accrued shares.

**HELD**—that the words "then surviving" could not be strained so as to include them; and that only the two children of the testator alive at L.'s death had any interest in her share.

Decision of C. A. ([1901] 2 Ch. 738; 71 L. J. Ch. 1; 85 L. T. 432) affirmed.

INDERWICK v. TATCHELL, [1903] A. C. 120; 72 [L. J. Ch. 393; 88 L. T. 399—H. L. (E.).

141. "*Survivor or Survivors*," when to be construed "*Other or Others*"—*Cross-remainders by Implication.*—A testator, after making certain provisions for his widow and children during their respective lives out of the income of his estate, continued his will as follows: "In case of the death of my son C. leaving children, then one-third . . . of such annual income to such children as hereinafter mentioned . . . and upon the death of my said son C. and my said daughters E. and S. A." he gave one-third part of his property to the children of C. in equal shares, and as to the two remaining one-third parts respectively to the children of E. and S. A. respectively in equal shares. "Provided nevertheless that in case of the death of any of my said children without leaving lawful issue the share . . . so given . . . to his or her issue shall go and be divided by and between the issue of the survivor or survivors of my said children in the same manner and proportions, and under the same trusts as hereinafore given and bequeathed *per stirpes*." The testator died in 1865. E. died in 1879 leaving issue. The widow died in 1887. C. died in 1893 without issue.

**HELD** (affirming Stirling, J., 78 L. T. Rep. 218) that, "upon the death of my said son C. and my said daughters E. and S. A." must be construed to mean upon the death of the survivor of them, and that the corpus was distributable, as to one-third among the children of E., and as to two-thirds among the children of S. A.; and distinguishing *Re Bowman, Whytehead v. Boulton* (60 L. T. Rep. 888; 41 Ch. Div. 525) that the word "survivor" must be read in its natural sense.

IN RE RUBBINS; GILL v. WORRALL, (1898) 79 L. T. [313—C. A.

(i) "Unmarried."

142. *Primary Meaning—Context.*—By her will a testatrix devised her estate and interest in certain hereditaments in trust for the use of her youngest son H. and his heirs, and (after devising other property in trust for her four youngest daughters, which, on the youngest of them attaining twenty-one, was "to become the property of such of them as shall have remained unmarried in equal proportions") she provided that if H. should "die unmarried and without issue" the hereditaments devised to him should go over to her sons E. and M. as tenants in common, "the share of either of them dying unmarried to go and become the estate and property of the survivor." H. married, but his wife predeceased him. He had no children.

**HELD**—that the words "die unmarried and without issue" following the gift to H. must be read in their primary signification as meaning "die without ever having been married and without issue"; that, conse-

**Interpretation of Terms—Continued.**

quently, H. becomes indefeasibly entitled to the hereditaments, and the gift over in favour of the other sons did not take effect.

ROBERTS v. BISHOP OF KILMORE, [1902] 1 Ir. R. [333—M. R.]

143. *Primary and Secondary Meanings.*—Testatrix, by her will, directed her trustees to divide a certain fund between two beneficiaries if her brother "shall die unmarried and without having any children or a child who shall attain 21 years." The brother died leaving a widow, but no child, surviving him.

HELD—that, in this case, the words "die unmarried" meant "die without leaving a wife," and that there was, therefore, an intestacy.

The primary meaning of the word "unmarried" is "without ever having been married," i.e., a bachelor; but there is a secondary meaning which the words may bear, namely, "not having a wife," i.e., being either a bachelor or a widower.

IN RE CHANT; CHANT v. LEMON, [1900] 2 Ch. [345; 69 L. J. Ch. 601; 48 W. R. 646; 83 L. T. 341—Cozens-Hardy, J.]

144. *"Intestate and Unmarried"*—*Persons Entitled.*—A widow by her will gave the income of her residuary estate in trust for her daughter for life for her separate use without power of anticipation, and after her death in trust for the testatrix's brother for life; after his death the capital was to be held in trust for all and every person or persons who would have been entitled thereto, and in the same shares and proportions as the same would have been distributable under the statutes for the distribution of intestates' estates if she "had died intestate and unmarried." The testatrix left an only daughter, who was unmarried, and who claimed to be entitled absolutely subject to her uncle's life interest.

HELD—that "unmarried" had the ordinary meaning of never having been married, and that the daughter took a life estate only.

IN RE COLLIER; COLLIER v. BACK, (1907) 24 [T. L. R. 117—Eady, J.]

(k) "Wife."

145. *Bigamous Marriage — "Wife," "Widow"* — *Secondary Meaning of "Widow."*—A testator, having gone through the ceremony of marriage with a married woman, made his will whereby he gave the income of his residuary estate to "my said wife during her life if she shall so long continue my widow for her own use and benefit and from or after her decease or second marriage" upon trust for children of the testator. The testator was never married to any other person, and at the time when he went through the ceremony of marriage he knew that his alleged wife had then a husband living.

HELD—upon the true construction of the will, and having regard to the circumstances, that the testator used the word "widow" in a secondary sense, and that the woman with whom he went through the ceremony of marriage was entitled, as his "widow," to the income of the testator's residuary estate unless and until she contracted a marriage subsequent to testator's death.

Decision of Kekewich, J., [1907] 2 Ch. 33; 76 L. J. Ch. 369; 96 L. T. 605; 23 T. L. R. 426—affirmed.

IN RE WAGSTAFF; WAGSTAFF v. JALLAND, [1908] 1 [Ch. 162; 77 L. J. Ch. 190; 98 L. T. 149; 24 T. L. R. 136—C. A.]

146. *Gift to Testator's Son, Wife and Children in Succession—Son Married at Date of Will and Testator's Death, afterwards Marries a Second Wife, who Survives him.*—Where in a will a gift is made to the wife of a person married at the date of the will, in the absence of any context to show the contrary, the wife in existence at that date is the person benefited. A testator gave the income of a share of his residuary estate to his son for life, after his death "to his wife" for life, and after her decease to the children of his son living at the time of the son's death. The will also contained a clause that in the event of the son's bankruptcy the trustees should apply the income of the share thereinbefore directed to be invested for the said son and his family for the benefit of the said son, his wife and children.

HELD—that there was sufficient context to take the case out of the general rule, and that a second wife of the son could benefit under the gift.

*In re Lynce's Trust* ((1869), L. R. 8 Eq. 65; 38 L. J. Ch. 471; 20 L. T. (N.S.) 735)—followed.

*In re Burrows' Trusts* ((1864), 10 L. T. (N.S.) 184)—not followed.

IN RE DREW; DREW v. DREW, [1899] 1 Ch. 336; [68 L. J. Ch. 157; 47 W. R. 265; 79 L. T. 656—Stirling, J.]

147. *Reputed "Wife" — Description of Legatee one Part True and the Other False — Legatee Named with an Additional Description not Satisfied—Condition.*—Where the description is made up of more than one part, and one part is true and the other false, then if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected and will not vitiate the gift.

A testator in 1893 bequeathed a sum of money to his trustees upon trust to invest the same and pay the income to arise therefrom to his son Francis during his life, and from and after his death to pay such income "to my son's wife Letitia during her life if she shall survive him." There was not any lawful wife of the testator's son Francis in the strict legal sense of the term; but in November, 1888, he wrote from New Zealand stating he had married Letitia

**Interpretation of Terms—Continued.**

L. C., who it appeared was then living with him, and continued to live with him until his death, as his wife, and they were reputed to be and were treated as lawfully married. The testator, however, never saw or had any direct communication with this lady.

HELD—that the gift to “my son’s wife Letitia, if she shall survive him,” did not fail, as it was not conditional upon Letitia being the lawful wife of the testator’s son Francis.

*Turner v. Brittain* ((1863) 3 N. R. 21) followed.

ANDERSON *v.* BERKLEY, [1902] 1 Ch. 936; 71 [L. J. Ch. 444, 50 W. R. 684, 86 L. T. 443, 18 T. L. R. 531—Joyce, J

148 “Wife of a Son”—*Son’s First Wife Alive at Date of Testator’s Death—Subsequent Death of Wife, and Re-marriage of Son—Whether Second Wife Entitled*—Where a gift is given by will to “the wife” of a named person, and that person has a wife living at the date of the will and of the death of the testator, the words *primâ facie* refer to that particular wife. The presumption may, of course, be negatived by some indication to the contrary contained in the will.

A. left her residuary estate upon trust to pay the income to her son during his life, and after his death to “his wife” for her life, if she should continue his widow, and ultimately for division among her son’s children. The son had a wife alive at the date of the will and of his mother’s death. Subsequently he married a second wife, who survived him.

HELD—that there was nothing to rebut the *primâ facie* meaning of the word wife, that it meant the wife of her son who was known to her, and was alive at her death; and that his second wife took no interest under the will, though her children were included in the ultimate trust.

*Per Romer and Cozens-Hardy, L.JJ., In re Lyne’s Trust* ((1869) L. R. 8 Eq. 65, 38 L. J. Ch. 471, was wrongly decided; *In re Burrow’s Trusts* ((1864) 10 L. T. 184, was rightly decided.

IN RE COLEY, HOLLINSHEAD *v.* COLEY, [1903] 2 [Ch. 102, 72 L. J. Ch. 502; 88 L. T. 517—C. A.

**(1) “Without Child.”**

149. *Die “Without Leaving any Child.”*—If there is a gift to A. for life, and after his death to his children, in terms which give them a vested interest in A.’s lifetime, a further gift over “if A. die without leaving any children” will be construed so as not to defeat any prior vested interest, *i.e.*, as meaning “without leaving any child who has not attained a vested interest.

The fact that the testator, when making his will, knew that he had a child living makes no difference to this rule of construction.

Money was left in shares to A. and other nephews for life or until alienation, and after the death of each nephew, or in the event of one dying in testator’s lifetime or alienation to his children, and if he should “die without leaving children,” then to X. A. had a child, known to the testator, but such child died after the will was made and before the testator.

HELD—that it had taken a vested interest, and the above rule applied.

Decision of Byrne, J., reversed.

*Treharne v. Layton* ((1875) L. R. 10 Q. B. 459; 44 L. J. Q. B. 202, 33 L. T. 327 (Ex. Ch.)) followed.

IN RE COBBOLD, COBBOLD *v.* LAWTON, [1903] 2 [Ch. 299; 72 L. J. Ch. 588, 88 L. T. 745—C. A.

150 *Gift for Own Absolute Use—“Die without Child or Children”—Executory Gift Over—Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10*—A testator devised and bequeathed his estate to be divided into three parts, “one-half of the whole estate to H. S. for her own absolute use, subject to no control of any husband, but, should she die without child or children, then her share” went over to other persons named, who were the defendants.

HELD—that, having regard to the form of expression used, the true meaning was, “die without child or children then living,” that was, at the time of her death, and that H. S. was absolutely entitled to one-half of the estate, subject to an executory gift over in favour of the defendants, in the event of her not having any child who should survive her, or attain twenty-one in her lifetime.

IN RE BOOTH; PICKARD *v.* BOOTH, [1900] 1 Ch. [768, 69 L. J. Ch. 474, 48 W. R. 566—Byrne, J.

**(m) Words of Relationship.**

151. “Blood Relations” — *Reading in Words—Invalid Appointment—Implied Trust—“Empower”—Next of Kin taking per capita*—In construing wills it is the duty of the Court to ascertain, if it be possible, what the testator really meant from the language he has used. The exact words are not to be followed in their literal meaning if it be plain that to do so would frustrate the real intention of the testator. If, from a consideration of the whole will, it is plain that to place a literal meaning upon one clause would have the result of defeating the clear intention, it is necessary even to do violence to the language used. The thing to be ascertained is, what is the testator’s will.

After certain other dispositions of his residuary personal estate a testator provided as follows: “I empower the survivor of them (the testator’s two brothers) by deed or will to appoint the said personal estate to and amongst my blood relations



*Interpretation of Terms—Continued*

in such shares and subject to such limitations as he may think fit." There was no gift of the residue in default of appointment. J., the surviving brother of the testator, who took a life interest in the residuary personal estate, by his will purported to make an appointment of the residue in favour of three cousins, having allocated merely nominal sums to the children of a deceased sister, a living sister, and her children.

HELD—that the appointment to the cousins being invalid, there was an implied gift in favour of the class who would have taken under an exercise of the power, and that the class entitled were the next of kin, who were to be ascertained at the date of the death of the tenant for life.

HELD ALSO—that the objects of the power under the implied trust, in default of appointment, took in severalty and *per capita*.

IN RE PATTERSON, DECEASED; DUNLOP v. GREER, [1899] 1 Ir. R. 324—M. R.

152. "Eldest Son of my Sister"—Son alive at Date of Will, but Predeceasing Testator—Lapsed Gift—Intestacy.]—A testator devised real estate to "the eldest son of my sister and his heirs for ever." At the date of the will, which contained no residuary devise, the sister had two sons, both of whom predeceased the testator, leaving no issue; two other sons were born after the date of the will and survived the testator.

HELD—that the gift operated in favour of the eldest son, and lapsed on his death; and that therefore there was an intestacy.

AMYOT v. DWARRIS AND OTHERS, [1904] A. C. [268, 73 L. J. P. C. 40; 53 W. R. 16; 90 L. T. 102; 20 T. L. R. 268—P. C.

153. "Heir-at-law"—Life Estate Given to the Eldest Son—Period of Vesting of Estate in Remainder Given to Heir-at-law.]—A testator devised his freehold estate called F. G. upon trust for his eldest son during his life, and directed that "when my six children shall have all departed this life then it is my will and desire that the said estate called F. G. be sold in public sale to the highest bidder, and that the moneys arising from the sale thereof be equally divided among my then surviving grandchildren share and share alike, and in case no grandchildren of mine be then living, it shall become the property of the heir-at-law."

HELD—that there was not enough to make this case an exception to the general rule that the heir-at-law means the heir of the testator at the time of his death.

IN RE FRITH; HINDSON v. WOOD, (1901) 85 L. T. [455—Joyce, J.

154. "Heirs and Assigns of Survivor"—Devise for a Term of Years to Persons in Succession—Remainder to the "Heirs and Assigns of the Survivor"—Direct Gift—To

Heirs of Survivor and their Assigns.]—A testator by his will devised certain land in the events that happened, to the use of W. M. for ninety-nine years if he should so long live, and then to the use of four sons of W. M. in succession for ninety-nine years if each should so long live, and from and after the determination of the last-mentioned term and estate or the death of the survivor of them the said W. M. and his four sons, then upon trust to and for the use of the heirs and assigns of the survivor for ever.

HELD—that the heirs of the survivor took by way of direct gift; that the limitation to the heirs and assigns of the survivor must be construed as being one to the heirs of the survivor and their assigns; and that therefore the heir of the survivor was entitled to the land as against a person who had purchased the land in fee from the survivor in his lifetime.

Decision of Lawrence, J. ((1900) 16 T. L. R. 568), affirmed.

MILMAN v. LANE, [1901] 2 K. B. 745; 70 L. J. [K B. 731; 49 W. R. 545; 85 L. T. 180; 17 T. L. R. 542—C. A.

155. "My own Nephews and Nieces"—Half-Blood—Great Nephews and Nieces—Husband's Nephews and Nieces.]—A testatrix at the time of her death had nephews and nieces of the whole, and of the half-blood, great-nephews and great-nieces of the whole, and of the half-blood, and also nephews and nieces of her husband. By her will she left certain property to "my own nephews and nieces"; and the question arose as to what persons were included in this term, in view of the fact that in other passages of the will she had called a great-niece, and also an illegitimate nephew's daughter, by the name of niece.

HELD—that in such cases there is no hard-and-fast rule that, where a great-niece is in one part of a will spoken of as a niece, in other parts of the will "nieces" must include the particular great-niece and other great-nieces. The question must be determined by a consideration of the whole document and any evidence properly admissible.

HELD ALSO—that in the present case only the lawful nephews and nieces of the whole, or of the half-blood, were entitled.

*Primâ facie* the half-blood are not excluded.

GRIEVES v. RAWLEY ((1852) 10 Hare 63) followed.

IN RE JODRELL ([1891] A. C. 304; 61 L. J. Ch. 70; 65 L. T. 57—H. L.), and MERRILL v. MORTON ((1891) 17 Ch. D. 382; 50 L. J. Ch. 249; 29 W. R. 394) discussed.

IN RE COZENS; MILES v. WILSON, [1903] 1 Ch. [138; 72 L. J. Ch. 39, 51 W. R. 220; 87 L. T. 581—Eady, J.

156. "Natural Representatives" of Children—Widow of Child—Lineal Descendants.]—A testator bequeathed the residue of his

*Interpretation of Terms—Continued.*

personal estate to trustees upon trust for two named unmarried daughters for their respective lives, and after the decease or marriage of both his said daughters, "upon trust to pay and divide the same unto and equally between and among all and every my children, whether sons or daughters, who shall then be living, or their natural representatives if dead, according to the statute rule of distribution.

HELD—that the testator clearly intended to use the word "representatives" in the statutory sense—i.e., lineal descendants of children; and in this case the idea of sanguinity was predominant, and the widow of a child was excluded.

IN RE BROMBY; WILSON v. BROMBY, (1900) 83 [L. T. 315—Farwell, J.

157. "*Nephews and Nieces*"—*Testator Illegitimate—Some Nephews Named—Some Sisters Named—Children of Unnamed Sisters.*—O., who was illegitimate, left property in trust for his brother A. and his sisters B., C., D., and E., the income of A.'s share and of D.'s share to be paid to them for life, and on their respective deaths the principal to go "equally amongst all my nephews and nieces then living." He had another reputed sister who was not mentioned in the will.

HELD—that in the absence of any legitimate brothers and sisters, nephews and nieces, all the reputed nephews and nieces shared, although the parent of some was not mentioned in the will.

Hill v. Crook, [(1873) L. R. 6 H. L. 265; 42 L. J. Ch. 265; 22 W. R. 137—H. L.] applied.

IN RE CORSELLIS, FREERORN v. NAPPER, [1906] 2 Ch. 316; 75 L. J. Ch. 607; 54 W. R. 536; 95 L. T. 583—Eady, J.

158. "*Next eldest*"—*Failure of Issue—Gift Over—"Next eldest brother."*—By his will B. left all his property to his wife for life, and after her death he devised to each of six of his sons a specific portion of his landed property, and to a seventh (his third) son he left one shilling. He directed that if any of his sons should "die before he attained the age of thirty, the portion of him so dying should go to his next eldest brother, and so on, respectively"; and if any of them should die without issue lawfully begotten after attaining the age of thirty, then his share should go to his "next eldest brother, and so on, respectively."

HELD—that the descending scale applied, and that by "next eldest brother" was meant the next younger.

CROFTS v. BEAMISH, [1905] 1 Ir. R. 349—C. A.

159. *Ultimate Limitation to "Right Heirs" of Testator—No Male Heirs—Daughters—Devisees—"Purchasers"—Coparceners—Joint Tenants—Inheritance Act,*

1833 (3 & 4 Will. 4, c. 106), s. 3.]—By his will a testator devised certain real property on various trusts with an ultimate limitation to his "own right heirs for ever." He died shortly after, in 1847, leaving no male heirs, but two daughters. All the prior limitations became exhausted, and the ultimate devise took effect. A question arose between the persons claiming under the daughters or surviving daughter, who were both dead.

HELD—that the two daughters took as *personæ designatæ*, i.e., took as devisees under the will, i.e., as joint tenants.

Re Baker ((1898) 79 L. T. 343—Stirling, J., No. 891, *infra*) approved.

Decision of Farwell, J. ((1901) 84 L. T. 381), affirmed.

OWEN v. GIBBONS, [1902] 1 Ch. 636; 71 [L. J. Ch. 338; 86 L. T. 571; 18 L. T. R. 347—C. A.

## VIII. SECRET TRUST.

160. *Absolute Gift—Secret Arrangement that the Legatee was to leave this Property along with Property of his own, to a Nephew of the Testator.*—In the year 1899, A., a clergyman, made his will, and thereby, after making two pecuniary bequests, left the residue of his property to his brother B., a solicitor, whom he appointed his executor. In the year 1891, during the lifetime of A., B. prepared, in his own handwriting, a draft will, whereby, after leaving the plaintiff, who was his nephew, a property called Owenberg, he devised and bequeathed all the residue of his property to the defendant, who was the son of a deceased nephew. He sent this draft will to the plaintiff, who was a solicitor, for his suggestions. Immediately afterwards, and during the lifetime of A., B. prepared, in his own handwriting, a draft codicil to his will, in which he recited A.'s will, by which he was appointed residuary legatee and executor, and also recited the particulars of A.'s property, and thereby, in the event of his surviving his brother, and becoming entitled to A.'s property, he devised and bequeathed the same, item by item, to the plaintiff, and he stated that he made these dispositions in pursuance of an arrangement made with his brother A. that the property mentioned in the draft codicil should go, along with Owenberg, to the plaintiff, and that his own property should go to the defendant, adding that if A. survived him, he would make a new will carrying out the provisions of the codicil. A. died shortly after the preparation of the draft codicil, and before either it or the draft will were executed, and B. thereupon prepared and executed a will practically incorporating the provisions of the draft will and codicil, but not stating anything about the arrangement made with his brother. B. sent his will, while in draft,

**Secret Trust—Continued.**

to the mother of the defendant, and at the same time wrote a letter, which he did not send her, stating that he had left the plaintiff Owenberg, and a full equivalent for the money and property which he had taken on A.'s death, "if being arranged between us that his property was to go to J.," the plaintiff, "and mine to W.," the defendant's father. By a subsequent will and codicil B. revoked, one by one, the bequests to the plaintiff of each item of the property representing A.'s estate, and directed the same to fall into his residuary estate, to which the defendant was to become entitled, and by the testamentary dispositions operative at the death of B., who died in 1899, the plaintiff only took Owenberg. B. kept accounts and rentals of A.'s property from 1891 to 1899, separating them from the accounts of his own property. He also wrote out a memorandum stating his reasons for revoking the several bequests of portions of A.'s property to the plaintiff, from which it appeared that he revoked these dispositions for the purpose of recouping himself or his estate for some loss which he imagined he had sustained by the conduct of the plaintiff and another solicitor whom he had taken into partnership with him. It was proved by an old friend of B. that he had stated to her that A. had said to him that he would take care of the plaintiff if he, B., would take care of the defendant.

**HELD**—that B. took A.'s property upon trust to leave it and Owenberg by will to the plaintiff.

**FRENCH v. FRENCH**, [1902] 1 Ir. R. 172—H. L. (Ir.)

**161. Absolute Gift—Museum and Grounds—Use of by Public Without Acquisition of Rights—Charitable Trust.**—A testator built a museum and laid out pleasure grounds on a part of his estate, to which he admitted the public free, but carefully guarded against the public acquiring any rights in respect thereof. The testator, by a codicil to his will, gave to his eldest son, F. P. R., and his heirs male his museum, grounds, and £300 per annum for the purpose of maintaining the museum and grounds. While giving this property to the son for the purpose of maintaining the museum and grounds, the testator insisted that the public should have no rights. The son agreed to continue things as they were in his father's lifetime.

**HELD**—that the testator, though he had with the utmost liberality afforded admission to the public to the museum and grounds, yet had anxiously guarded throughout his whole life against the public acquiring any rights against him; that no trust had been created by the giving by the son of a promise which it would be unconscionable for the son not to perform; that the son was entitled for an estate in tail male to the property, and

absolutely entitled to the annuity, free from any charitable trust, and that the trustees appointed by the codicil took no interest or estate.

Decision of Kekewich, J. ([1901] 1 Ch. 352; 70 L. J. Ch. 257; 65 J. P. 168; 49 W. R. 425; 84 L. T. 110; 17 T. L. R. 220), reversed.

**IN RE PITT-RIVERS; SCOTT v. PITT-RIVERS**, [1902] 1 Ch. 403; 71 L. J. Ch. 225; 66 J. P. 275; 50 W. R. 342; 66 L. T. 6; 18 T. L. R. 272—C. A.

**162. Document Found with Will—Beneficial Gift or Trust—Husband and Wife—Advancement—Presumption—Rebutting Evidence—Estoppel.**—A testator bequeathed all his real and personal estate "for the use of my wife M., her heirs, executors, or administrators respectively, upon trust, that she, my wife M. . . shall thereout in the first place pay my funeral expenses and debts (if any), and in the next place my testamentary expenses and debts, and in the next place do all things I have requested of her at my decease. I appoint my wife M. to be one of my executors or executrix and administrator of this my will." Then followed a proper attestation clause. And then testator appointed C. "as one of my executors." Probate was granted to the widow M., the other executors having renounced. There was no real estate. At the date of testator's death £600 bonds (valued at £667) were standing in the names of the testator and his wife, representing stock mainly purchased by the testator out of his own money, and were stated in an affidavit made by her as executrix for purposes of probate to be part of the assets of her deceased husband, the net value of which was £991. In a document found with the will after the death of the testator these £600 bonds were mentioned by the testator as his property, and the document stated that it was drawn up in the presence of his wife M., she agreeing to pay the sums mentioned in it to certain named persons and the treasurer of certain charitable organisations. These gifts would have exhausted the assets. This document was signed by the testator. It was signed by M. without knowing the contents thereof, though at the time she knew it had something to do with the disposition of the testator's property. The testator at the time of signing told M. to pay four sums of money to four persons (whose names and the sums directed to be paid to each, respectively, were mentioned in the document of 1899), and she agreed to do so. These sums amounted in all to £120. No other request as to disposition of the property was made to M. The document was signed by C. as witness.

**HELD**—(1) that under the circumstances of the case the £600 bonds belonged to the widow M. by survivorship, the presumption of advancement not having been rebutted; (2) that under the provisions of the will M. took a beneficial interest in all the personal estate of the testator, subject to the payment of

**Secret Trust—Continued.**

debts, &c., and subject to a secret trust for the payment of the four sums she agreed to pay when so requested by the testator.

MORRISON v. M'FERRAN, [1901] 1 Ir. R. 360.

163 *Gift for Life with Power of Disposition According to Verbally Expressed Wishes—Admissibility of Parol Evidence—Power of Disposition Void for Uncertainty—Partial Intestacy*—A testator of great wealth, having perfect confidence in his wife, and having probably arranged with her as to how his property should be disposed of, made a will which, after appointing her sole executrix, proceeded in the following terms: "I give, devise, and bequeath to her all my real and personal estate whatsoever and wheresoever for her use, enjoyment, and benefit during her life And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her," &c.

HELD—that all that was by the will expressly given to the widow was a beneficial life interest, and as to everything else she took by virtue of her appointment as executrix or otherwise, she was a trustee, after payment of debts, &c., for the testator's heir-at-law and next-of-kin respectively subject to the clause beginning: "I desire and empower her," &c., that neither the objects of the power nor the limitations under which it was to be exercised were expressed in the will, that parol evidence of the wishes verbally expressed by the testator to his wife was inadmissible; that the clause purporting to create the power of disposition in question was void for uncertainty; and that subject to the life interest of the testator's widow, the testator's real and personal estate was undisposed of and went as on an intestacy.

*In re Fleetwood* ((1880) 15 Ch. D 594, 49 L. J. Ch. 514; 29 W. R. 45—V.-C. Hall) distinguished.

IN RE HETLEY; HETLEY v. HETLEY, [1902] 2 Ch. [866, 71 L. J. Ch. 769; 87 L. T. 265; 51 W. R. 202—Joyce, J.

164. *Gift to Legatee "to be distributed as he thinks right"—Persons indicated verbally as Beneficiaries—One of them an Attesting Witness*.—A bequeathed personally to O. "to be distributed as he thinks right." No executor was appointed. O. prepared the will, and was verbally informed that he was to do "as he thought fit with the money, to distribute it after paying debts, etc., amongst" five named persons. O. accepted the trust.

HELD—that under the terms of the will, O. was entitled for his own benefit; but that, as he had accepted a secret trust, he took, subject to such trust.

A's next of kin, one of the five persons named by him, attested his execution of the will.

HELD—that she could nevertheless take under the secret trust.

*Re Fleetwood* ((1880) 15 Ch. Div. 594) not followed.

O'BRIEN v. CONDON, [1905] 1 Ir. R. 51—M.R.

165 *Tenants in Common—Joint Tenants—Antecedent Promise—Subsequent Promise—Notice to One only*—If A. induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as tenants in common, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not bound. To hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust

*Tee v. Ferris*, (1856) 2 K. & J. 357; 25 L. J. Ch. 437.

If, however, the gift were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C., as no person can claim an interest under a fraud committed by another.

*Russell v. Jackson*, (1852) 10 Hare, 204; *Jones v. Badley*, (1868) L. R. 3 Ch. 362; 19 L. T. (N.S.) 106.

In the latter case A. and not C. is bound because the gift is not tainted with any fraud in procuring the execution of the will.

*Burney v. Macdonald*, (1845) 15 Sim. 6; 6 L. T. (O.S.) 1; *Moss v. Cooper*, (1861) 1 J. & H. 352; 4 L. T. (N.S.) 790.

IN RE STEAD, WITHAM v. ANDREW, [1900] 1 Ch. 237, 69 L. J. Ch. 49; 48 W. R. 221; 81 L. T. 751—Farwell, J.

**IX ELECTION.**

166. *Devise of "all my Estate and Interest in the Lands of H"—Lands in fact Settled on Residuary Legatee*.—A testatrix devised all her estate and interest in the lands of H. to A., and appointed B. residuary legatee. She had no power to dispose of the lands of H., which were settled by her husband's will on herself for life with remainder to B. in fee.

HELD—that the testatrix only intended to dispose of her estate and interest, if any, and not to dispose of property which was not her own, and that therefore no case of election arose.

*Whitley v. Whitley* (31 Beav. 173) distinguished.

GALVIN v. DEVEREUX, [1903] 1 Ir. R. 185—M.R.

167. *Election against Will—Compensation to other Beneficiaries—At what Date to be Assessed*.—A beneficiary under a will having elected to take property under a settlement which gave him a title to it, and against the

*Election—Continued.*

will, compensation became payable from him to the other beneficiaries.

HELD—that the amount of the compensation must be ascertained at the date of the testator's death, and not at the date when the beneficiary made his election.

IN RE HANCOCK; HANCOCK v. PAWSON, [1905]  
[1 Ch. 16; 74 L. J. Ch. 69; 53 W. R. 89; 91  
L. T. 737—Kekewich, J.]

168. *Election under an Instrument and Compensation under the same Instrument—Person Receiving and also Liable to make Compensation.*—Where property is given by one instrument, e.g., a will, to a person already entitled thereto under another instrument, and the person in question elects to take under the latter and not under the will, his election does not prevent him from claiming compensation against one who by making a similar election deprives him of benefits given by the will. The compensation which he thus gets is a benefit under the will, and will be available for compensating other persons claiming only under the will and disappointed by his election.

IN RE BOOTH; BOOTH v. ROBINSON, [1906] 2 Ch.  
[321; 75 L. J. Ch. 610; 95 L. T. 524—Eady, J.]

169. *Limitations void for Perpetuity.*—The doctrine of election is a rule of equity by virtue of which the Court of Equity compels a recipient of the testator's bounty to conform to all the provisions of his will, but only so far as they are legal.

Therefore, where limitations in a will are illegal and void as transgressing the rule against perpetuities and the testator has in the same will given to the persons entitled in default of appointment a benefit out of his estate, no case of election arises.

IN re Bradshaw ([1902] 1 Ch. 436; 71 L. J. Ch. 230; 86 L. T. 253—Kekewich, J. (See POWERS, 41)) not followed.

IN RE OLIVER'S SETTLEMENT; EVERED v. LEIGH, [1905] 1 Ch. 191; 74 L. J. Ch. 62; 53 W. R. 215; 21 T. L. R. 61—Farwell, J.]

170. *Limitations void for Perpetuity—Power of Appointment.*—When a testamentary appointment fails for infringing the rule against perpetuities the persons taking in default of appointment are not put to their election between their interests in default of appointment and their interests in the testatrix's own estate given to them by the will.

IN re Oliver's Settlement (*supra*) followed.

IN re Bradshaw ([1902] 1 Ch. 436; 71 L. J. Ch. 230; 86 L. T. 253—Kekewich, J. (See POWERS, 41)) not followed.

IN RE BEALES' SETTLEMENT; BARRETT v. BEALES, [1905] 1 Ch. 256; 74 L. J. Ch. 67; 53 W. R. 216; 92 L. T. 268; 21 T. L. R. 101—Warrington, J.]

171. *Limitations void for Remoteness—Appointment—Doctrine of Election.*—Per-

sons taking a settled fund as in default of appointment in consequence of the appointment purported to be made by the will of the appointor being void for remoteness, and also having bequeathed to them by the same will other property belonging to the testatrix, are not put to their election between the settled fund and the property of the testatrix bequeathed to them, but are entitled to retain both without making compensation.

A testatrix having a power of appointment by will over certain settled property, and also being possessed of property of her own, devised and bequeathed her real and residuary personal estate, and all real and personal estate over which she had power of appointment by will, to trustees upon trust for sale, and to hold £10,000, part of the proceeds of sale, upon certain trusts, and the residue of the proceeds of sale upon other trusts. Some of the trusts were, as regards the settled property, void for remoteness.

HELD—that the persons taking in default of appointment, who were also beneficiaries of the testatrix's own property, were not put to their election between the two properties.

HELD ALSO—that the £10,000 must be considered as taken proportionately out of the settled property and the property belonging to the testatrix according to their respective values.

IN re Bradshaw ([1902] 1 Ch. 436; 71 L. J. Ch. 230; 83 L. T. 283—Kekewich, J. (See POWERS, 41)) not followed.

IN RE WRIGHT; WHITWORTH v. WRIGHT, [1906]  
[2 Ch. 288; 75 L. J. Ch. 500; 54 W. R. 515;  
94 L. T. 696—Buckley, J.]

172. *Title by Inheritance—Compensation—Married Woman—Restraint on Anticipation—Becoming Discoverd—Alienation.*—A testator was the owner of some lands in Turkey, and by his will he purported to direct those lands to be sold, and he further directed the proceeds of sale to be held by the trustees of his will as if the same were moneys arising from the conversion of the residue of his personal estate. He disposed of the residue of his personal estate in such manner as to give interests therein to his three children. According to the law of Turkey the testator had not the power which he purported to have of disposing of the proceeds of sale of land in that country, and the result was that such proceeds were divisible as on an intestacy between his said three children.

HELD—that if the children insisted on the title by inheritance they were bound, according to the doctrine of election, to compensate out of the interests which they took under the will those who thereby lost the benefits which the testator intended for them in the proceeds of sale of the lands in Turkey.

**Election—Continued.**

With regard to two of the children their interests were coupled with restraint on anticipation.

**HELD**—that whether they were discovert or not they were not bound to make compensation, and although they, if discovert, were capable of alienating their interests in the residue, because the restraint on anticipation was no longer operative.

*In re Wheatley*, ((1884) 27 Ch. D. 606; 54 L. J. Ch. 201; 33 W. R. 275; 51 L. T. 681) and *In re Vardon's Trusts* ((1885) 31 Ch. D. 275; 54 L. J. Ch. 244; 33 W. R. 297; 51 L. T. 884) followed.

*Hamilton v. Hamilton* ([1892] 1 Ch. 396; 61 L. J. Ch. 220; 40 W. R. 312; 66 L. T. 112) commented on

*HAYNES v. FOSTER*, [1901] 1 Ch. 361; 70 [L. J. Ch. 302; 49 W. R. 327; 84 L. T. 139—Kekewich, J.

**X. ADEMPITION.**

**173. Bequest of Specific Stock—Statutory Conversion thereof into other Stock—Effect of.]**—A. bequeathed to his wife a life interest in his “money invested in . . . the Lambeth Waterworks Co.” Before his death his stock in that company was by statute converted into Metropolitan Water Board Stock.

**HELD**—that such stock did not pass by the gift.

Decision of *Joyce, J.* ([1906] 2 Ch. 480; 75 L. J. Ch. 660; 54 W. R. 602; 95 L. T. 350) affirmed.

*IN RE SLATER; SLATER v. SLATER*, [1907] 1 Ch. 665; 76 L. J. Ch. 472; 97 L. T. 74—C. A.

**174. Gift within Twelve Months of Death—Estate Duty—Account—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (c); s. 9, sub-s. 1.]**—The purchase and gift of two leasehold houses by the testator, within one year of his death, to his two married daughters ought to be considered by the Court as an ademption *pro tanto* of their respective shares in the residuary estate which must be brought into account. The question then arose as to the exact amount to be charged to each of these daughters' shares: the whole sum so advanced, or the sum less estate duty under the Finance Act, 1894, s. 2, sub-s. 1 (c), and s. 9, sub-s. 1.

**HELD**—that the amount to be brought into account by each daughter was the value of the sum so advanced after deducting the estate duty, which became a charge on the property so given.

*IN RE BEDDINGTON; MICHOLLS v. SAMUEL*, [1900] 1 Ch. 771; 69 L. J. Ch. 374; 48 W. R. 552; 82 L. T. 557; 16 T. L. R. 291—Byrne, J.

**175. Legacy—Particular Purpose—Subsequent Gift—Parol Evidence that Gift Satis-**

*fied Legacy.]*—By his will, dated 1898, C. gave “to the trustees of the endowment fund of the C. hospital £10,000.” In August, 1900, he sent to the trustees a cheque for that amount accompanied by a letter.

**HELD**—that the legacy was for a particular purpose, and that parol evidence was admissible to prove that the gift was intended to satisfy such purpose, and that the legacy was therefore adeemed.

*IN RE CORBETT; CORBETT v. VISCOUNT COBBHAM*, [1903] 2 Ch. 326; 72 L. J. Ch. 775; 52 W. R. 75; 88 L. T. 591—Farwell, J.

**176. Legacy to Adopted Child—Residue to Child and Strangers Equally—Advancement to Child.]**—A. left £3,000 to his adopted daughter M., to whom he stood *in loco parentis*, and divided the residue of his estate between M. and a stranger. After making his will he made an advance to M. The evidence showed that such advance was not a portion; but

**HELD**—that, if it had been, the doctrine of ademption would not have applied in favour of a stranger against a child taking a share of residue as well as a legacy.

*Montefiore v. Guedalla* ((1859) 1 D. F. & J. 93, 100) followed

*IN RE HEATHER; PUMFREY v. FRYER*, [1906] 2 Ch. 230; 75 L. J. Ch. 658; 54 W. R. 625; 95 L. T. 352—Eady, J.

**177. Legacy to Testator's Daughter—Part to be Settled and Part an Absolute Legacy—Subsequent Settlement on Daughter's Marriage—Different Trusts.]**—A testator, by the joint effect of his will and codicil, provided for each of his daughters the sum of £20,000—£15,000, part thereof, to be settled and go as in the will mentioned, and the remaining £5,000 to be paid to the daughter. Subsequently upon the marriage of a daughter, he settled a sum of between £7,000 and £8,000, the limitations under this settlement not being the same as those of the £15,000 under the will. The question arose whether this sum must be taken and considered as in ademption of the £15,000 or of the £5,000.

**HELD**—that it was to be taken in satisfaction *pro tanto* of the settled portion of the legacy, and not of the absolute legacy of £5,000, which should not be taken away or diminished.

*IN RE FURNESS; FURNESS v. STALKARTT*, [1901] 2 Ch. 346; 70 L. J. Ch. 580; 84 L. T. 680—Joyce, J.

**178. Receipt of Residuary Estate by Testatrix—Payment into Bank—Part Ademption.]**—By a codicil to her will a testatrix devised and bequeathed “all moneys and property devolving upon or receivable by me under the will of W.” to A. and B. upon trust to pay certain legacies. During her lifetime the testatrix received a sum of £693 in respect of the residuary estate of W., and thereupon opened an account with a bank

**Ademption—Continued.**

and lodged the money to her own credit. She from time to time drew out sums of money for the payment of the testamentary expenses of W., for making gifts to persons (some of whom were beneficiaries under the trust in her codicil), and for other purposes of her own. Previous to this lodgment of £693 the testatrix had no banking account. After the payments to her there remained as balance to her credit a sum of £149. Subsequently a further sum of £151 was received by the testatrix in respect of the residuary estate of W., and this was lodged by her in bank, making in all the sum of £300, which remained intact to the credit of her account at the date of her death.

HELD—that the bequest to A. and B. was adeemed only as regards money paid out of bank to the testatrix, but that as regards the sum of £300 remaining intact at her death to the credit of her account there was no ademption, and that the same passed under the bequest in her codicil.

TOOLE v. HAMILTON, [1901] 1 Ir. R. 383—M. R.

179. *Specific Legacy.*—A testatrix bequeathed a moiety of a trust fund of £8,000 held by trustees for herself and sister. She received the annual income of one moiety. The prior life estate having fallen in, the trustees transferred the moiety to the lady, so that, instead of a moiety of a trust fund of £8,000, there became a sum of £4,000 standing in the name of the testatrix.

HELD—that in substance the testatrix had disposed of her £4,000, which was a trust fund, and it was no less her trust fund because, having fallen in, it was carried to her separate account; that there was no total or partial ademption, and that the doctrine of appropriation of payments did not apply.

IN RE VICKERS; VICKERS v. MELLOR, (1900) 81 [L. T. 719—Kekewich, J.

180. *Testator not in loco parentis—Subsequent Gift of same Sum—Particular Specific Purpose.*—A. left to a trustee a general legacy of £500 in trust for an infant (to whom he did not stand *in loco parentis*), for her own sole use and benefit, . . . to be paid to her either in whole or in part at such time or times and in such manner as her mother might think fit.

HELD—that this was not a legacy given for a “particular specific purpose” within the rule in *Pankhurst v. Howell*, and was therefore not adeemed by a subsequent gift of £500 in trust for the same child with slightly different limitations.

*Pankhurst v. Howell* ((1870) L. R. 6 Ch. 136; 19 W. R. 312) followed.

IN RE SMYTHIES; WEYMAN v. SMYTHIES, [1903] 1 Ch. 259; 72 L. J. Ch. 216; 51 W. R. 284; 87 L. T. 742—Eady, J.

**XI. SATISFACTION.**

181. *Covenant in Marriage Settlement—Covenant by Parent to Settle Sum on Daughter—Bequest to Daughter Absolutely—Election—Persons Derivatively Entitled.*—A father, upon his daughter's marriage, covenanted to pay to the trustees of her marriage settlement a certain sum, to be held by them upon the trusts of the settlement. The trusts were for the daughter for life for her separate use, and after her death (subject to a life interest for the husband) for the children of the marriage. The settlement contained a covenant by the wife to settle after-acquired property to which during the coverture she should become entitled. Subsequently to the marriage the father advanced his daughter £3,000 as a loan. By his will the father left one-third of the residue of his property to his daughter absolutely, and he directed that the advance of £3,000 should be brought into hotch-pot. The one-third share of the residue exceeded the sum which the father covenanted to pay to the trustees of the settlement.

HELD—that the bequest of the share of the residue to the daughter was a satisfaction of the covenant so far as her life interest was concerned, but was not a satisfaction of the covenant so far as the interests of the children were concerned, as they took nothing directly under the will, but only by reason of the wife's covenant to settle after-acquired property; and that therefore the wife alone was put to election.

IN RE BLUNDELL; BLUNDELL v. BLUNDELL, [1906] 2 Ch. 222; 75 L. J. Ch. 561; 94 L. T. 818; 22 T. L. R. 570—Eady, J.

182. *Covenant on Marriage of Daughter to Pay Share of Estate to Trustees—Subsequent Will Confirming Covenant—Election by Life Tenant against Will—Satisfaction of Ulterior Interest—Differences in Limitation—Acceleration of Subsequent Interests.*—V. on the marriage of his daughter covenanted with the trustees of her settlement that his heirs, executors, and administrators would, within twelve calendar months after his decease or that of his wife, pay to them a share (which ultimately became one-sixth), ascertained by the number of his children, of his real and personal estate, upon trusts for his daughter for life for her separate use, without power of anticipation, then to her husband I. H. for life, and subject to a joint power of appointment among their issue, and in default of such appointment as the survivor should appoint, to the children of the marriage at twenty-one or marriage. The settlement contained an agreement and declaration that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the covenant. The father subsequently made a will, whereby he confirmed the covenant in the settlement, and, after a trust for payment of his debts, directed his trustees to stand possessed of an equal share of his

*Satisfaction—Continued.*

residuary estate upon trust for his daughter for life, and then for her children at twenty-one or marriage, in default of children for any husband of his daughter for life, and subject thereto such share to fall into residue.

The daughter having elected against the will, the question arose whether her husband and children could claim under the will as to their rights, having regard to the provision of the settlement and will.

HELD—that the liability under the covenant in the settlement was not a debt to be deducted before ascertaining the testator's residue. That on the construction of the agreement and declaration in the settlement there was no satisfaction of the covenant. That having regard to the recital by the testator of his covenant in his daughter's marriage settlement and its confirmation by his will, and to the substantial distinctions between the limitations in the settlement and will, an intention was manifested that the covenant should not be abrogated by the will, and that the testator intended to perform it, and that there was no satisfaction as regards any of the parties claiming under the settlement, the children of the daughter not being put to their election.

*Per curiam.*—The result of the daughter not claiming under the will was not to accelerate the interests of those claiming in remainder as if she had been an attesting witness to the will, and as before the event she could not be regarded as leaving or not leaving children, there was held to be an intestacy as regards her life interest under the will.

IN RE VERNON; GARLAND *v.* SHAW, (1906) 95 L. T. 48—Kekewich, J.

183. *Double Portions—Parent and Child—“Advances or Moneys” to be brought into Hotchpot—Subsequent Gift of Real Estate.*—It is still the rule that an advance, in order to be a satisfaction of a debt or legacy, must be *ejusdem generis*.

A testator directed that his daughter should bring into hotchpot as part of his residuary personal estate the total amount of “any advances or moneys lent” by him to her or her husband. He subsequently bought a farm for his daughter and her husband, and expended some money upon it, and upon the stock thereon.

HELD—that the farm, and the money so expended, need not be brought into hotchpot.

*Holmes v. Holmes* ((1783) 1 Bro. C. C. 555) approved.

Comments of North, J., in *In re Vickers* ((1888) 37 C. D. 525, 534; 57 L. J. Ch. 738; 36 W. R. 545, 59 L. T. 921) disapproved.

IN RE JACQUES; HODGSON *v.* BRAISBY, [1903] 1 Ch. 267, 72 L. J. Ch. 197; 51 W. R. 229; 88 L. T. 210—C. A.

184. *Double Portions—Gifts by Parent to Children—Rule against Double Portions.*—The presumption that a gift to a child is made in partial satisfaction of a provision already made for him by will may be rebutted.

A testator who in 1891 had two sons (J. and A.) and six daughters alive made his will in that year. He had previously given £5,000 to each of his daughters, and he now left his residuary estate amongst his eight children in specified shares, grandchildren to take equally between themselves the share of any deceased child their parent, and he specially declared that his daughters should not bring into hotchpot the sums of £5,000 previously given to each of them. In 1892 he voluntarily, and unexpectedly, made a present of £5,000 to his son A., and two years later he added a codicil to his will, making some trifling alteration, but confirming it in other respects.

In 1897 J., who was in partnership with his father, but with no other member of the family, had, contrary to the provisions of the partnership deed, drawn money out of his capital account with the firm, and the testator now transferred £5,000 to his account and also gave him £1,500 to pay part of a mortgage on his residence.

In 1899 the testator died, and the question arose whether A. and the daughter of J. (then dead) must account for their respective presents of £5,000 and £6,500. Two of the daughters had been told by the testator that A.'s £5,000 was intended to be treated just as their presents of £5,000, and not accounted for.

HELD—that, looking at “the whole of the circumstances in evidence, the time, circumstances, and manner of the gift,” the presumption of law had been rebutted, and that the sums need not be accounted for. In the case of A. the evidence of the two sisters would have been sufficient, apart from the important fact that the will was confirmed after the date of the gift; in the case of J. the gifts were more in the nature of temporary assistance within the decision of *Taylor v. Taylor* ((1875) L. R. 20 Eq. 155; 44 L. J. Ch. 718; 23 W. R. 719—Jessel, M.R.).

Decision of Kekewich, J., affirmed.

HELD ALSO (dissenting from the opinion of Kekewich, J.)—that the child of J. was in the same position as J., and must have accounted, if he would have been liable to account.

IN RE SCOTT; LANGTON *v.* SCOTT, [1903] 1 Ch. 1, 72 L. J. Ch. 20; 51 W. R. 182, 87 L. T. 574—C. A.

185. *Legacies not payable for Four Years—Debts secured by Negotiable Instruments—Legacies for same Sums as Debts.*—Pecuniary legacies which by the express terms of the will were not payable until a period of four years after testator's decease



**Satisfaction—Continued.**

are not a satisfaction for debts of equal amount secured to the legatees by a negotiable instrument made by the testator.

IN RE ROBERTS; ROBERTS v. PARRY, (1902) 50 [W. R. 469—Byrne, J.]

186. *Legacy to Creditor—Legacy Exceeding Debt—No Time Fixed for Payment—Creditor Executrix.*—A legacy given by will to a person to whom the testator owes a debt payable with interest, the legacy being given generally, and no time being fixed for payment, and being equal to or greater than the amount of the debt, is a satisfaction of the debt.

This general rule applies even though the creditor is appointed executrix, and though (no time being fixed for payment) payment of the legacy cannot be enforced for the period of a year from death.

IN RE RATTENBURY; RAY v. GRANT, [1906] 1 Ch. [667, 75 L. J. Ch. 304; 54 W. R. 311; 94 L. T. 475, 22 T. L. R. 249—Eady, J.]

187. *Trust to Pay Debts—Presumption of Satisfaction of Debts by Legacies—Presumption Against Double Portions—Debt and Portions Under Settlement in Respect of one Fund—Legacies Under a Will in Respect of Another Fund—Settlement Executed by Settlor Only, but Delivered to His Solicitor.*—A testator had in 1869 received a sum of £4,000, in right of his second wife. In 1887 he covenanted to pay this sum of £4,000 for the benefit of his said wife and his two children by her. By his will dated 1888 he devised and bequeathed his real and personal estate to trustees upon trust to sell and to pay his debts, and directed that the residue should be equally divided between all his children, subject as to the shares of the children by his second wife to a trust for her benefit during widowhood. He also expressly directed that the children should bring into hotchpot certain benefits received by them in his lifetime. By a codicil dated 1899 the testator directed that the trustee should, out of his moneys, pay the income of £4,000 to his wife, and after her decease that the said sum should fall into his residuary estate; and he thereby confirmed his said will.

HELD—that the trust to pay debts not having been revoked by the codicil, and the property comprised in the settlement having come by right of the wife, neither the debt to the wife nor the children's portions under the settlement were intended to be satisfied by the legacies under the will or the codicil.

IN RE FRANKLIN; FRANKLIN v. FRANKLIN, (1907) [52 Sol. Jo. 12—Joyce, J.]

**XII. HOTCHPOT.**

188. *Advancement “under any appointment”—Other Advancement.*—A testator left his residuary estate upon trust for his wife for life, and gave her power to appoint

the funds among their children, who, in default of appointment, were to take such funds in equal shares. The will contained an advancement clause, and also a hotchpot clause applicable only where a child had received any part of the funds “under any appointment.” After his death £705 was advanced to R. Subsequently the widow by will appointed “one equal one-fourth share” of her husband's estate, of which she was tenant for life, upon trust for each of her four children, making no reference to the advance to R.

HELD—that there was nothing to show that R. was intended to bring his advance into account.

IN RE FOX; WODEHOUSE v. FOX, [1904] 1 Ch. [480; 73 L. J. Ch. 314; 52 W. R. 229; 90 L. T. 477—Byrne, J.]

189. *Erroneous Recital of Indebtedness—Account.*—A testator after reciting that a son to whom he had previously given a share of residue, was indebted to him in the sum of £5,500, and that he (the testator) was desirous of reducing the amount of such indebtedness to £3,000, proceeded to forgive the son the balance of his debt over and above £3,000, and to declare that the said sum of £3,000 or so much thereof as should remain unpaid at the period of distribution, should be taken into account as part of his son's share of residue. The son, in fact, was never indebted to his father in the sum of £5,000, the only sum which his father had ever advanced on his account being a sum of £80 for an indenture of apprenticeship.

HELD—that on the true construction of the will, the testator only intended the son to bring into account such sum, not exceeding £3,000, as he owed the testator, and as might remain unpaid at the period of distribution, therefore the son was only liable to account for the sum of £80. In such cases of erroneous recital the question is whether the testator's intention as expressed in the will was to charge the legatee with the sum mentioned (less any repayments made subsequently) or with such sum as may be actually due.

*In re Taylor's Estate; Tomlin v. Underhay* ((1882) 22 Ch. D. 495), followed.

IN RE KELSEY; WOOLLEY v. KELSEY, KELSEY v. [KELSEY, [1905] 2 Ch. 465; 74 L. J. Ch. 701; 54 W. R. 136; 93 L. T. 662—Eady, J.]

190. *Extinguishment of Estate of Testatrix by Adverse Possession of Son—Rent in Arrear brought into Account of Son's Share—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 34, 42—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*—A testatrix in 1868 let a farm to her son, R. S. J., at the rent of £80 a year, and rent was paid till April, 1881. By her will, after giving her property upon trust for her four children in equal shares, the testatrix declared “that all sums which I have al-

**Hotchpot—Continued.**

ready paid or advanced, or which I shall hereinafter pay or advance, to or for the benefit of any child of mine, and that all moneys owing to me at my death by any child of mine, whether for rent or otherwise, shall be taken in or towards satisfaction of the share under my will of such child," and accounted for accordingly.

It was admitted that R. S. J. had acquired a title under the Statute of Limitations, and the question now was whether the rent for twelve years from April, 1881, ought to be deducted from his share.

**HELD**—that R. S. J. must be regarded as having been in possession during the twelve years, not as tenant to the testatrix, but in a right in respect of which he was under no obligation to pay rent, and that the rent for twelve years ought not to be deducted from his share.

Decision of North, J. ([1900] 1 Ch. 292; 69 L. J. Ch. 103; 64 J. P. 200; 82 L. T. 78), reversed

**IN RE JOLLY; GATHERCOLE v. NORFOLK**, [1900] 2 Ch. 616, 69 L. J. Ch. 661; 48 W. R. 657; 83 L. T. 118; 16 T. L. R. 521—C. A.

**191. Gift of Income of Residue to Children for Life subject to Annuity to Widow—Advances to Children in Testator's Lifetime—Adjustment.**—A testator by his will and codicil gave his residuary estate upon trust out of the income to pay certain annuities and the annual sum of £2,000 unto his wife during her life, and subject thereto upon trust to divide the same into as many shares as there should be children of his who should be living at his death or should have died in his lifetime leaving children living at his death, and to pay the annual income of such shares unto his children, and then upon certain trusts therein expressed, and it was provided that certain advances made to some of his children should be treated as capital of their shares, and brought into hotchpot and accounted for accordingly. Upon the widow's death,

**HELD**—that in order to ascertain the portions of the six children who survived him the gross value of the testator's residuary estate on the day of his death should be ascertained by adding to the net value the sum total of the advances. The gross share of each child could then be discovered by dividing by six, and the net share by deducting any advance. The income received from the date of the testator's death must then be divided proportionately to the net shares, and one-sixth of the annuity paid away must be deducted from each child's share

Decision of Joyce, J. (86 L. T. 43) varied.

**IN RE HARGREAVES; HARGREAVES v. HARGREAVES**, [1903] 88 L. T. 100—C. A.

**192. Gifts to Several of Residue Subject to an Annuity for Life—Advances made before**

**Testator's Death—Instalments Paid after his Death—Final Adjustment—Calculation of Interest on Advances and Instalments—Rate of Interest—Period of Distribution.**—In adjusting accounts for the purpose of making the final distribution of an estate, *e.g.*, after the death of an annuitant, the working rule is to ascertain the "date of distribution," and to charge interest from that day on any advances previously made, which have to be brought into hotchpot, and to charge interest on subsequent advances from the date of each advance.

By a testator's will his residuary estate was left to trustees to pay an annuity to his widow, and, subject thereto, in trust for his two living sons, S. and B., and the trustees of the marriage settlement of the deceased son H. An advance of £4,000 to H., and a further sum of £6,000 covenanted to be paid to his trustees, were to be brought into hotchpot.

B. died shortly after the testator, leaving to his widow a life interest in his property. After testator's death the £6,000 was paid to the trustees of H.'s settlement, and two sums of £6,500 were paid to S. and the trustees of B.'s will; and the annuity having now fallen in, a final distribution and adjustment were necessary.

**HELD**—that the testator's death was the "date of distribution"; that interest must be charged on H.'s £4,000 from that date, and on the sums of £6,000, £6,500 and £6,500 from the days on which they were paid;

**THAT**—although as between payers and payee part of the sums of £6,500 was treated as income and part as capital, the working rule is to charge interest on the whole of each payment, as being made generally on account of the recipient's share.

*In re Lambert* ([1897] 2 Ch. 169; 66 L. J. Ch. 624; 45 W. R. 661; 76 L. T. 752) followed.

Also that interest should be calculated at 3 per cent.

**IN RE WHITEFORD; INGLIS v. WHITEFORD**, [1903] 1 Ch. 889, 72 L. J. Ch. 540; 51 W. R. 491—Buckley, J.

**XIII SUBSTITUTIONAL GIFT**

**193. Alternatives—First Gift to be Absolute—Second Gift also Treated as Absolute.**—C. by his will left real estate to his widow for life, and at her death to his eldest son, John, for life, and then "to become the absolute property of" John's eldest son, alternatively "to become the property of my son James or of his eldest son," with a gift over failing either of such previous gifts. John predeceased his father, leaving no issue; James and his son survived the widow, but the son died in James's own lifetime.

**HELD**—that the gift over failed if either James or his son lived to take absolutely. The absolute nature of the gift to John's son must, in the absence of any expression of a contrary intention, be read into the alternative gift to James or his son.

**McCORMICK v. SIMPSON & Co.**, [1907] A. C. 494—P. C.

**Substitutional Gift—Continued.**

194 *Annuity—Share of Residue—Substitution—Accumulations—Quebec.*—A testator gave the residue of his property to his children who might be living at the time of his death, and in the event of the death of any of them to their respective children, declaring that the children of each of his children should be considered as one root and take the share of the parent. He charged each of his children with a substitution in favour of their respective children, and meantime he placed his estate in the hands of trustees, who were to administer it until the death of all his children, when a division was to be made of the property comprising his estate. He directed that each of his children should only receive from the time of majority or from marriage the revenue derivable from his estate to the amount of 6,000 dollars a year.

HELD—that the annuity payable to each child upon attaining majority was only chargeable upon such child's proportionate share of the income and accumulations, and not upon the whole residue. That the claim of the eldest son to any advantage which would confer upon him more than an equal share with his brothers and sisters, and more than the revenue of that share, whether current or accumulated, must be rejected. That the accumulations of the income of the share of the eldest son during his minority were not to be treated as an addition to his share of the capital nor as subject to the substitution, the testator having confined the substitution to the capital of the share of the residue, and that the accumulations arising from revenue during minorities belonged absolutely to the legatees.

BEAUDRY v. BARBEAU, [1900] A. C. 569; 69 [L. J. P. C. 131; 83 L. T. 236—P. C.

195. *Interpretation—Gift to Brothers and Sisters Equally—Gift to Issue of Brothers or Sisters Dying in Testator's Lifetime—Sister Dead prior to the Making of the Will leaving Children who Survived Testator.*—A testator made his will in 1895, giving the residue "upon trust for my brothers and sisters equally," with certain directions as to the share of his brother James; and the will provided "if any of my other brothers or sisters shall die in my lifetime leaving issue, any of whom shall be living at my death, such issue so living shall take equally amongst themselves if more than one the share which such other brother or sister would have taken if then living." One of the testator's sisters had died in 1892, leaving seven children. The testator died in 1899.

HELD—that "other brothers and sisters" in the last gift meant "brothers and sisters other than James," and "brothers and sisters" in the last gift meant the same as "brothers and sisters" in the previous gift  
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of the residue—namely, "the brothers and sisters living at my death." The children of the sister who died in 1892 did not therefore take.

RE OFFILER; OFFILER v. OFFILER, (1901) 83 [L. T. 758—Buckley, J.

196. *Gift to Children—Die without "leaving" Issue—"Having" Issue.*—B. left personalty on trust for his two daughters for their respective lives in equal shares, with remainder to their children as they might appoint. In case either should "die without leaving lawful issue, or being such, none of such issue shall live to attain twenty-one," her share was to go to the survivor: if both should die "without leaving lawful issue as aforesaid," the trust funds were to go in equal shares to his nephews and nieces.

After B's death, one daughter died unmarried; the other was still alive, and had a son aged twenty-one.

HELD—that the son was absolutely entitled, subject to his mother's life interest. "Die without 'leaving,'" must be read as "die without 'having.'"

Maitland v. Chalie ((1822) 6 Madd. 243) followed.

In re Ball, Slattery v. Ball ((1888) 40 Ch. D. 11, 58 L. J. Ch. 232; 37 W. R. 37; 59 L. T. 800—C. A.) explained.

BARKWORTH v. BARKWORTH, (1906) 75 L. J. Ch. [754—Joyce, J.

197 *Gift to Children or Their Children—Period of Division—Life Estate or Absolute Interest.*—A bequest of residue to legatees, with a subsequent gift over to their children in case of death.

HELD—that death meant death in the lifetime of the testatrix, and that the legatees, having survived her, were absolutely entitled to the residue.

RE REEVES, (1907) 51 Sol. Jo. 325—Joyce, J.

198. *Gift to Children or their Children—Issue of Child Dead at Date of Will—"Shall" Predecease Me.*—G., by his will, gave legacies to the children of A. G., whom he described as my "deceased son." He gave a legacy to his son R. G. if he could be found within a specified time; and then gave the residue of his estate in trust for all or any of his children (other than R. G.) who should be living at his death and attain the age of twenty-one or marry, with a substitutional gift to issue, "in case any one or more of my children (other than R. G.) shall predecease me," leaving issue.

HELD—that, as A. G. was known to the testator to be dead at the date of his will, A. G.'s children were not entitled to share in the residue.

Decision of C. A., *sub nom. In re Gorrings*; Gorrings v. Gorrings, [1906] 2 Ch. 341; 75 L. J. Ch. 687, 95 L. T. 574) reversed.

GORRINGE v. MAHLSTEDT, [1907] A. C. 225; 76 [L. J. Ch. 527; 97 L. T. 111—H. L. (E.).  
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*Substitutional Gift—Continued.*

199. *Gift to Children or their Children—Gift to Issue of Deceased Children—Children Dead at Date of Will—Words of Futurity.*—A will contained a gift to the issue of any member of a class, in case such member "shall" die without attaining a vested interest, but "shall" leave a child or children living at or after my decease, and which child or children "shall attain the age of twenty-one years," of the share which such member would have taken if he had come under the description of the members of the class attaining a vested interest.

HELD—an original and not a substitutional gift, so as to let in the issue of members of the class who were dead at the date of the will and were not beneficiaries under the will.

*Gorringe v. Mahlstedt (supra)* distinguished.

IN RE STOKES; *BARLOW v. BULLOCK*, (1907) 52 [Sol. Jo. 11.

200. *Gift to Daughter or her Children—Gift over "failing such issue"—"Death leaving no issue"—Vested Interest.*—A testator left his property in trust to pay the income to his widow for her life; after her death the property to be transferred to his younger daughter, but if she should be dead, to any child or children of hers, and "failing such issue" to his elder daughter, with other limitations in case his two daughters should both be dead "leaving no issue."

In an action brought during the widow's life-time, the younger daughter having a child,

HELD—that the younger daughter's children took vested interests as soon as born; and that, therefore, she or her children must take absolutely on the widow's death, and that in no event could the further limitations take effect.

*Treharne v. Layton* (1875) L. R. 10 Q. B. 459; 44 L. J. Q. B. 202 followed.

IN RE BRADBURY; *WING v. BRADBURY*, (1904) 73 [L. J. Ch. 591; 90 L. T. 824—C. A.

201. *Revocation by Codicil—Gift by Implication.*—By his will, dated the 19th October, 1867, M. devised the lands of N. to trustees, upon trust to the use of his son D. M. and his heirs, upon his attaining the age of twenty-six years, and in the meantime, and until his said son should attain that age, to apply the rents and profits for his maintenance. The will also contained a power of advancement. The will then provided that in case D. M. should die before he attained twenty-six, then from and immediately after his death the lands of N. should go to the use of the testator's eldest son W. M., and the testator appointed his daughter residuary legatee and devisee.

By a codicil dated the 15th July, 1868, the testator revoked all the gifts in his will to D. M., and in lieu thereof gave him a rent-

charge upon all the testator's real estate in the county of D., and the testator declared the same to be in full substitution of all absolute and reversionary interests to which his said son or his heirs would or might have been entitled under his said will, which the testator thereby confirmed in all respects, save in so far, and as to such parts thereof, as were thereby revoked.

The testator died on the 8th February, 1899. At the date of the codicil D. M. was under twenty-six, but he had attained that age at the date of the death of the testator.

HELD—that W. M. did not take any interest in the lands of N., but that the same passed under the residuary clause in the will.

*M'KAY v. M'KAY*, [1901] 1 Ir. R. 109—C. A.

202. *Real and Personal Estate—Gift to Son for Life—Remainder to his "Children or their Heirs"—One of such Children Predeceasing Testator—Substitutional Gift.*—A devise or bequest of corpus to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to admit children born between that date and the period of distribution.

A testator left his real and personal estate to his two sons, H. and J., for their lives in equal shares, "and at their death their or his portions or portion if married to their or his child or children or their heirs."

One of H.'s children, L., predeceased the testator, leaving a child, who was still alive when H. died.

HELD—that L. was never a member of the class designated by the will; and that, therefore, her child took no share, even though the words "or their heirs" implied a substitutional gift as to the realty or personalty or both, so far as concerned children who were actually members of the class.

IN RE IBBETSON; *IBBETSON v. IBBETSON*, (1903) [L. T. 461—Joyce,

203. *Natal—Residuary Gift to Two Sons—Gift over in event of one Dying and leaving Children—Whether Death at any time, or at Testator's Lifetime, intended—Fidei commissum.*—A testator left his residuary estate to his two sons equally with the following proviso:—"In the event of either of my sons dying before his brother without leaving an issue, then his share shall become the property of his brother; but, if there be any legitimate children surviving my father, then their father's share shall be invested in any way my executors deem fit. The interest to be used for the education and maintenance of the said children until the youngest attains twenty-one years, then the residue to be equally divided."

One of the sons died after the testator's death. HELD (reversing the decision of the Supreme Court)—that the proviso did not apply to a son dying in the testator's lifetime.

**substitutional Gift—Continued.**

that the son's share was subject to *fidei commissum* in favour of his children.

DUFFILL AND ANOTHER *v.* DUFFILL, [1903] A. C. 491; 72 L. J. P. C. 97; 89 L. T. 82; 19 T. L. R. 600—P. C.

**XIV. CLASS GIFTS.**

204. *Ascertainment of class.*—The rule that a bequest to the children of a person is confined to children living at the date of a testator's death, although in a sense a rule of convenience, is applicable to a bequest of income.

*Re Wenmoth's Estate* (37 Ch. Div. 266) distinguished.

*RE POWELL; CROSLAND v. HOLLIDAY*, [1898] 1 Ch. [227, 67 L. J. Ch. 148; 77 L. T. 649; 46 W. R. 231—Kekewich, J.

205. *Class Gift or Gift to Personæ Designatæ.*—A testator gave the sum of £200 to each of his three sisters, whom he named, and devised his farm, with all furniture, stock, &c. (subject to their mother's life interest therein), to his "said three sisters," or such of them as should survive him, in equal shares as tenants in common. By a subsequent codicil he revoked the legacy of £200 given to one of his sisters, and also the bequest in remainder to her of a share of the farm, &c., and in other respects confirmed his will. The testator's mother and three sisters survived him.

HELD—that the bequest of the farm, &c., under the terms of the will passed to the sisters, not as members of a class, but as *personæ designatæ*, and that consequently the revoked share fell into residue.

*HORFORD v. ORFORD*, [1903] 1 Ir. R. 121—V.-C.

206. *Double Legacies—Legacy to a Class—Additional Gift by Codicil of £50 to each member "so that each receives £100"—First Share alone exceeding £100.*—S. gave £1,000 to 10 of his god-children in equal shares. By a subsequent codicil he gave "£50 additional to each of 10 of his god-children . . . so that each receives £100." He had nine god-children alive at his death.

HELD—that each was entitled to £50 in addition to a ninth share of £1,000.

*Milner v. Milner* ((1747) 1 Ves. Sen. 106—dictum of Lord Hardwicke) doubted.

*IN RE SEGELCKE; ZIEGLER v. NICOL*, [1906] 2 Ch. [301; 75 L. J. Ch. 494; 54 W. R. 624; 95 L. T. 708—Joyce, J.

207. *Equitable limitation in remainder to members of class contingently on attaining Twenty-one—Infants—Destination of Income on one Member of Class attaining Twenty-one.*—A testator, who died in 1881, devised certain real estate to trustees upon trust for A. for life, and after her death upon trust for the children of A. who, being sons, should attain the age of twenty-one, or, being

daughters, should attain that age or marry, to be divided between them, if more than one, as tenants in common. A. died in 1875, leaving six children, all infants and unmarried. The eldest child of A. attained twenty-one in March, 1897.

HELD—that the eldest child on attaining twenty-one became entitled to the whole of the income until another child attained a vested interest, when that child would have to share, and so on as the other children severally acquired vested interests, in the same way as if the limitations had been legal instead of equitable.

*IN RE AVERILL; SALSBOURY v. BUCKLE*, [1898] 1 Ch. 523; 67 L. J. Ch. 233; 78 L. T. 320; 46 W. R. 460—Romer, J.

208. *Estate to be Divided in Certain Proportions between Two Classes—Forfeited Interests to Form Part of Residue—Forfeiture—Mode of Division.*—W. left property, as to three equal seventh parts thereof, in trust for a certain class of persons living at his death as tenants in common, and as to four equal seventh parts thereof in trust for a certain other class of persons living at his death as tenants in common. He directed that, if a certain event should happen in his lifetime, the share of a certain member of the first class should "lapse and form part of my residuary estate." The event in fact happened before his death.

HELD—that three-sevenths of the lapsed share went to the remaining effective members of the first class, and four-sevenths to the members of the second class.

*IN RE WAND; ESCRITT v. WAND*, [1907] 1 Ch. [391; 76 L. J. Ch. 253; 96 L. T. 424—Eady, J.

209. *Gift of Residue to a Class Living at Period of Distribution—Settlement of "the Share" of one of the Class—Death of such one of the Class before Period of Distribution—Capricious and Anomalous Interpretation to be Avoided.*—Subject to certain provisions for her sisters, Sophia, Catherine, and Elizabeth, a testatrix, by her will made in 1854, directed her residuary estate to be held in trust for all or such one or more of her brothers and sisters (except Elizabeth, but including Sophia and Catherine if they or either of them should marry) who should be living at the decease or marriage of such surviving or last marrying sister, in equal shares, if more than one, as tenants in common and not as joint tenants. And she directed that if at the death or marriage of such her surviving or last marrying sister her brothers William, George and James, or any or either of them should be dead, or either of her sisters Sophia and Catherine should be dead, having previously married, and there shall be living any child or children of any one or more of them so dying, who should have attained or should afterwards attain the age of twenty-one years, or who should then have married or should afterwards marry, such child or children should together and *per stirpes*

**Class Gifts—Continued.**

have and be entitled to such part or share of her said trust estates and funds as his, her, or their parent, or respective parents, would have had or been entitled to, if such parent or parents had been then living. And she declared and directed that, with respect to "the share" of her said sister Charlotte of and in her said trust estates and funds, the same share should be held in trust to pay the income thereof to her during her life, for her separate inalienable use, and after her decease the capital of "the same share" should be held in trust for her children or child, as she should by deed or will appoint, and in default of appointment, in trust for and to vest in her children or child at twenty-one or marriage, in equal shares, if more than one. Neither Sophia nor Catherine married. Charlotte died in 1884. She had four children, all of whom attained twenty-one, but all of whom died before Catherine, who died in 1900, having survived all her brothers and sisters. Elizabeth left no issue, nor did either of the brothers of the testatrix. The contest was between the legal personal representatives of Charlotte's four children, and the next of kin of the testatrix.

**HELD**—that the brothers and sisters named in the earlier clause of the proviso constituted the primary objects of the bounty of the testatrix in the sense that they took their shares absolutely, if they survived the period of distribution, while their children were only secondary objects of bounty in the sense that they took nothing unless their parents died before the period of distribution, that the interests given to the children of Charlotte did not in any way depend on their surviving the period of distribution, and they were primary objects of bounty; that as the language of the will with respect to the conditions under which the children of Charlotte took vested interests, was clear and unambiguous, the words "the share" of Charlotte meant an aliquot share of the estate destined by the testatrix for Charlotte and her children, and did not mean that which under the prior gift would have come to Charlotte, if she had survived Catherine, as the consequence of the latter interpretation would be capricious and anomalous; and that the legal representatives of Charlotte's four children were entitled to the residue.

*In re Roberts* ((1885) 30 Ch. D. 234; 53 L. T. 432—C. A.), *In re Pinhorne* ([1894] 2 Ch. 276; 63 L. J. Ch. 607; 42 W. R. 438; 70 L. T. 901), and *In re Powell* ([1900] 2 Ch. 525; 69 L. J. Ch. 788; 83 L. T. 24, No. 255, *infra*) considered.

Where by acting on one interpretation of the words we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that

which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable. Rule of interpretation laid down by Lord Cranworth in *Abbott v. Middleton* ((1858) 7 H. L. C. 68, 89; 28 L. J. Ch. 110, 112) approved.

Decision of Byrne, J., reversed.

*IN RE WHITMORE; WALTERS v. HARRISON*, [1902] 2 Ch. 66; 71 L. J. Ch. 673; 87 L. T. 210—C. A.

**210. Gift to A. and B. and Four Children of C.—Gift Divisible into Sixths**—A testator gave his residuary personal estate to trustees upon trust for sale and conversion and upon certain trusts for the benefit of his daughter for life, and for her issue, all of which had then failed, and the will then proceeded as follows: "And in case there shall be no child of my said daughter who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, then I direct and declare that my said trustees or trustee shall stand possessed of the said residuary trust fund in trust for the said G. B., his sister M. B., and the children now living of the said R. H. who being male shall live to attain the age of twenty-one years, or being female shall live to attain that age or marry, and if more than one, in equal shares, the share or shares of any of them being female to be for her or their sole and separate use." There were four children of R. H. living at the date of the will, all of whom attained twenty-one.

**HELD**—that the gift was a gift to a class, and that the fund was divisible into six equal shares.

Judgment of the C. A. *sub nom. Capes v. Dalton* (86 L. T. 120) reversed.

*KEKEWICH AND OTHERS v. BARKER AND OTHERS*, [(1903) 88 L. T. 130—H. L. (E.)]

**211. Gift to A. and the Children of B. Equally—Death of A. before the Testator—Lapse—Survivorship**—A testator appointed his wife and his "niece A. executrixes, and gave property X. to his wife and A. upon trust to pay the income to his wife for life," and after her decease upon trust for the said A. and the child or children of his sister B. who should attain the age of twenty-one years, equally to be divided among them as tenants in common. A. was at the date of the will nearly twenty-one—she died before the testator. B.'s children had all attained twenty-one when the testator's widow died.

**HELD**—that the gift to A. and the child or children of B. was a gift to a class of all his nephews and nieces, and the testator intended that if any of them died in his

**Class Gifts—Continued.**

lifetime the survivors should take; and that the share bequeathed to A. did not lapse by her death, nor did it fall into the residue of the testator's estate, but went to B.'s children.

Decision of the Court of Appeal ([1899] 2 Ch. 314; 68 L. J. Ch. 598; 47 W. R. 642; 81 L. T. 139) affirmed.

KINGBURY v. WALTER, [1901] A. C. 187, 70 [L. J. Ch. 546; 84 L. T. 697—H. L. (E.).

212. *Gift "to be equally divided between the children of A. and B."*—W. by her will directed one half of the proceeds of sale of certain realty "to be equally divided between the children of F. M. W. and J. C. W., or their heirs." F. M. W. had six children living at the date of W.'s death, but had for five years lived apart from them and his wife. J. C. W. had two children living. Both F. M. W. and J. C. W. were nephews of W.'s late husband.

HELD—that the gift was one of moiety to J. C. W. and of the other to the children of F. M. W.

IN RE WALBRAN; MILNER v. WALBRAN, [1906] 1 [Ch. 64; 75 L. J. Ch. 105; 54 W. R. 167; 93 L. T. 745—Joyce, J.

213. *Gift of Residuary Estate to a Class—Divesting Clause or Gift Over—"Die Leaving Issue"—Operation During Life of Tenant for Life and also After Her Death—Period of Defeasibility.*—The testator by his will devised and bequeathed the residue of his real and personal estate to his trustees upon trust, for conversion and investment, and to set aside certain investments for certain purposes, and upon further trust for his wife during her life if she should continue his widow, but if she should marry again, upon trust to pay her a certain annuity during her life. The will then proceeded, "and subject to the provision aforesaid upon trust after the decease or second marriage of my wife, to apply the income of the trust fund in or towards the maintenance, education and advancement of my children until the youngest who shall be living shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry"; and subject thereto he directed that the trust funds and the income thereof, and all accumulations of income, should be held in trust for "all my children who being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry, to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue, such issue shall take his or her deceased parent's share equally as tenants in common." The testator died leaving him surviving two sons and a daughter. A son and a daughter had attained the age of twenty-one.

HELD—that the gift should be read according to its natural and proper meaning—that is, as meaning death at any time, and not merely death within the life of the widow or at any time less than the whole life of the legatee. There was no context in the will to limit the meaning of the word "death."

O'Mahoney v. Burdett ((1874) L. R. 7 H. L. 388, 44 L. J. Ch. 56 n.; 23 W. R. 361; 31 L. T. (n.s.) 705) followed.

Decision of Joyce, J. ([1901] 2 Ch. 338; 70 L. J. Ch. 583; 84 L. T. 537), affirmed.

IN RE SCHNADHORST; SANDEUHL v. SCHNADHORST, [1902] 2 Ch. 234; 71 L. J. Ch. 154; 50 W. R. 485; 86 L. T. 426—C. A.

214. *Gift to Tenant for Life—Remainder to a Class, their Children to take by Substitution—Death of Member of Class before Testator and after Tenant for Life.*—A testator left his property in trust for his wife for life, and finally for such of his children as should be living at the death of his wife and the issue of such as "shall be dead."

The wife died in 1891, one of the children in 1899, and the testator in 1900.

HELD—that the issue of the deceased child took no share.

IN RE KINNEAR; KINNEAR v. BARNETT, (1904) 90 [L. T. 537—Kekewich, J.

215. *"Relations of like degree in Scotland"—Visitor in Scotland.*—A gift to "my relatives of like degree in Scotland" living at the date of death does not include such a relative whose home is in Australia, but who happens to be in Scotland on a visit at the date of testator's death.

ARGO v. ELSMLIE, (1906) 8 F. 67—Ct. of Sess.

216. *Period of Distribution—Legacy to a Class.*—S. directed her trustees to "hold" a fund in trust for all the children of A., who, being sons, should attain twenty-one, or being daughters should attain that age or marry.

HELD—that no distribution could be made until A.'s death, as until then there might be additions to the class of beneficiaries.

HOPE-JOHNSTONE v. SINCLAIR'S TRUSTEES, (1905) [7 F. 25—Ct. of Sess.

217. *Time for ascertaining Class—Gift to Children at 21—Advancement Clause—Maintenance out of Vested Share.*—Where there is a gift to children at twenty-one years of age, the general rule is that the class is ascertained when the eldest child attains twenty-one, no child born subsequently being admitted.

If, however, maintenance or advancement is continued beyond the date when the eldest child attains twenty-one—e.g., if advancement is directed out of vested shares—all children are let in.

Iredell v. Iredell ((1858) 25 Beav. 485) followed.

IN RE COURTENAY; PEARCE v. FOXWELL, (1905) [74 L. J. Ch. 654—Kekewich, J.

*Class Gifts—Continued.*

218. *Time for ascertaining Class—Death of Testator or of Life Tenant—Next-of-kin according to Statute.*—W. by his will gave funds to trustees upon trust for his nephew S. for life with remainder to children or grandchildren of S.; there were provisions as to maintenance, education and advancement.

In default of issue of S. living to attain vested interests, he directed the funds to be held in trust "for such person or persons as on the death of my said nephew S. will be entitled to [sic] as my next-of-kin under the Statute for the Distribution of Intestates' Estates."

In 1884, when W. died, S. was his sole next-of-kin. S. died in 1906.

HELD—that, although the death of S. was not necessarily the period of distribution, the class to take were W.'s next-of-kin at the date of W.'s death, and not those who would have been his next-of-kin had he died when S. died; and that therefore S.'s executors were entitled to the funds.

*Bullock v. Downes* ((1860) 9 H. L. C.) applied.

Decision of Parker, J. ([1907] 1 Ch. 450; 76 L. J. Ch. 228; 96 L. T. 392) affirmed.

IN RE WILSON; *WILSON v. BATCHELOR*, [1907] 2 [Ch. 572—C. A.]

**XV. LAPSE.**

219. *Appointment in satisfaction of a Debt—Death of Creditor before Testator—No Lapse.*—Where under a general testamentary power money is appointed not out of mere bounty, but in discharge of a moral obligation (e.g., in satisfaction of a debt), the gift will enure to the estate of the appointee, if he dies before the testator.

A trustee in error made over payments to the beneficiary; she was ordered by the Court to pay to him interest on the amount thereof during her lifetime, and to appoint to him by will a similar amount out of the trust funds. She did so, but outlived him.

HELD—that the trustee's executor took under the appointment.

STEVENS v. KING, [1904] 2 Ch. 30; 73 L. J. Ch. [535; 52 W. R. 443; 90 L. T. 665—Farwell, J.]

220. *Bequest of Specific Sum part of Share of Residue—"The Remaining Part"—Gift over—Partial Failure.*—A testator bequeathed one-third of his residuary estate upon trusts "as to the sum of £4,500 part thereof, the sum of £2,250, to be held in trust for each of" his two grandchildren, A. S. P. and N. J. P. (sons of his son Arnold), who should attain the age of twenty-one years; "and as to the remaining part of the said one-third part of my residuary estate, in trust for such one or more of the four children of my said son Arnold," viz., F. K. P., A. M. P., and the said A. S. P. and N. J. P., who being sons or a son should attain the age of twenty-one years, or being a daughter should attain that age or marry

under that age. And in case there should not be any such children or child, then over. N. J. P. died a minor; the other children attained twenty-one.

HELD—that the words "the remaining part" were ambiguous; that the gift over showed that the testator intended that no part of the principal gift should fail unless all the children died without attaining vested interests, which was inconsistent with any partial failure of the trusts; and that the words "the remaining part" must be construed in the sense of true residue so as to carry the lapsed residuary legacy to the three children who attained twenty-one.

*Skrymsher v. Northcote* ((1818) 1 Swans. 566; 18 R. R. 142) doubted.

The principle of *In re Palmer* ([1893] 3 Ch. 369; 62 L. J. Ch. 988; 42 W. R. 151; 69 L. T. 477; 2 R. 619—C. A.) applied.

IN RE PARKER; *STEPHENSON v. PARKER*, [1901] [1 Ch. 408; 70 L. J. Ch. 170; 49 W. R. 215; 84 L. T. 116—Farwell, J.]

221. *General Bequest—Exception of Chattels Real—Chattels Real Bequeathed Specifically—Death of Legatee—Intestacy.*—A testator excepted his chattels real from the residuary bequest in his will, and bequeathed them to his brother. After his brother's death he made a codicil referring to such death, but leaving the general bequest and exception, and also the specific bequest standing.

HELD—that the will must be construed as if made at date of the codicil; and that, therefore, it must be presumed that the testator intended the chattels real to remain excepted from the residuary bequest, and that there was an intestacy.

*Blight v. Hartnoll* ((1883) 23 Ch. D. 218; 52 L. J. Ch. 672) distinguished.

IN RE FRASER; *LOWTHER v. FRASER*, [1904] 1 Ch. [726; 73 L. J. Ch. 481; 52 W. R. 516; 91 L. T. 48; 20 T. L. R. 414—C. A.]

222. *Gift of Residue with an Exception—Failure of One Gift Comprised in Exception—Gift Falling Into Residue—No Intestacy.*—Where there is a gift of residue with an exception (not a particular gift followed by a gift of the residue), and the exception fails, there is not a partial intestacy, but the amount of the exception falls into residue.

A gave his residuary estate to his wife absolutely, subject to payment of two legacies; and his will then proceeded: "Nevertheless, as to the sum of £1,000 part thereof, I give the same to my wife, to receive the income thereof during her life only, and after her decease I give the sum of £500, part of such £1,000, to my nephew, James Jupp, absolutely, and I give £500, the other part of such £1,000," etc. As far as could be discovered A. never had a nephew named James Jupp.

HELD—that his £500 passed to the widow absolutely as part of the residue, and not to A.'s next-of-kin.

IN RE JUPP; *GLADMAN v. JUPP*, (1903) 87 L. T. [739—Joyce, J.]



*Lapse—Continued.*

**223. Gift to a Class.**—A testatrix gave her property upon trust for a niece for life, and then for equal division between the brothers and sisters of the niece living at her death and A., B. and C. in equal shares, "and should either be dead leaving children, such children are to take the share their deceased parent would have been entitled to if living."

A. and B. were relations of the testatrix; C. was a stranger.

A. predeceased both testatrix and tenant for life; B. survived testatrix, but predeceased the tenant for life.

HELD—(1) that the gift to A., B. and C. was not contingent upon their surviving the tenant for life, and that, therefore, B.'s representatives took his share; (2) that the gift was not a class gift, and that A.'s share lapsed to the next of kin of the testatrix.

IN RE VENN, LINDON v. INGRAM, [1904] 2 Ch. [52; 73 L. J. Ch. 507; 90 L. T. 502—Joyce, J.]

**224. Gift to Two Persons—Gift over to Survivor in Default of Issue—Death of One Leaving Issue—Death of Survivor Without Issue—Gift over not Capable of Taking Effect**—A testator left real and personal property to his daughter, with a gift over, if she died without issue, to his two nieces H. and R., their heirs and assigns, in equal shares: he concluded "in case either of my said two nieces shall happen to die leaving no issue . . . the part or share of her so dying shall go to the survivor."

H. died leaving a child: then R. died childless, and last of all the daughter died childless.

HELD—that as, when R. died, there was no survivor to take her share, such share was never divested, and neither passed to H.'s child, nor became undisposed of as under a partial intestacy of the testator.

Jones v. Davies (1880) 23 W. R. 455 followed.

IN RE DEACON; DEACON v. DEACON (1907) 95 [L. T. 701—Kekewich, J.]

**225. Lapsed Legacies — Two Residuary Gifts.**—A testator having appointed H. his executor, gave pecuniary legacies to sixteen persons and his watch to a nephew. He then directed that "the remainder of" his "property" should "pass as follows, viz., be divided amongst" certain named persons in defined shares; he concluded, "and I appoint my executor my residuary legatee."

Two of the sixteen legatees died in his lifetime.

HELD—that the lapsed legacies fell into the first residue and not the second.

IN RE ISAAC; HARRISON v. ISAAC, [1905] 1 Ch. [427; 74 L. J. Ch. 277; 92 L. T. 227—Buckley, J.]

**226. Lapsed Legacies—Direction to Pay Legacy "Six Years after my Decease"**—

*Death of Beneficiary before Time for Payment—Lapse.*—A testator declared that his trustees should stand seised and possessed of his residuary personalty and realty, upon trust to retain legacies to themselves, and to pay the following legacies: To my brother, G. E., the annual sum of £50 for the term of five years from my decease, and the legacy of £1,000 six years after my decease."

The testator died on the 6th July, 1900, and G. E. on the 9th May, 1903.

HELD—that, there being no gift except in this direction to pay, everything depended upon the expiration of six years, and that, G. E. not having survived this period after the testator's death, his estate did not take the £1,000.

IN RE EVE; BELTON v. THOMPSON, (1905) 93 [L. T. 235—Kekewich, J.]

**227. Lapsed Legacies and Devises—General Residuary Gift of Property "not Hereinbefore Disposed of"—Second Residuary Clause — Whether Captured by First or Second Clause.**—A testator, after several legacies and devises of land, which failed, devised and bequeathed to his executors on certain trusts the remainder of his property, which he described as follows:—"All my railway and other shares, stocks, and interest in companies, moneys in the funds, dividends and debts due to me at the time of my death, and also the rest of my estate and effects, real and personal, *not hereinbefore disposed of*, and all securities, bonds, coupons, cash in bank and elsewhere." At the end of the will he appointed C. S. his residuary legatee.

HELD—that the words of the first general residuary clause were sufficiently wide to capture not only property undisposed of, but also lapsed legacies and devises, although there was apparently in that case nothing left for the second residuary clause to operate upon.

JOHNS v. WILSON, [1900] 1 Ir. R. 342—V. C.

**228. Residuary Devise — Lapsed Specific Devise—Wills Act, 1837 (1 Vict. c. 26), s. 25.**—A testator died possessed of freehold estates at Wimbledon and elsewhere, and also leaseholds, but no copyholds. He devised to his son a certain freehold house at Wimbledon, and devised upon trusts "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere, and all my leasehold estates whatsoever and wheresoever." The specific devise having failed in consequence of the son attesting the will,

HELD—that the will contained a good residuary devise to the trustees, in spite of the use of the word "other," and of the omission of any reference to copyholds, and that therefore the house passed to the trustees and not to the heir-at-law.

Decision of C. A. ([1901] 1 Ch. 619; 70 L. J. Ch. 342; 84 L. T. 174), reversing Kekewich, J. ([1900] 2 Ch. 196; 69 L. J. Ch. 475; 82 L. T. 554), affirmed.

## Lapse—Continued.

*Springett v. Jennings* ((1871) L. R. 6 Ch. 333, 40 L. J. Ch. 348; 19 W. R. 575; 24 L. T. 643) explained.

*MASON v. OGDEN*, [1903] A. C. 1, 72 L. J. Ch. [152, 51 W. R. 560, 87 L. T. 622—H. L. (E.)

**229. Residuary Gift — Named Person — Limited Survivorship Clause—Revocation of Gift by Codicil—Gift to Person by Wrong Name.**—A testatrix left her residuary estate to four named persons, A., B., C. and D., "as tenants in common, and if only one of them shall survive me, then to such one absolutely." By a codicil, after referring to the death of D., the testatrix revoked whatever interest D. had in her will. A., B. and C. survived the testatrix.

HELD—that the gift of survivorship was intended to be general, and not confined to the case of only one legatee dying, and that in any event the revocation clause of the codicil must be construed as directing the residuary bequest of the will to be read as if D. was not one of the residuary legatees, and, consequently, that in the events that had happened D.'s share was not undisposed of, but went to the other legatees.

Two of the residuary legatees were described as "Edith Beale, daughter of E. J. Beale," and "Violet Beale, daughter of E. J. Beale." E. J. Beale had two, and only two, daughters, one of whom was named Violet Edith Beale; the other had different first names.

HELD—that both daughters were residuary legatees.

IN RE RADCLIFFE, *YOUNG v. BEALE*, (1903) 51 [W. R. 409—Buckley, J.

**230 Specific Legacies—Particular Residue—Lapsed and Revoked Shares of Particular Residue—Gift to Wife and Children then Living—Death of Wife in Testator's Lifetime.**—A testator bequeathed certain articles, consisting of works of art, etc., specifically to individuals, and directed that all his furniture, . . . objects of art, and household goods, not by his will or any codicil thereto otherwise bequeathed, should be sold within six months after his decease, and that the money arising from the sale should be divided equally between his wife and all his children then living, share and share alike, and after other dispositions he bequeathed the residue of his property to one of his children. By a codicil he revoked all gifts to, another child D. The specific legatees and the testator's wife died in his lifetime.

HELD—(1) that the specific legacies fell into the particular residue; (2) that the shares of the wife and D. of that residue did not pass to the general residuary legatee, but went to the children, other than D., living at the period of distribution.

*M'KAY v. M'KAY*, [1900] 1 Ir. R. 213—V.-C.

## XVI ABSOLUTE GIFT.

**231. Executory Devise over of a Contingency which does not Happen—Presumption against Intestacy—Clear Words Required to Cut Down a Clear Gift.**—A testatrix bequeathed all her estate, except two specified sums, to her sister B., and added the words, "I would wish my money to be divided in equal shares, after my sister B.'s death, between my sister G. and my niece H., should they survive her." G. and H. predeceased B.

HELD by the Court of Appeal (Holmes, L.J., dissenting), reversing the decision of the Vice-Chancellor—that B. took an absolute interest, which, though liable to be divested if G. and H. survived her, became indefeasible on her surviving them.

*MONCK v. CROKER*, [1900] 1 Ir. R. 56—C. A.

**232. Gift Over—Prior Absolute Gift—Failure of Gift Over**—C. B., by her will, gave and devised all her real and personal estate to her sister E. B. absolutely, but if E. B. should not dispose of the said estate in her lifetime, the testatrix purported to dispose of it by a gift over in a certain manner. E. B. died a few months after the testatrix without having dealt with the estate.

HELD—on the true construction of the will, that E. B. took absolutely and that the gift over failed.

IN RE BEETLESTONE; *BEETLESTONE v. BEETLESTONE*, [1907] L. T. Jo. 367—Parker, J.

**233. Gift over if Legatee Disentitles himself prior to Actual Payment—Validity.**—A gift over of a share of residue if a legatee, to whom it is given absolutely subject to a life interest, disentitles himself to receive it (e.g., by bankruptcy) prior to actual payment, is valid.

*In re Chaston* ((1881) 18 Ch. D. 218; 29 W. R. 778) and *In re Wilkins* ((1881) 18 Ch. D. 634; 29 W. R. 911) followed.

*Martin v. Martin* ((1866) L. R. 2 Eq. 404; 14 W. R. 986) and *Bubb v. Padwick* ((1880) 13 Ch. D. 517; 28 W. R. 382) not followed.

In such a case the words prior to "actual payment" must be taken in their literal sense, and not as indicating the time when the life interest ends and the legacy becomes *de jure* "payable."

IN RE GOULDER; *GOULDER v. GOULDER*, [1905] 2 [Ch. 100, 74 L. J. Ch. 552; 53 W. R. 531; 93 L. T. 163—Eady, J.

**234 Gift over of what shall be Undisposed of at Death of Legatee—Costs.**—A testator gave all his real and personal estate to his wife "for her absolute use and benefit so that, during her lifetime for the purpose of her maintenance and support, she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my real and personal estate as she shall not have sold or disposed of as aforesaid, subject to the payment of

**Absolute Gift—Continued.**

my wife's funeral expenses, I give, devise, and bequeath the same "in trust for other persons.

HELD—that the widow took an absolute interest in the testator's estate, and that the gift over was void.

*Re Pounder; Williams v. Pounder* (56 L. T. 104) distinguished.

IN RE JONES; *RICHARDS v. JONES*, [1898] 1 Ch. 438, 67 L. J. Ch. 211; 78 L. T. 74; 46 W. R. 313—Byrne, J.

**235. Later Words Cutting Down to Life Interest—Administration with Will Annexed to Residuary Legatee.]**—A will in printed form with holograph additions left a testator's real and personal property to his widow "for absolute use and benefit," subject to payment of debts, "and after her death to come absolutely to H., to her and her heirs for ever." The widow was appointed executrix, but died without proving the will.

HELD—that the widow only took a life interest, and that H. was entitled to a grant of administration with the will annexed in preference to the widow's executor.

IN THE ESTATE OF LUPTON, [1905] P. 321; 74 [L. J. P. 162; 94 L. T. 100—Barnes, P.

**236. Legacy in Trust for A. for Life, and afterwards, if he shall have Two Children who Attain Twenty-one, as to a Moiety for his Executors or Administrators—Whether A. absolutely entitled to such Moiety on Two Children attaining that Age.]**—Where a testator bequeathed a legacy to trustees upon trust to pay the income to A. for life, and after his decease if A. should have three or more children who should attain twenty-one, for his executors or administrators; and if he should have two such children, as to a moiety for his executors or administrators, and as to the other moiety for the sister of A. and her children, it was

HELD—that A. having had two children he was absolutely entitled, on their attaining twenty-one years, to a moiety of the fund.

IN RE BOGLE; *BOGLE v. YORSTOUN*, (1898) 62 [J. P. 423, 78 L. T. 457—Stirling, J.

**237. Life Estate to Widow—After her death Executors to sell Portion to pay Legacies—Balance to be Disposed of according to Widow's Wishes.]**—A testator left to his widow during her life all his property, and directed that she was to receive all interest and profits from it, to be paid to her during her life by his executors. After her death the executors were to sell part of the property to pay certain legacies. Any balance remaining was to be disposed of according to the widow's wishes.

HELD—that the widow took the property absolutely, subject to the legacies payable after her death.

REID v. CARLETON, [1905] 1 Ir. R. 147—

[Barton, J.

**238. Repugnancy—Subsequent Gift over on Legatee Dying Childless and Intestate.]**—A testator left money absolutely to such of his children as should be living at his death, with a provision that children of a deceased child should take their parent's share. He then attempted to declare further trusts in case any such child of his should die childless and intestate.

HELD—that the gift over in case of intestacy was clearly repugnant, and could not be severed from the gift over in case of failure of children, which might by itself have been good; and that therefore the whole gift over failed.

IN RE DIXON; *DIXON v. CHARLESWORTH*, (1903) [72 L. J. Ch. 642; 51 W. R. 652; 83 L. T. 862—Eady, J.

**239. Subsequent Gift over after Death—Doctrine of Perpetuities—Splitting up Gift over — Cutting Down — Intestacy.]**—It is settled law that if you find an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin, as the case may be.

A testator by his will gave the residue of his personal property to trustees in trust to permit his wife to receive the income during her life for her separate use, and after her death upon trust to be divided into five equal portions, which he allotted in the manner following: To S. D. he gave two of such portions, to his brother W. one such portion, to his brother C. one such portion, and to the sons of his late brother Sampson the remaining one such portion. The will then proceeded as follows: "But it is my will, and mind that the two-fifth portions allotted to the said S. D. shall remain in trust, and that she shall be entitled to take only the interest and annual proceeds of the shares so bequeathed to her during her natural life, and for her sole and separate use independent of her present or any future husband, but without power of anticipation, and from and after her decease in trust for the benefit of any child or children born unto her, the said S. D., by her present or any future husband upon his or their attaining the age of twenty-five years, if a son or sons, or if a daughter or daughters, upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever of these events may first happen; but in default of any such issue, then and in that case the said two-fifths of my residuary estate, and any accumulation of interest thereon, shall go and be divided, subject to the appointment of my wife, among the children of my brother Charles; but if there be no such appointment, then to be equally divided among

**Absolute Gift—Continued.**

such children, payable if a son or sons upon their attaining the age of twenty-five years, and if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever event may first happen." The testator's widow made no appointment of the two-fifths allotted to S. D. S. D. died without ever having had any issue. The two-fifths of the testator's residuary estate allotted to her were represented by a sum of £12,399 10s., reduced 3 per cent. annuities. The appellants were the children of the testator's brother Charles, and in the events which had happened they claimed to be entitled to S. D.'s two-fifths of the residuary estate under the gift over stated above. They were also next of kin of the testator; and if they failed on their first point they contended that the share was undisposed of.

**HELD**—that the gift over of S. D.'s two-fifths was not severable into distinct gifts, viz., if "S. D. shall have no issue, or if her children die without having fulfilled the prescribed conditions for the vesting of the property in them," but was void for remoteness; and that the two-fifths allotted to S. D. on failure of the gift over did not go to the next of kin of the testator, but to S. D.'s representatives, as it was an absolute gift to S. D. in the first instance.

The decision of the Court of Appeal ([1901] 1 Ch. 482; 70 L. J. Ch. 114; 84 L. T. 163—C. A.) affirmed.

**HANCOCK v. WATSON**, [1902] A. C. 14; 71 L. J. Ch. 149; 50 W. R. 321; 85 L. T. 729—H. L. (E.).

**240. Superadded Words—Directions as to Investment for Certain Purposes—Repugnancy—Motive of Gift—Trust.**—A testator, after certain legacies, directed the balance of the purchase-money, realised by the sale of a portion of his freehold property, to be equally divided among his four sons (of whom J. was one). He then provided as follows: "I direct my executors to invest the share of my said son J. in the purchase of a good, substantial tenement house in a good neighbourhood (having first had the same examined by an architect), where my said son and family may enjoy apartments in same free of rent, and that he may have after the payment of rent (which must be small) and rates, some income towards support of himself and family. The assignment or conveyance of same must be made to my executors, who alone are legally to possess same and the disposition thereof."

**HELD**—that there was a gift of an absolute interest to J., and that there was no trust created in favour of J.'s children.

*Compare In re Bourke's Trusts*, [1891] 27 L. J. Ir. 573.

**DOWLING v. DOWLING**, [1902] 1 Ir. R. 79—M. R.

**XVII. CONDITIONS.****(a) Condition Precedent or Subsequent.**

**241. Bequest to be Claimed Within Three Years of Testator's Death.**—A testator left the residue of his property, real and personal, to his only son, provided he should claim same within three years from the testator's death; and in case his son should have died in his lifetime or without claiming the said bequest within three years it should lapse; and in the event of the bequest lapsing, or not being claimed within the said period, the testator left the residue to his brother, who should also be entitled to the rents and profits during the three years or such lesser period as should elapse before the son should claim. The son was abroad at the time of his father's death, and did not become aware thereof, or of the terms of the will, until after the expiration of the three years. He contended that the condition was a condition subsequent, and that he, being heir-at-law, did not forfeit the real estate by the non-performance, through ignorance, of the condition.

**HELD**—that the condition was a condition precedent, and that, accordingly, the gift over took effect.

Decision of V.-C. ([1904] 1 Ir. R. 29) affirmed.

**HORRIGAN v. HORRIGAN**, [1904] 1 Ir. R. 271—[C. A.]

**242. Devise of Freeholds for Life subject to Condition of Residence—Trust on Breach of Condition—Validity—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 51—Gift of Residue—Legacies and Bequests Free of Legacy Duty—Incidence of Duty.**—S. D., by her will, devised certain freeholds to trustees upon trust for T. S. for life, subject to a condition of actual and continuous residence, and in case T. S. should cease to reside there, then on trust to sell and invest the proceeds and pay one-third of the income thereof to T. S. for life, and the remaining two-thirds to other persons therein mentioned.

**HELD**—that the provision was such as to induce the tenant for life to abstain from exercising his powers under the Settled Land Act, 1882, within the meaning of sect. 51, and was void.

After giving certain legacies to males and females, the testatrix declared that all legacies, devises and bequests thereinbefore or thereafter given or made in favour of females should be free of legacy duty, the residue being given to three males and three females as tenants in common.

**HELD**—that the legacy duty in respect of the shares of the females in the residue were to be paid out of their respective shares.

**IN RE SARAH DALRYMPLE; BIRCHAM v. SPRINGFIELD**, (1901) 49 W. R. 627—Kekewich, J.

**243. Gift of Farm—Devisee Directed to Pay Legacy—Personal Liability—Order for Pay-**

**Conditions—Continued.**

*ment—Ord. 55, rr. 4, 11.]—A testator bequeathed a certain farm with the stock thereon to his son. There were certain conditions attached to the gift, and amongst them the following:—"It is my will that the said T. M'M., my son, do pay off all my debts and burial expenses. It is my will that my son, the said T. M'M., do give unto my daughter, C. M'M., the sum of £350, to be paid to her in three instalments." The son went into possession of the farm under the will:*

*HELD (on an originating summons, taken out by C. M'M. under Ord. 55, r. 4)—that he was personally liable for the payment of the legacy to her.*

*IN RE M'MAHON, DECEASED; M'MAHON v. [M'MAHON, [1901] 1 Ir. R. 489.*

**244. Gift of Chattels Subject to Marriage with Consent—Executor—Assent.]—A testator by his will bequeathed his farm and "all stock and chattels thereon" to his son Michael, "provided he marries with the consent of my executors hereinafter named, and gets a substantial fortune with his wife, not less than £250"; and directed that, "in the event of his marrying without such consent, Michael should get one shilling, and that the farm, stock and chattels should go to the testator's other son, Patrick. The testator bequeathed to his wife an annuity of £10 for life, charged on "the said farm and stock"; and to his daughters Alice and Johanna £100 each, and to his daughter Mary £50, "said legacies to be paid to each of my said daughters on the marriage of Michael and out of the fortune he receives with his wife, or upon the marriage of each of my said daughters with the consent of my executors." The testator appointed his son Patrick, and another, executors. The testator died in 1893. Michael continued to live on the farm and work it; he never bought stock, but sold stock and paid the rent. Patrick lived at some distance. He stated in evidence that he used to go from time to time and look after the farm, and see that the rent was paid; that he took no interest while his mother lived, and that she died about 1895. In December, 1897, Patrick obtained probate of the testator's will, leave being reserved to his co-executor to prove. In 1898 a judgment for £65 damages for breach of promise of marriage was obtained against Michael, and, in obedience to a writ of *fi. fa.* thereunder, the sheriff seized four cows, admittedly some of seven cattle which were on the farm when the testator died, and sold them for £31 5s. Patrick was present at the auction and made no objection; but next day objected, on the ground that they were his property. On interpleader issue, tried before Gibson, J., without a jury, his lordship held, as a matter of fact, that assent should be presumed from the acts and conduct of the parties, and reported that he regarded the claimant's**

evidence with distrust; and being of opinion that the condition was a subsequent one, gave judgment for the execution creditor.

*HELD, by the Queen's Bench Division (Sir P. O'Brien and Andrews, J., O'Brien, J., dissenting)—that the condition was a condition precedent, and that no interest in the cattle seized vested in Michael until marriage in accordance with the terms of the will, and that the money should be retained in Court until further order to allow of administration proceedings being taken and the rights of all parties protected; and,*

*HELD FURTHER—even assuming that the condition was a condition subsequent, and that Michael had a seizable interest in the cattle, the execution creditor could not be held to be entitled to the entirety of the proceeds of the sale, but only entitled to be put in the same position as Michael, and that, therefore, even so, the money should still be retained in Court in order that it might be ascertained whether, in the course of time, it would cease to be Michael's property.*

*HELD, on appeal to the Court of Appeal (affirming the judgment of the Divisional Court [1899] 2 Ir. R. 637)—that the condition was a condition precedent, but that the money should be paid out of Court to Patrick, the executor.*

*FITZGERALD v. RYAN, [1899] 2 Ir. R. 661—C. A.*

**245. "Wishing to Return and Settle in his Native Country"—Condition becoming Illusory—Dispensing with Performance—Discretion of Executors—Death of Executors—Trust Carried out by Court—Equality is Equity.]—A testator by his will left two farms to his son M., and by a codicil he provided that in case of his son R., who was then in New Zealand, wishing to return and settle in his native country, one of the farms should be given to him by the testator's executors at such time and coupled with such conditions as they might deem expedient. The farms were sold in a suit, under an order which reserved the question of the rights of the parties in respect of the proceeds, and realised £1,100 and £400 respectively. The executors were dead. R. had never returned, and was still in New Zealand.**

*HELD—that the proceeds of the two farms should be divided into two equal parts, and that R. was entitled to be paid one moiety without returning to this country.*

*CROSKERY v. RITCHIE, [1901] 1 Ir. R. 437—*

*[V.-C.]*

**246. Ultimate Devise in Default of Children of J.—Condition that Devisee should take and use the Testator's Surname—Lunacy and Death of Devisee during Life of J.—Death of J. Childless—Non-performance of Condition—"Act of God"—Excuse from Obligation of Performance of Condition.]—A testator devised his real estate to trustees upon trust for his daughter J. during her life, and**

*Conditions—Continued.*

after her death upon trust for her children as she should appoint; and, if she should have no child, the testator devised his real estate to his cousin, W. A. N., his heirs and assigns, on condition nevertheless that he took and used the testator's surname only. The testator's daughter J. having now reached her fifty-ninth year and being childless, the question was raised what, in the event, that would doubtless happen, of no child being born to her, was or would be the effect of the limitation, since the testator's cousin, W. A. N. had died without having taken or used the surname of the testator. W. A. N. had died in a lunatic asylum, having been actually incapacitated to perform the condition by the lunacy with which he was afflicted during the last eighteen months of his life.

HELD—that the condition was a condition subsequent, and not to be performed until J. died childless; that W. A. N. had been prevented from performing it by an act of God (viz., his own death), and therefore performance was excused, and the estate would vest in his personal representative, free from the condition, if and when J. died childless.

Decision of Joyce, J. ([1902] 2 Ch. 198, 71 L. J. Ch. 579; 86 L. T. 500; 18 T. L. R. 530), reversed.

IN RE GREENWOOD; GOODHART v. WOODHEAD, [1903] 1 Ch. 749; 72 L. J. Ch. 281; 51 W. R. 358; 88 L. T. 212; 19 T. L. R. 180—C. A.

(b) *Contingent Gift.*

247. *Condition Precedent—Legacy on Condition of entering into a "Calling"—Teacher in a Jesuit College.*—A testator by his will directed his trustees to hold his residuary estate in trust for his son J. until he should attain the age of twenty-five, and provided that in case he should live to attain that age, and should before then have obtained a university degree or should have become duly qualified to practise as a barrister, or solicitor, or doctor, &c., or should have obtained a commission in the army or navy, "or entered into any other profession, trade or calling with the approbation of my trustees," then the residuary estate should be held in trust for him for the remainder of his life. There was a gift over in the event of J. dying before attaining the age of twenty-five, or in the event of his attaining that age "without having obtained such degree, or qualification, or employment as aforesaid." J. attained the age of twenty-five. He had become a member of the Order of Jesuits, and was engaged in study preparing for the priesthood. As a Jesuit he became a prefect of Stoneyhurst College; and, under the control and direction of the Order, took part in the teaching and management of pupils in the college. In return for such services he was supported free of all charge. The trustees of the will approved the course adopted by J. He never obtained a university degree.

HELD—that J., having become a teacher in

a Jesuit college, had entered on a "calling" within the words of the will, and was entitled to the legacy.

GALWEY v. BARDEN, [1899] 1 Ir. R. 568—M. R.

248. *Contingent or Vested Gift—Condition as to Marriage.*—A testatrix by her will left certain pictures "as heirlooms to my grandson, Edward Panter-Downes, to go to him when he is married and has a house of his own, till then I wish my daughter, Mrs. J. F. Bally, to take charge of those she now has; and those which my daughter-in-law, Mrs. Herbert Panter has now, I wish her to keep for him also."

HELD—that the gift was not conditional on the grandson marrying, but was an absolute gift accompanied by a direction as to the time for handing over the pictures.

IN RE PANTER; PANTER-DOWNS v. BALLY, (1906) [22 T. L. R. 431—Eady, J.

249. *Contingent or Vested Gift—Gift to a Class who Attain Twenty-one—Gift over upon Death "Without Leaving any Children"—Only Child Dying under Twenty-one—Gift over Inoperative—Intestacy.*—E. gave all her estate in trust for her children who should attain twenty-one or (being daughters) should marry, with a gift over to relatives if she should die "without leaving any children surviving me." Her only child died in infancy after E.'s death.

HELD—(1) that the child did not take a vested interest at birth; and

(2) that "any children" could not be read as "any such children," and that consequently the gift over failed and there was an intestacy.

Walker v. Mower ((1852) 16 Beavan, 365) approved.

Kidman v. Kidman ((1871) 40 L. J. Ch. 359—observations of Malins, V.-C.) disapproved.

IN RE EDWARDS; JONES v. JONES, [1906] 1 Ch. [750, 75 L. J. Ch. 321; 54 W. R. 446; 94 L. T. 593—C. A.

250. *Gift to Children—Expectant or Presumptive Share—Powers of Advancement—Woman Past the Age of Child-bearing.*—By his will, dated in 1891, a testator, who died in 1892, declared that, should his sister A. (who was then a spinster about forty-seven years of age) marry and have children, then, when the youngest child of A. or of B. (another sister of the testator) should attain twenty-one, the whole of his estate should be divided equally between all the children of A. and B., and the issue of such children as therein mentioned, subject to a provision for certain annuities to A. and B.; and that, should A. die without being married, then, when the youngest child of B. had attained twenty-one, his whole estate should be divided equally between her children and their issue as therein mentioned, provision being made for an annuity to B. The testator further provided that his

**Conditions—Continued.**

trustees might, subject to the payment of the annuities, at their discretion raise any part of "the then expectant, presumptive, or then vested share, or fortune," of any child of B. not exceeding one-third, and apply the same for his or her support, education, advancement, or benefit. The testator then directed the surplus income of his estate to be accumulated. B. was married, and had four children, all of whom were still infants. In 1896 A. married. Her husband died in 1897. There was no issue of that marriage, and A. was now fifty-four years of age.

**HELD**—that the Court was not at liberty to insert in the will a clause to meet the event which the testator had omitted to provide for, viz., of A. marrying and having no children, and that, therefore, in that event, there was no disposition of the testator's estate beyond the annuities.

Decision of Kekewich, J., affirmed.

**HELD, ALSO**—that the Court ought not to deprive one person of the chance of becoming entitled to property if another should die childless or have a child; and that, therefore, the discretion of the trustees under the advancement clause of the will could be exercised during the lifetime of A. Order of Kekewich, J., varied.

**IN RE HOCKING; MITCHELL v. LOE**, [1898] 1 Ch. [350, 67 L. J. Ch. 166; 78 L. T. 1; 14 T. L. R. 20, 46 W. R. 312—C. A.

**251. Intermediate Income—Mixed Fund—Accumulation.**—A testator directed his trustees for sale and conversion to stand possessed of the residuary trust funds, and also of the appropriated funds, in trust for all the children of his sister who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares. And in the event of her not having any child or children who should attain a vested interest in the remainder of the residuary trust funds, he directed the trustees to hold the same funds for other persons. There was no express disposition of the intermediate income. His sister, a married woman, was forty-six years old, and she never had a child.

**HELD**—that the income of the residue should be accumulated for the benefit of those who might be ultimately entitled for twenty-one years, or until the death of the married woman without a child.

*Green v. Tribe* ((1878) 47 L. J. Ch. 783; 27 W. R. 39; 38 L. T. 914—Fry, J.) not followed.

**IN RE TAYLOR; SMART v. TAYLOR**, [1901] 2 Ch. [134, 70 L. J. Ch. 535; 49 W. R. 615; 84 L. T. 758—Cozens-Hardy, J.

**252. Intermediate Income—Security by Residuary Legatee**—Where a contingent legacy (as distinguished from one payable *in futuro*) is given to a person without interest until the happening of the contingency, the

amount of the legacy and any interest earned by it remain a portion of the testator's estate.

The executor may set aside and invest a reasonable sum to provide for such a legacy, and distribute the residue of the estate; but he is not entitled to appropriate to it a specific sum or investment so as to make the legatee a gainer or a loser by fluctuations in the value of the security. The legatee can insist on receiving the exact amount on the happening of the contingency.

Decision of Kekewich, J. (72 L. J. Ch. 74; 51 W. R. 107; 87 L. T. 560) reversed.

*King v. Malcott* ((1853) 22 L. J. Ch. 157; 9 Hare, 692) applied.

**IN RE HALL; FOSTER v. METCALFE**, [1903] 2 Ch. [226; 72 L. J. Ch. 554; 51 W. R. 107; 88 L. T. 619—C. A.

**253. Intermediate Income—Gift Contingent on Marriage with a Specified Person.**—A testator left a farm to his widow for life and after her death to his nephew W., provided he married M. F., but not otherwise, and he appointed his wife residuary legatee. After the widow's death M. F. refused to marry W.

**HELD**—(1) that the marriage was a condition precedent to W. taking the farm, but (2) that as, in the event of the marriage taking place, W. would be entitled as from the widow's death, the rents and profits must be accumulated until the marriage took place or became impossible by the death either of W. or M. F.

*KIERSEY v. FLAVAHAN*, [1905] 1 Ir. R. 45—M. R.

**254. Part Happening of Contingency.**—By a will certain property was left to H. S. upon certain contingencies which happened, and by a codicil it was declared that the property should pass to W. S. if H. S. "should get married and die leaving no legitimate children." H. S. died unmarried, whereupon W. S. sought a declaration that the gift over in his favour had taken effect.

**HELD**—that where there was a divesting clause upon a contingency it could not take effect unless the exact contingency happened; and that the divesting clause had no effect on the estate of H. S. which remained absolute.

**IN RE SEARLE; SEARLE v. SEARLE**, (1905) W. N. 86—Joyce, J.

**255. Settlement of Shares—Life Interest only in Share—Death of Legatee in Testatrix's Lifetime.**—A testatrix bequeathed "her residuary estate" to her trustees, "in trust for my said three daughters, in equal shares," and directed her trustees to retain the share of each daughter, and stand possessed of it upon trust to pay the income only to each daughter for life, to her husband for life, and then to hold the capital for the benefit of her children, in the usual way, with an accruer in default of any child of a daughter to take a vested interest.

*Conditions—Continued.*

One of the daughters died in the lifetime of the testatrix, without issue, leaving her husband surviving her.

**HELD**—that the testatrix intended that each daughter should take a life interest, and a life interest only, in one-third of her residuary estate, and that the death of the daughter in the lifetime of the mother had no other effect than to accelerate the life interest of the surviving husband, and he was, therefore, entitled to receive the income of a third for his life, and subject to this it would accrue for the benefit of the other daughters, their husbands and children upon the trust declared of the original shares.

*In re Pinhorne* ([1894] 2 Ch. 276; 63 L. J. [Ch. 607, 42 W. R. 438; 70 L. T. 901, followed.

*In re Roberts* ((1885) 30 Ch. D. 234; 53 L. T. 432—C. A.) distinguished.

*IN RE POWELL; CAMPBELL v. CAMPBELL*, [1900] 2 [Ch. 525; 69 L. J. Ch. 788; 83 L. T. 24—Cozens-Hardy, J.

**256. Successive Limitations—Gift Conditional or Subject to Prior Limitations.**—A testator devised an estate to J. for life, and after his decease “in the event of his having a son or sons, or any male issue shall be born in due time after his decease,” who should live to attain twenty-one, “to such son or issue male on his attaining the age of twenty-one years, but in case he shall die under that age,” then over. J. died without ever having had issue.

**HELD**—that the principle recognised in *Maddison v. Chapman* ((1858) 4 K. & J. 709) and *Edgeworth v. Edgeworth* ((1869) L. R. 4 H. L. 35) applied, and that the gift over took effect.

*IN RE SANFORTH'S WILL*, [1901] W. N. 152; 36 [L. J. N. C. 378—Byrne, J.

**257. Vesting—Executory Limitation—Contingency—Devise to A. “when she shall Attain the Age of 25.”**—In the absence of any controlling circumstances, or context, a devise to A. “when she shall attain the age of 25 years” confers upon A. an estate in fee simple, contingent upon her attaining that age, and not a vested estate liable to be divested by her death under 25. Until, therefore, A. attained the age of 25, the property in question would belong to the residuary devisee, subject to an executory limitation over in favour of A.

*IN RE FRANCIS; FRANCIS v. FRANCIS*, [1905] 2 [Ch. 295; 74 L. J. Ch. 487; 53 W. R. 571; 93 L. T. 132—Eady, J.

(c) **Forfeiture.**

**258. “Alienating or Incumbering”—Tenant for Life presenting Bankruptcy Petition—Immediate Adjudication.**—A will gave a life interest in certain funds to F., with a proviso that in the event of his alienating or incumbering, or agreeing to alienate or

incumber his share, such life interest should be forfeited.

F. filed a petition in bankruptcy and was adjudicated a bankrupt thereon upon the same day.

**HELD**—that he had thereby forfeited his life interest.

*In re Amherst's Trusts* ((1872) L. R. 13 Eq. 464; 41 L. J. Ch. 222) followed.

*IN RE COTGRAVE; MYNORS v. COTGRAVE*, [1903] [2 Ch. 705; 72 L. J. Ch. 777; 89 L. T. 433; 52 W. R. 411; 10 Manson, 377—Kekewich, J.

**259. Alienation—Forfeiture of Life Interest—Charge given in Forgetfulness—Cancelled before Testator's Estate Finally Administered.**—H. was entitled to a life interest in a share of the residue of his father's estate subject to a proviso that he should not have power to dispose of his interest by way of anticipation, and that in the event of his becoming bankrupt, or doing anything whereby his share or any part thereof should become payable to or vested in some other person, it should go over to his children.

Before the testator's estate was wound up, or any legacies became payable, H. borrowed two small sums and charged his interest in the estate with the repayment thereof. Such charges were cancelled shortly afterwards, upon H. being reminded of the terms of the proviso.

**HELD**—that a forfeiture had been incurred, although the mortgagees released their charges before distribution of the estate.

*IN RE BAKER; BAKER v. BAKER*, [1904] 1 Ch. [157, 73 L. J. Ch. 172; 52 W. R. 213; 89 L. T. 742—Buckley, J.

**260. “Assignment” — Administration of Testator's Estate—Receiver Appointed—Request to Receiver to deduct and pay to Creditor a small Sum out of Moneys due to Legatee upon Receiver's Accounts being passed—Not an Assignment “by way of anticipation.”**—It is only an assignment “by way of anticipation” that works a forfeiture under a clause in a will forbidding a life tenant to assign his interest.

*In re Sampson* ([1896] 1 Ch. 630; 65 L. J. Ch. 406, 44 W. R. 557; 74 L. T. 246—Stirling, J.) and *In re Greenwood* ([1901] 1 Ch. 887; 70 L. J. Ch. 326; 49 W. R. 461; 84 L. T. 118—Farwell, J., No. 262, *infra*) followed.

G. was entitled under a will to a share in the income of trust funds during his life or until he should assign, or attempt to assign it. The testator's estate was administered by the Court and a receiver appointed. At a time when the receiver had in hand a considerable sum due to G. as his share of income, G. by letter requested him to deduct and pay to a creditor £5 out of what might be due to G. on the passing of the receiver's accounts in two months' time.

**HELD**—that such a letter addressed to a trustee would not have caused a forfeiture,



**Conditions—Continued.**

and that G.<sup>a</sup> was still entitled to receive his share of the income.

Decision of Joyce, J. (91 L. T. 187), affirmed.  
DURRAN v. DURRAN, (1905) 92 L. T. 819—C. A.

**261. Forfeiture Clause—Void for Uncertainty.**—A testator by his will gave a life interest in certain property to his daughter, and in a codicil he added a condition that if she should in any way associate, correspond or visit with any of his present wife's nephews or nieces, or their husbands or wives respectively, or if she should to the knowledge of his trustees entertain or exercise hospitality to them, or in any way contribute to the maintenance of any house in which they or any of them resided, or were or should be at any time entertained or received as visitors or guests, then and in such case all the estate and interest of his daughter under his will should be forfeited and cease and determine.

HELD—that the condition was void for uncertainty, as the daughter could not predicate with certainty what she might or might not do.

IN RE JEFFREYS; JEFFREYS v. JEFFREYS, (1901) 84 [L. T. 417; 17 T. L. R. 356—Farwell, J.

**262. Gift of Income to Person for Life** “until any other Event happens which Deprives him of the Right to receive the same or any part thereof”—*Garnishee Order on Income accrued Due*—R. S. C. 1883, Ord. 45, r. 2.]—A testatrix devised and bequeathed her real and personal estate to trustees for sale and conversion, and then upon trust to pay the annual income to her son during his life “or until he attempts to alien, charge or anticipate . . . or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof,” in any of which cases it was given over. A creditor obtained an order absolute garnishing the income accrued due under the trust and then actually in the hands of the trustees.

HELD—that the garnishee order absolute did not operate as a forfeiture, as the garnishee order proceeded on the footing that the trustee was not only a trustee, but also by operation of the true construction of the will and the rules of law and equity, a debtor as well; and that it was not competent to the testatrix to attempt to deprive her son, after the date at which he was entitled to give a receipt, of the income by reason of any matter subsequent to the day on which he was entitled to give a discharge for it.

Bates v. Bates ((1884) W. N. 129) dissented from.

In re Sampson ([1896] 1 Ch. 630; 65 L. J. Ch. 406; 44 W. R. 557; 74 L. T. 246)—and Sutton, Carden & Co. v. Goodrich ((1899) 80 L. T. 765; 15 T. L. R. 397, *infra*) followed.

IN RE GREENWOOD; SUTCLIFFE v. GLEDHILL, [1901] 1 Ch. 887; 70 L. J. Ch. 326; 49 W. R. 451; 84 L. T. 118—Farwell, J.

**263. Shall do or suffer Anything whereby the Income or any Part thereof shall become Vested in any other Person—Garnishee Order on Income accrued due.**—A tenant for life was entitled to certain income under a will “until he shall become bankrupt, or shall assign, charge, or otherwise dispose of the said income or any part thereof, or shall do or suffer anything whereby the said income, if payable to him absolutely, or any part thereof, shall become vested in any other person,” then the trustees of the will were given discretionary power as to the application of the income. The plaintiffs obtained judgment against the tenant for life, and served a garnishee order *nisi* upon the trustees of the will attaching a dividend in their hands which had accrued due some days previously. The trustees contended that they were not indebted to the tenant for life, because the effect of the garnishee order was to terminate his interest in the income under the above clause in the will.

HELD—that the clause upon its true construction was against disposing of the income by way of anticipation, and did not apply where the income had accrued due to and vested in the tenant for life, and that, therefore, the trustees were indebted to the tenant for life.

SUTTON, CARDEN & Co. v. GOODRICH, (1899) 80 [L. T. 765; 15 T. L. R. 397—Kennedy, J.

**(d) Heirlooms.**

**264. Chattels Settled to Follow the Devolution of a Dignity—“To be Worn and Used by the Wife”—Absolute Vesting.**—Lord Gerard bequeathed certain jewellery to the trustees of his will upon trust to allow them to accompany the barony “so far as the rules of law and equity will permit,” and to be worn and used by the wife for the time being of his said son Frederick John Gerard, “or other the person who at my death may succeed to the said barony.” The testator died on July 30, 1902. His son succeeded to the barony, and attained the age of 21 in November, 1906.

HELD—that Lord Gerard was entitled to the heirlooms absolutely subject to a trust to permit them to be worn by any wife of his during his life.

IN RE GERARD; GOSSELIN v. GERARD, [1906] [W. N. 21—Kekewich, J.

**265. Chattels Settled to Follow the Devolution of a Dignity—“To Descend as Heirlooms so far as the Rules of Law and Equity will Permit”—Absence of Clause of Defeasance—Period of Absolute Vesting.**—Where chattels are settled to follow the devolution of a dignity, and to descend as heirlooms so far as the rules of law and equity will permit, and in the absence of any clause of defeasance in the instrument of settlement,

*Conditions—Continued.*

they will vest absolutely in the first person upon whom the dignity devolves, upon the decease of any person or persons to whom limited interests in the chattels are expressly given.

A testatrix bequeathed her diamonds, two miniatures and a ring, to her son, the third "Viscount Hill, until he shall die, and after his death to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill, or any other title or dignity which may be granted to or assumed by any person for the time being entitled to the said title and dignity of Viscount Hill, severally and successively as they shall in turn succeed to such title and dignity as aforesaid, my intention being that the said diamonds and miniatures and ring shall descend as heirlooms as far as the rules of law and equity will permit." The third Viscount Hill survived the testatrix and died.

HELD—that upon the decease of the third Viscount Hill the chattels passed absolutely to the fourth Viscount.

*Tollemache v. Earl of Coventry* ((1834) 2 Cl. & F. 611; 8 Bligh (N.S.) 547; 37 R. R. 260) followed.

Decision of Eady, J. ([1902] 1 Ch. 537; 71 L. J. Ch. 222; 86 L. T. 146; 18 T. L. R. 267), affirmed.

IN RE HILL; *HILL v. HILL*, [1902] 1 Ch. 807; 71 [L. J. Ch. 417; 50 W. R. 434; 86 L. T. 336; 18 T. L. R. 487—C. A.]

266. *Vesting—Estates Entailed—Attempt to Settle Personalty in Perpetuity—"Person for the time being in Actual Possession," &c.—"Person for the Time being Entitled to the Possession," &c.—First Tenant in Tail Predeceasing Life Tenant.*—A gift of personalty to the persons for the time being entitled to entailed estates, so far as the rules of law and equity permit, vests absolutely in the first tenant in tail as soon as he is born. A testator left estates to M. for life, and then to her first and other sons successively in tail. He also bequeathed (a) certain chattels to trustees upon trust to permit them to be enjoyed by the person for the time being "in the actual possession" or entitled to the rents and profits of the entailed estates, and (b) certain funds to trustees to pay the income to the person for the time being "entitled to the possession of," etc.

The first tenant in tail died before his mother, and the question arose whether the chattels and funds above mentioned had, or had not, become absolutely vested in him.

HELD—that the funds had so vested: there was nothing in the will to show any intention to restrict the rule of law that a gift of personalty to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely in the first tenant in tail at birth, whether he

lives to succeed or not; but that the words "in the actual possession" prevented the vesting of the chattels.

*In re Angerstein* ([1895] 2 Ch. 883; 65 L. J. Ch. 57; 44 W. R. 152; 83 L. T. 500), and *Foley v. Burnell* ((1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319) followed.

IN RE FOTHERGILL'S ESTATE; *PRICE-FOTHERGILL v. PRICE*, [1903] 1 Ch. 149; 72 L. J. Ch. 164; 51 W. R. 203; 87 L. T. 677—Eady, J.

*(e) Name and Arms Clauses*

267. *"Lawfully Assume"—Impossible Condition.*—A "lawful" assumption of arms means something more than an ordinary assumption; to comply with a condition as to "lawfully assuming" arms a person must obtain a proper grant of arms by Royal Licence, or from the College of Arms. Therefore, if according to the rules of the college such a grant cannot be obtained, e.g., because the arms in question are borne by another family, compliance with the condition is impossible.

*Semble*, the possibility of obtaining a private Act of Parliament may be disregarded.

IN RE CROXON; *CROXON v. FERRERS*, [1904] 1 Ch. 252, 73 L. J. Ch. 170; 52 W. R. 343; 89 L. T. 733—Kekewich, J.

268. *Married Daughter "to Retain" Name of Testator—Forfeiture Clause—Validity.*—By his will G. directed that in the event of any of his daughters marrying, such daughter should retain the name of G. as an addition to the surname of her husband, and in the event of her failing to do so she should forfeit all benefits under the will.

HELD—that, without further directions as to the manner in which the surname should be used, the forfeiture clause was void for uncertainty.

IN RE GASSIOT, (1907) 51 Sol. Jo. 570—  
[Warrington, J.]

269. *Use of Surname—"Alone or Together with"—Order of Names.*—A devisee was directed to assume and use a prescribed surname "alone or together with" his own family name.

HELD—that the use by the devisee of the prescribed surname before his own family name was a sufficient compliance with the direction.

*D'Eyncourt v. Gregory* ((1875) 1 Ch. D. 441; 45 L. J. Ch. 205; 24 W. R. 424), distinguished.

IN RE EVERSLEY (LORD); *MILDMAX v. MILDMAX*, [1900] 1 Ch. 96; 69 L. J. Ch. 14; 48 W. R. 249; 81 L. T. 600; 16 T. L. R. 6—Byrne, J.

270. *Using Ordinary Name in Letters and Visiting Cards—Continued Use.*—By her will the testatrix, after disposing of her real estate, required that every female who, or whose husband in her right, should under the will become entitled in possession to the hereditaments "shall within one year next

**Conditions—Continued.**

after such person shall or become entitled . . . . take upon . . . herself and use in all deeds and writings to which . . . she shall be a party or which . . . she shall sign, and upon all other occasions, the surnames of Erle and Drax either alone or in addition to and after . . . her original surname, and also take, use, and bear the arms of Erle and Drax either alone or quartered with . . . her original arms, and shall within the time aforesaid apply for and endeavour to obtain a licence from the Crown or take such other means as may be requisite to enable" her to do so. There was a forfeiture clause in case she should refuse or neglect to comply with the above provisions.

**HELD**—that it was not sufficient compliance with the above provision to take the name and arms for the first year from the date of the person becoming entitled, and not to use them subsequently, but that she must take and thereafter use them.

**HELD ALSO**—that the person becoming entitled, who was the widow of a peer and who had taken the name and arms, need not use the full names in her ordinary correspondence or on her visiting cards, it being sufficient for her to sign or describe herself by her Christian name followed by her title in such cases.

To sign family letters with a Christian name alone is no breach of such a condition; the obligation is only imposed where a surname is ordinarily used.

**IN RE DRAX; BARONESS DUNSANY v. SAWBRIDGE**, [(1906) 75 L. J. Ch. 317; 54 W. R. 418; 94 L. T. 611; 22 T. L. R. 343—Eady, J.]

**(f) Restraint of Marriage.**

**271. Condition as to Residence—Void Condition in Restraint of Marriage—Residence until Marriage—What Constitutes Residence.**—W. left a house to trustees upon trust to permit his niece C. to occupy the same rent free "subject to the proviso and condition hereinafter mentioned and to her residing upon the said premises during her lifetime." In a later part of the will he directed and declared that the use and occupation of the house were given upon the express condition that she remained single and unmarried; in the event of her marrying the gift was to be forfeited and to fall into residue.

C. resided in the house as a spinster and until she had been married 10 years; she and her husband then moved into another residence, and she let to a weekly tenant all the rooms in the house except one; in this room she kept some clothes, books, a bed and other furniture, and she had keys of the outer door and of the room door; she went to the room two or three times a week and sometimes slept there.

**HELD**—(1) that she was not fulfilling the condition as to "residing;" but (2) that,

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reading together the condition as to residence, and the void condition in restraint of marriage, the Court would construe the words "residing during her lifetime" as equivalent to residing as a spinster, and that therefore there was no forfeiture.

**IN RE WRIGHT; MORT v. ISSORT**, [1907] 1 Ch. [231; 76 L. J. Ch. 89; 95 L. T. 697—

Kekewich, J.]

**272. Gift over Subject to Money Payment—Accrual of Right of Action on Tender of Money—Recovery of Lands.**—A testator, who died in 1863, devised freeholds to his wife B. and his daughter J., to hold jointly during B.'s life, and after B.'s death to J. in fee, "provided always, that if my said wife (B.) should ever get married, she shall forfeit and lose all claim and title to any of my property on receiving the sum of £50." Testator's widow B. was married again in 1874. J. came of age in 1879, and died intestate and unmarried in 1897. In 1898 the plaintiff (the heir-at-law both of J. and of the testator) tendered £50 to B., and demanded possession of the land; and on B.'s refusal brought an action of ejectment against her and her husband. The action was tried before a judge and jury, and, it not being suggested that there was any question of fact proper to be left to the jury, the judge directed a verdict for the defendants, on the ground that the election to take advantage of the forfeiture should have been exercised within a reasonable time. On new trial motion,

**HELD**—that the right of action only accrued in 1898, upon the tender of the £50, and that (on lodging this amount in Court) the plaintiff was entitled to recover possession of the lands.

**HELD FURTHER** (O'Brien, J., dissenting)—that, inasmuch as the action was in substance an action to determine a question of difficulty on the construction of the will of a person through whom both parties claimed, which raised the substantial question in the case—a question for the judge at the trial, both sides admitting that there was no question for the jury—both parties should bear their own costs of the trial and argument.

**CONNOLLY v. LEAHY**, [1899] 2 Ir. R. 344—Q. B.

**273. Marriage with Consent.**—A testator by his will bequeathed out of the income arising from his personal estate to his son "during his life an annuity of £2,000, and if he shall marry or shall have married either in my lifetime or after my death an additional annuity of £1,000"; and by a codicil to his will the testator directed that the annuity of £1,000 should be payable only if his son should have married in the testator's lifetime with his consent in writing, or after his death with the previous consent in writing, of the trustees for the time being of his said will.

**HELD**—that the condition was operative, as

*Conditions—Continued.*

it was not a declaration of the testator in *terrorem*.

*Gillet v. Wray* ((1715) 1 P. Wms.) followed; and *Reynish v. Martin* ((1746), 3 Atk. 330) distinguished.

IN RE NOURSE; *HAMPTON v. NOURSE*, [1899] 1 [Ch. 63; 68 L. J. Ch. 15; 47 W. R. 116; 79 L. T. 376—Stirling, J.

274. *Marriage with Consent of Specified Person—Power to Withdraw a Consent once Given.*—Where a person *in loco parentis* has given his consent to a marriage, he cannot capriciously and without strong reasons withdraw such consent; but he may do so, if facts come to his knowledge which, if previously known to him, would have caused him to refuse his consent in the first instance.

*Merry v. Ryves* ((1757) 1 Eden, 1), and *Dashwood v. Lord Bulkeley* ((1804) 10 Ves. 230), applied.

A., by a codicil dated 1891, declared that if his daughter should marry without her mother's consent, she should only take a life interest in property which he had bequeathed to her absolutely. In May, 1893, the daughter became engaged with the approval of both parents, the marriage to be deferred for two years. In February, 1895, A. died; and, at his widow's desire, the wedding was postponed till August. Subsequently disputes as to the form of the marriage settlement arose between the widow and the daughter, and the former purported to withdraw her consent; whereupon her daughter left her and was married.

HELD—that the consent was unjustifiably withdrawn, and that the daughter was absolutely entitled to her legacy.

IN RE BROWN; *INGALL v. BROWN*, [1904] 1 Ch. [120; 73 L. J. Ch. 130; 52 W. R. 173; 90 L. T. 220—Byrne, J.

275. *Marriage after Twenty-one without Consent—Validity of Condition.*—A condition subsequent in a will or settlement providing for the forfeiture of a previous gift given thereby to a daughter for life with remainder to her children in the event of the daughter marrying at any time without certain consents is a valid condition, provided there is a gift over to take effect upon such forfeiture; the marriage of the daughter without consent destroys the interests of her children.

Decision of Warrington, J. (1904) 52 W. R. 653; 20 T. L. R. 538—affirmed.

IN RE WHITING'S SETTLEMENT; *WHITING v. DE RUTZEN*, (1904) 21 T. L. R. 83; 91 L. T. 821; 74 L. J. Ch. 207; 53 W. R. 293—C. A.

276. *Monthly Payments to Widow out of a certain Sum—“So long as she remains Unmarried”—Act of Marriage necessary to Determine Interest—Title to Balance on Death of Widow.*—A testator by his will

desired his executor and trustee to set aside £200 and thereout pay to his wife the sum of £3 monthly so long as she remained unmarried or until the said sum of £200 became exhausted, the said payment to cease on his said wife marrying again. The wife survived the testator and died without having married again, and the sum of £200 not being exhausted. An originating summons was issued to determine whether the plaintiff, her executrix, was entitled to the balance of the £200.

HELD—that her interest was not determined by her death, and that the plaintiff was entitled to the balance of the £200.

*Rishton v. Cobb* ((1839) 5 My. & Cr. 145; 9 L. J. (N.S.) Ch. 110; 43 R. R. 256) followed.

IN RE HOWARD; *TAYLOR v. HOWARD*, [1901] 1 [Ch. 412; 70 L. J. Ch. 317; 49 W. R. 480; 84 L. T. 296—Farwell, J.

277. *Provision for Widow Re-marrying—“Maintain her in Comfort and Affluence.”*—Testator, a land agent, had a private income of about £150 per annum. He had also a certain income from settled funds, and was tenant *pur autre vie* of a house and some land. His estate was sworn at £3,400.

He left to his wife a life interest in all his property with a gift over to his children in case she should marry “a person of ample fortune to maintain her in comfort and affluence.”

She subsequently married a rich man who settled £10,000 upon her.

HELD—that the defeasance clause was not too vague; and that, having regard to the testator's position in life, the widow's life interest was determined.

*Clavering v. Ellison* ((1859) 7 H. L. C. 707) applied.

IN RE MOORE; *LEWIS v. MOORE*, (1907) 96 L. T. [44—Kekewich, J.

278. *Words of Futurity—Marriage before Testator's Death—Whether Clause applicable.*—*Primâ facie* words of futurity in a will apply only to events happening after the testator's death.

A testator by his will gave legacies to his children, and declared that “if any son or daughter shall” alienate his or her interest or become bankrupt, or “shall contract any marriage forbidden by me,” then his or her interest “shall cease and determine”; and further that “the marriages forbidden by me are in the case of a son or daughter marrying with a person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter, marriage contracted without the previous consent of the trustees or trustee for the time being of this my will.”

Subsequently, but in testator's lifetime, a daughter married her first cousin.

HELD—that, so far as the forfeiture clause in this particular will related to marriages, it only referred to events occurring after the testator's death.

*Conditions—Continued.*

Decision of C. A. *sub nom.* (In *re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431; 73 L. J. Ch. 291; 52 W. R. 467; 90 L. T. 339)—affirmed.

CHAPMAN AND OTHERS *v.* PERKINS, [1905] A. C. 106; 74 L. J. Ch. 331; 53 W. R. 485; 92 L. T. 372—H. L. (E.).

## XVIII. VESTING.

279. *Attempt to Protect Son's Interest—To Vest at 35—Discretionary Trust for Maintenance Out of Income.*—W. gave his whole estate to trustees upon trust, as to a third share, to pay the income or such part thereof as the trustees might think fit to his son A. for his advancement, preferment or benefit by equal weekly instalments until he should attain 35, and then to pay him the corpus.

When the testator died, A. was aged 25.

HELD—that A. took a vested interest and could claim payment of the corpus at once.

In *re Parker* ((1880) 16 Ch. D. 44) followed.

IN *RE WILLIAMS*; *WILLIAMS v. WILLIAMS*, [1907] 1 Ch. 180; 76 L. J. Ch. 41; 95 L. T. 759—Neville, J.

280. *Contingent Gift to a Class—"Issue."*—A father bequeathed to his daughter the life-rent of £12,000 and directed his trustees "on the death of my daughter, leaving lawful issue," to divide the capital between her "issue."

HELD—that the fee of the £12,000 vested in the children of the life-rentrix as a class on the opening of the life-rent, and was payable to them, or the representatives of those who pre-deceased the life-rentrix, subject to the contingency that the life-rentrix was survived by lawful issue.

HICKLING *v.* FAIR, [1899] A. C. 15; 68 L. J. P. C. 12; 1 F. 7; 35 S. L. R. 975—H. L. (Sc.)—(Lord Watson and Lord Herschell dissenting).

281. *Curtesy—Bequest to Married Daughter Dead at Date of Testator's Death.*—Where under a devise to a testator's married daughter, who predeceases him intestate, she is deemed to have become absolutely entitled under sect. 33 of the Wills Act, 1837, her husband takes an estate by the curtesy.

IN *RE DERBYSHIRE*; *WEBB v. DERBYSHIRE*, [1906] 1 Ch. 135; 75 L. J. Ch. 95; 54 W. R. 135; 94 L. T. 138—Buckley, J.

282. *Gift in Remainder—Substitutionary Gift—"Dying Before Becoming Entitled"—Entitled in Possession—Entitled in Interest.*—A testatrix by her will, dated July 5th, 1889, devised all her real and bequeathed all her personal estate to trustees in trust for her son Robert for his life, and on his decease she specifically devised various freehold properties to her respective grandchildren, the children of Robert, and then she continued as follows: "If there shall be any

residue of my trust estate not disposed of, I direct my trustees to pay the income thereof to my said son's wife for her life, and after her death to realise such residue and divide the net proceeds amongst all the children of my said son. And in the event of either of my grandchildren dying before becoming entitled to any share of my estate hereinbefore in any way disposed of, I direct that the child or children of such deceased grandchild shall take the parent's share, or, if there shall be no such child or children, then that such share or devise or bequest hereinbefore contained shall vest equally in all my surviving grandchildren." The testatrix died in 1891, leaving her son Robert and eight grandchildren, his sons and daughters, surviving.

HELD—that there was no gift to the grandchildren until after the death of Robert, that the word "entitled" meant "entitled in possession," and that the substitutionary clause might operate at any time during the subsistence of the preceding life estate, and that the devises to the grandchildren were not indefeasibly vested, but were subject to be defeated or destroyed so long as the prior tenancy for life existed.

Decision of Joyce, J. ([1902] 2 Ch. 875; 71 L. J. Ch. 815; 51 W. R. 31; 87 L. T. 262, affirmed.

IN *RE MAUNDER*; *MAUNDER v. MAUNDER*, [1903] 1 Ch. 451; 72 L. J. Ch. 367; 51 W. R. 549; 88 L. T. 280—C. A.

283. *Gift to Children Contingent on attaining 21—Income given for Maintenance and Support of Children during their Minority—Interest Vested and not Contingent.*—A testator by his will directed his trustees to pay, transfer and divide his residuary real and personal property unto and equally between his two children, E. G. and J. T. G., on their severally attaining the age of twenty-one years, their heirs, executors, administrators and assigns, as tenants in common, the income during the respective minorities of his two children to be applied in or towards their maintenance and support. J. T. G. survived the testator and died under the age of twenty-one years, and without having married.

HELD—that the intention of the testator was that the shares of the two children should be kept separate, each being maintained out of the income of his own share, and not that they should be jointly supported out of the income of the whole fund; and that therefore there was nothing to prevent the application of the rule in *Hanson v. Graham*, and that J. T. G. took a vested interest.

*Hanson v. Graham* ((1801) 6 Ves. 239; 5 R. R. 277) followed.

Decision of Eady, J. ([1902] 1 Ch. 945; 71 L. J. Ch. 680; 87 L. T. 63), reversed.

IN *RE GOSSLING*; *GOSSLING v. ELCOCK*, [1903] 1 Ch. 448; 72 L. J. Ch. 433; 88 L. T. 279—C. A.

*Vesting—Continued.*

**284. Gift to Children upon Surviving their Parents—Presumption in Favour of Vesting.**—A testator left property to trustees, upon trust for his son G. for life or until he should become bankrupt, and after his death or bankruptcy to E., the wife of G., for life, and directed that in case there should be any child or children of G. living at the death of G. and E., or at the other period thereafter contemplated, then, from and immediately after the death of the survivor of G. and E., or from and after the death of E. and the bankruptcy of G., the said share should be held in trust for all and every, or such one or more exclusively, of the others or other of the children or child of G. by his then or any future wife, with such provisions for their respective maintenance, education, and advancement, at such ages, days, and times, and if more than one in such shares as G. should by deed or will appoint, and in default of such appointment in trust for all and every such the children and child of G. who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or day of marriage, and if more than one in equal shares, and in case there should be only one such child, then the whole for such one or only child; provided that after the death of the survivor of G. and E., or the death of E. and the bankruptcy of G. and until the whole of the trust funds should become vested in such child or children, his trustees should apply a competent part of the income of the trust funds for the benefit of the children or child for the time being entitled thereto in expectancy towards his or her maintenance and education; and in default of such child or children of G., upon other trusts declared by testator's will. G. had one son, J., who attained age, married, and predeceased G., leaving children. E. predeceased G., who died without having become bankrupt.

HELD—that J. took an absolute interest in the property on attaining age, although he did not survive G.

*Emperor v. Rolfe*, ((1818) 1 Ves. Sen. 208) applied.

DUFFIELD *v.* McMASTER, [1906] 1 Ir. R. 333—[C. A.]

**285. Five Legatees, Gift of Income to—Remainder to eldest Male Issue—Gift over in Default of Issue—Vesting—Persona Designata.**—A testator bequeathed his property to trustees upon trust that the rents and profits should be divided into five equal parts to be paid half-yearly to each of his five nephews, share and share alike, “to be by them enjoyed during the period of their natural lives, and after the decease of each to their eldest male issue, respectively, of each, and in default of such male issue share to revert to the remaining legatees, or their eldest male issue, to be divided equally every half-yearly term among them.” All the tes-

tator's nephews survived him. Three of them died subsequently, intestate and unmarried; one (the husband of the plaintiff) died, having had a son who predeceased him, intestate and unmarried; and the fifth nephew was still alive.

HELD (by Porter, M.R.)—(1) that the gift of the income of the property amounted to a gift of the *corpus*; (2) that the gift after the decease of each of their eldest male issue, respectively, of each, meant to the eldest male issue living at the decease of each; (3) that the words “remaining legatee” meant surviving legatee; and that accruing shares went absolutely to such legatee; (4) that the plaintiff was entitled, pursuant to the foregoing declarations, as personal representative of her husband, F. S., to his accrued shares of the personality, but as representative of her son she took nothing.

HELD, on appeal—as to the second declaration of the decree, and as to so much of the fourth declaration as declared that as personal representative of her son the plaintiff took nothing (varying the decree of Porter, M.R.), that the son of F. S. took a vested interest at birth, and that the gift to him was a gift to a *persona designata*, and not to a class.

SHERIDAN *v.* O'REILLY, [1900] 1 Ir. R. 386—[C. A.]

**286. Legacy to be Set Apart and Paid by Instalments at certain Ages—No Gift over—Intermediate Income—Right to Payment of Whole at 21.**—By her will C. directed her trustees to set apart £200 for her grandson, J. W., and £150 for her grandson J. V., to be paid free of duty as to £50 on the grandsons in question attaining 21 and as to the balance on their attaining other ages. There was no gift of the intermediate income, and no gift over of the principal.

J. W. received £50 on attaining 21, but died before the date fixed for the next payment to him.

HELD—that his representatives were entitled to the unpaid balance of principal and income. Each bequest was in effect a legacy payable in part at 21, and in part at a later date, and therefore each legatee on attaining 21 was entitled to claim payment of the whole legacy and intermediate income.

*Gosling v. Gosling* ((1859) Joh. 265)—followed and applied.

IN RE COUTURIER; COUTURIER *v.* SHEA, [1907] 1 [Ch. 470; 76 L. J. Ch. 296; 96 L. T. 560—Joyce, J.]

**287. Life Interests—Ultimate Gift to “Grandchildren then Living, Equally per stirpes, or the Issue of such as may have Died”—Death of Great-grandchild and his Parent before Period of Distribution—Whether Great-grandchild's Share Vested—Original or Substitutional Gift—Joint Tenancy or Tenancy in Common.**—A gift to issue is an original, and not a substitutional, gift when the share which the issue are to

**Vesting—Continued.**

take is not by a prior clause expressed to be given to the parent of such issue.

In a case of ambiguity the Court leans to the construction which creates a tenancy in common in preference to a joint tenancy.

A testator left his property upon trust for his children for their lives, and, after the death of the survivor of them, for division "among my grandchildren then living, equally *per stirpes* and not *per capita*, or the issue of such as may have died (such issue taking a parent's share only), so that my grandchildren (or their issue) may take their shares equally in *loco parentis*." The will contained also a maintenance clause in favour of grandchildren (or their issue) Before the death of the last surviving life tenant, a grandchild and one of her sons died.

**HELD**—(1) that the gift to the issue of the grandchildren was original, and not substitutional, and that therefore the deceased great-grandson took a vested interest; (2) that his representative and his brothers took their parent's share as tenants in common, and not as joint tenants.

*Martin v. Holgate* ((1866) L. R. 1 H. L. 175; 35 L. J. Ch. 789; 11 L. T. 501—H. L.) followed  
*In re Merrick's Trusts* ((1866) L. R. 1 Eq. 551; 35 L. J. Ch. 418; 14 L. T. 130, explained

*IN RE WOOLLEY; WORMALD v. WOOLLEY*, [1903] 2 Ch. 206; 72 L. J. Ch. 602; 89 L. T. 16—Joyce, J.

288. *Life Interests—Ultimate Gift to "Life Tenant's Children or Legal Representatives"—Children Dying before Period of Distribution.*—Where in a will there is a clear gift, and then a gift over, and the gift over is fairly capable of two constructions, the Court will lean to that construction which is consistent with the maintenance of the vested interests already clearly given. A testator left property to his two daughters for their lives, their respective shares to be equally divided after their death "between their respective children or legal representatives."

**HELD**—(1) that "legal representatives" meant the representatives of the daughters, and not of the grandchildren; (2) that every grandchild alive at the date of, or born after, the testator's death took a vested interest, even though it did not survive its mother; and the gift over to the representatives was only an alternative (not a divesting) gift to take effect in case no child took a vested interest.

*Ralph v. Carrick* ((1879) 11 C. D. 873; 40 L. T. 505) and *Treharne v. Layton* ((1875) L. R. 10 Q. B. 459; 44 L. J. Ch. 299; 33 L. T. 327—Ex. Ch.) applied.

*IN RE ROBERTS; PERCIVAL v. ROBERTS*, [1903] 2 [Ch. 200; 72 L. J. Ch. 597; 88 L. T. 505—Joyce, J.

**289. Period of Distribution — Legatee**

*entitled to a Share of the Interest in Settled Fund—Right to call for his Share of Capital—Construction.*—A testator directed the income of his property to be divided between his four children; if any child died without issue, his share was to be divided amongst his survivors; but if a child died leaving issue, such issue were to take his share of income; and finally, "on the death of all" the children, the estate was to be "winded up and converted into money," and divided among grandchildren equally *per stirpes*.

Four children survived the testator; one had since died without issue, and one had died leaving a child (the plaintiff). The plaintiff and the two surviving children were each receiving a third of the income of the testator's estate; and the plaintiff now claimed that he had a vested interest in one-third of the *corpus*, and was entitled to immediate payment thereof.

**HELD**—that he was not so entitled, for the testator had fixed a date, not yet arrived, for the division of the *corpus*, which until then was intended to remain *in globo*, and a third of the whole income, to which he was admittedly entitled, was not the same as the income of a severed third of the *corpus*.

Decision of the Ct. of Session ([1900] 2 F. 749) affirmed.

*MACCULLOCH v. ANDERSON*, [1904] A. C. 55—[H. L. (Sc.).

**290. Postponed Period of Distribution.]—**

A testator was at the time of his death a partner in a firm of coal-masters. The partnership was to last during the term for which the colliery tacks or leases should be in subsistence, but in case of the decease of any partner the representatives of the deceased partner should come in his place and succeed to his rights and liabilities.

By his will the testator vested his whole estate, including his interest in the firm, in trustees. He gave to his widow the life-rent, use, and enjoyment of his dwelling-house and furniture, and such allowance as his trustees might consider necessary for the maintenance and support of herself and such of the testator's daughters or their children as might be living in the family with her. He empowered his trustees, as representing him in the firm, to be parties to any new lease or leases which the said firm might consider it expedient to enter into. On the dissolution and winding-up of the firm, in the event of the predecease of his wife, and if she survived, on her death, he directed his trustees to realise his whole estate and to divide the same into four equal shares, and pay one share to each of his children (A., J., R., and I.), or to their respective heirs. The widow survived the testator; the firm was subsisting. R. and T. survived the testator and died.

**HELD**—that the interests of all the children were vested *a morte testatoris*.

## Vesting—Continued.

BOWMAN v. BOWMAN, [1899] A. C. 518—H. L. (Sc.).

291. *Remoteness—Absolutely upon attaining Twenty-five—Maintenance.*—A testator bequeathed £12,000, to be invested within ten years after his decease upon trust for his daughter for life, then, as to £1,000 part thereof, for her husband for life, and subject thereto for all the children of the daughter, when they should attain twenty-five, but not before, in equal shares; and until the £12,000 should be invested, the testator directed the trustees to pay to his said daughter, or, in the event of her decease, to her said husband and children, interest on “their respective portions.” In default of children the fund to form part of the residue. He bequeathed another sum of £12,000 upon similar trusts for another daughter, her husband, and children. The residue he devised and bequeathed to his two sons absolutely in equal shares. The testator empowered his trustees to raise any part (not exceeding one moiety) of the expectant share of any grandchild of his under his will, and apply it for the advancement of such grandchild. He also empowered them to apply all or any part of the income arising from the expectant share of such grandchild, after the death of the tenant for life, for the maintenance and education of such grandchild.

By a codicil the testator revoked the gift of one moiety of his residuary estate to one of his sons, and directed that such moiety should be held on trust for his said son during his life, and after his death for the child or children of his said son absolutely on attaining twenty-five. In the event of a child dying before attaining twenty-five, such child's share was to go to the testator's other son absolutely.

HELD—that the children of the son and of the two daughters took under the will vested interests in their shares, and that, therefore, the gifts to them were not void for remoteness.

*Fox v. Fox* ((1875), L. R. 19 Eq. 286; 23 W. R. 314) approved.

Decision of Kekewich, J., reversed.

IN RE TURNER; TURNER v. TURNER, [1899] 2 Ch. 739; 69 L. J. Ch. 1; 48 W. R. 97; 81 L. T. 548—C. A.

## XIX. DIVESTING.

292. *Alternative Devise—Vested Interest under Prior Clause—Divesting Clause—Later Clause modifying Prior Clause—Gift over to Heirs—New South Wales.*—A devise to such of the testator's stepsons and son *nominatim* as should survive his widow and attain twenty-one.

HELD—that the effect of the clause was to give all the devisees vested interests in fee subject to be divested as regards each devisee in the event of his death in the lifetime of the testator's widow, in

favour of those devisees (if any) who survived her and attained twenty-one. If there were none such the divesting clause failed, the original vested gifts remained, and all the devisees took absolutely.

A later clause in the will modified the first by saying in effect that if any devisee died in his mother's lifetime, and under twenty-one, his share, *i.e.*, the share to which he would have been entitled if he had survived her and attained twenty-one, should go, not to the survivors, but to his heir as a purchaser in fee.

HELD—that the gifts over on the deaths of the two stepsons who died in the wife's lifetime took effect, and that the appellant as their heir was entitled as devisee and not the surviving devisees.

PENNY v. COMMISSIONER FOR RAILWAYS, [1900] [A. C. 628; 69 L. J. P. C. 113; 83 L. T. 182—P. C.

293. *Divesting or Over-riding Gift—Life Interests to Daughter and Son-in-Law—Power of Appointment Among their Children—In Default, for Children in Equal Shares—Gift Over, if no Child Survive Parents—Appointment in Favour of Only Child—Death of Child Before Parents—Whether Gift Over Acts as a Divesting Clause.*—A testator left the residue of his real and personal estate to trustees to pay the income to his daughter and her husband (her surviving) for life, and after the death of the survivor of them, upon trust for such one or more of their children as they, or the survivor, might appoint, and in default of appointment for their children alive at the death of the survivor in equal shares. He then continued: “Provided, nevertheless, and I hereby declare it to be my will and mind,” that the issue of a deceased child should take their parent's share, and “Provided always, and I hereby declare it to be my will and mind, and I do hereby give and devise, in case there shall be no child or remoter issue at the decease of the survivor of them. . .” (here followed an ultimate gift of the trust funds).

After the death of the testator's daughter her husband appointed in favour of the only child of the marriage, who, however, died unmarried before her father.

HELD—that the final gift in the will did not operate to override the appointment, but was only intended to take effect in default of children or issue surviving the life tenants and in default of a previous appointment.

IN RE SIMMONS; DENNISON v. ORMAN, (1908) 87 [L. T. 594—Joyce, J.

294. *Shifting Clause—Testator not in loco parentis—Settlement—“Except on eldest or only Son for the Time Being”—“Entitled” to the Possession or Receipt of Rents, Issues and Profits after Decease of Parents.*—In 1855 a testator devised his real estates in Lancashire to certain uses, which ceased to take effect, and subject thereto to the use of his nephew R. A. and his assigns for life,



**Divesting—Continued.**

and from and after the decease of R. A. to his nephew T. F. B. and his assigns for life, and after the death of T. F. B. to all and every the son and sons of T. F. B., and all and every the son and sons of R. A. "other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues and profits of certain estates within the parish of Cockerham, in Lancashire, after the decease of the said R. A. as tenant for life or any greater estate or interest whatever," the eldest or only one of such sons or son of T. F. B. taking the first turn, and the eldest or only of such sons or son of R. A. (other than and except as aforesaid) taking the next turn. The testator died in 1875, T. F. B. died in the testator's lifetime without having married. R. A. had several children, of whom R. N. A., born in 1847, was in 1869 tenant in tail male in remainder of the Cockerham estates, R. A. being the tenant for life. In 1869, by a disentailing deed, the Cockerham estates were limited to such uses as R. A. and R. N. A. should jointly appoint. Afterwards, by a deed of 1869, the estates were jointly appointed by the father and son to trustees for sale, and by another deed of the same date trusts were declared of the purchase-money. The trustees sold the estate and received the purchase-money.

In 1870 R. N. A. became bankrupt, and his interest both in the purchase-money of the Cockerham estates and his interest under the testator's will were acquired by his father, R. A., from the trustee in bankruptcy. R. A. died in 1899. A summons was taken out to determine the question whether, by reason of the exception contained in the will of "an eldest son for the time being entitled to the possession or to the receipt of the rents, &c." of the Cockerham estates, R. N. A. was excluded from the life estate given to him by the will.

**HELD**—that the testator was not a parent or a person *in loco parentis*, and as R. N. A. was not after the death of his father R. A. "entitled" to the "possession or to the receipt of the rents, issues and profits" of the family estates at Cockerham, and was not within the words of the exception, he could not be deprived of the position in the succession given to him by the will.

Decision of Court of Appeal (*sub nom. Shuttleworth v. Murray*) ([1901] 1 Ch. 819; 70 L. J. Ch. 453; 49 W. R. 388; 84 L. T. 605), affirmed.

**LAW UNION AND CROWN INSURANCE CO. v. HILL**, [1902] A. C. 263; 71 L. J. Ch. 602; 86 L. T. 773—H. L. (E.).

**295. Vested Interests of Two Persons—Gift Over if "either" shall be "then" dead—**"Either" means one of two and not both—Both being "then" dead, Gift not Divested.]—A testatrix by her will gave her residuary personal estate to trustees upon trusts for

sale, conversion, payment of debts, and investment, and to pay the dividends and interest of the trust fund to her sister T. P., during her life; and from and after her death the testatrix directed that her trustees should "pay and divide the said trust moneys unto and equally between my two sisters" F. J. and S. P., "share and share alike. And if either of my said sisters shall be then dead I declare that my said trustees shall stand possessed of the whole of the said trust moneys upon trust for the survivor of my said sisters absolutely."

T. P., F. J., and S. P. all survived the testatrix, and T. P. outlived F. J. and S. P.

**HELD**, by Lindley, M.R., and Vaughan Williams, L.J. (Rigby, L.J., dissenting)—that F. J. and S. P. took vested interests; that there was no gift over in the event which happened of both F. J. and S. P. dying in the lifetime of T. P., the tenant for life, as "either" must be taken in the ordinary sense as one of the two and as not, in any sense, meaning both; and that the previous gift vesting the residue in F. J. and S. P. was not divested in the events which had happened.

*White v. Baker* ((1860) 2 D. F. & J. 55; 29 L. J. Ch. 577; 8 W. R. 533; 2 L. T. (N.S.) 583) distinguished.

**IN RE PICKWORTH; SNAITH v. PARKINSON**, [1899] 1 Ch. 642; 68 L. J. Ch. 324; 80 L. T. 212—C. A.

**XX. PERPETUITIES AND REMOTENESS.**

**296. Child en ventre sa mère—Relation back of Birth to Date of Testator's Death—Disadvantage to Child—**A child *en ventre sa mère* is, for all purposes except one, to be treated as already born, and as being of that sex which it ultimately proves to be, at the date of the testator's death (or other date at which the instrument in question comes into operation).

The rule does not apply to descent at common law, so far as regards rents during the period before birth, but there is no other exception.

The rule applies in all cases, even though the child might take a larger estate if the operation of the rule were excluded.

It follows that, if limitations in a will are valid provided that a certain person has a son alive at the date of the testator's death, but otherwise void for remoteness, they are saved if the person is pregnant at the date of his death, and is subsequently delivered of a living son.

A testatrix left real estate in trust for M. for life, and after her death in trust for the second and every younger son of M. for life, with remainder to their respective sons in tail male, with a proviso disqualifying any son of M. who became entitled to certain other estates.

At the date of the death of testatrix M. had two sons, of whom the elder was dead,

*Perpetuities and Remoteness—Continued.*

and the younger was disqualified under the proviso, and she was pregnant of a third son.

HELD—that the estates tail given to the sons of such third son were valid, and consequently that he himself only took a life estate, and not an estate tail by virtue of the *cy près* doctrine.

*Doe v. Lancashire* ((1792) 5 T. R. 49; 2 R. R. 535) followed and applied.

Decision of Buckley, J., [1903] 1 Ch. 874; 72 L. J. Ch. 378; 51 W. R. 395; 88 L. T. 379, affirmed.

IN RE WILMER'S TRUSTS; *MOORE v. WINGFIELD*, [1903] 2 Ch. 411; 72 L. J. Ch. 670; 89 L. T. 148—C. A.

297. *Contingent Remainder or Executory Devise—Remoteness.*] — By a codicil to his will, by which he had settled real estate in strict settlement, a testator directed that no devisee under his will should have a vested interest in such real estate or be entitled to possession thereof until the attainment of the age of twenty-four, any law or usage to the contrary notwithstanding.

HELD—that the effect of the codicil was to convert the limitations contained in the will into executory devises; that they were, therefore, void for remoteness, and that there was an intestacy.

*In re Lechmere Lloyd* ((1881), 18 Ch. D. 524; 45 L. T. 551); *Miles v. Jarvis* ((1883) 24 Ch. D. 633; 52 L. J. Ch. 796; 49 L. T. 162); and *Dean v. Dean* ([1891] 3 Ch. 150; 60 L. J. Ch. 553; 39 W. R. 568; 65 L. T. 65—Chitty, J.), followed.

*Russel v. Buchanan* ((1836) 7 Sim. 628; 40 R. R. 193) distinguished.

IN RE WRIGHTSON; *BATTIE-WRIGHTSON v. THOMAS*, [1904] 2 Ch. 95; 73 L. J. Ch. 742; 90 L. T. 748—C. A.

298. *Direction to Apply Moneys in Maintaining Monument on Part of Devised Real Estate.*]—A testator by his will devised two freehold farms to his nephew on condition that he should set apart the rents and profits thereof for the term of five years “for the use and purpose of erecting on some portion” (suggesting a particular situation) a monument to the memory of John Locke, and at the expiration of the five years he directed that his nephew should enjoy three-fourths of the rents and profits, but should devote the balance or remaining one-fourth towards the maintenance and keeping in order of the monument.

HELD—that the erection of the monument was not intended as a mode of enjoyment of the property by the devisee, and that the application of one-fourth of the rents and profits was intended to perpetuate the memory of John Locke, and, therefore, as to such one-fourth there was an intestacy.

IN RE JONES; *PARKER v. LETHBRIDGE*, (1898) 79 [L. T. 154—Stirling, J.

299. *Repair of Inclosure round Grave—*

*Void Gift.*]—A testatrix bequeathed £50 to be invested and the dividends to be applied in keeping the inclosure round a grave in order and repair.

HELD—a void gift.

*TOOLE v. HAMILTON*, [1901] 1 Ir. R. 383—M. R.

300. *Gift to Members of a Class attaining Twenty-five.*]—A. left property in trust, as to one-half to pay the same to the children of her niece R., who should live and attain the age of twenty-five, or the lawful issue of such children who should have married and pre-deceased R., leaving issue, such issue to take only their deceased parents' share, and as to the other half to pay the same to the children of her nephew C. upon similar conditions.

At the date of testatrix's death one of R.'s children had attained twenty-five, but none of C.'s children had done so.

HELD—that there was a valid disposition of the one-half given to R.'s children, but that the gift of the other half infringed the rule against perpetuities and was invalid.

IN RE BARKER; *CAPON v. FLICK*, (1905) 92 L. T. 831—Joyce, J.

301. *Life Interest to Unmarried Niece—Power for Niece to Appoint Life Interest to Surviving Husband—Reversion to Children—Gift over in Default of Children—Validity of such Ultimate Gift—Independent Alternative Trusts.*]—A testatrix left a sum of money in trust for M., a married niece, for life with power to M. to appoint a life interest to any husband surviving her, and with remainder to M.'s children (if any) at twenty-one. She left three other sums of money upon corresponding trusts for E., J. and B., three unmarried nieces. Ultimately, in case none of the nieces should have a child who should take “under the trusts aforesaid,” all four sums were “subject to the preceding trusts” to be held in trust for a class of persons, ascertained within due limits, in such shares as the last surviving niece should appoint. All the nieces died childless, and the last survivor made an appointment.

It was now argued that the ultimate trust for the class was void for remoteness, since an appointment to a husband not in fact born at the date of testatrix's death would have infringed the rule against perpetuities; in fact, no appointment to a husband was ever made.

HELD—(1) “that the trusts aforesaid” would include a trust created by an appointment of a life estate to a husband, but (2) that it was a case of “alternative independent gifts”; and that, as no appointment in favour of a husband was ever made, the ultimate gift and appointment under it were, in the events which happened, valid.

*Monypeny v. Dering* ((1852) 2 D. M. & G. 145) and *Longhead v. Phelps* ((1770) 2 Wm. Bl. C. 704) applied.

**Perpetuities and Remoteness—Continued.**

IN RE BOWLES; PAGE v. PAGE, [1905] 1 Ch. 371; [74 L. J. Ch. 338; 92 L. T. 556—Farwell, J.]

302. *Married Woman—Restraint on Anticipation—Separability of Class—Divisibility of Proviso.*—A testator by his will, dated February 8th, 1844, provided that several provisions therein made for his daughters and their children, and also for any other person or persons being females, should not be paid to them by anticipation. The testator died in 1850. Helen, a married daughter of one of his daughters, was *in esse* at the date of the will, and survived both the testator and her mother.

HELD—that Helen's share in the testator's estate was subject to the restraint on anticipation.

*Herbert v. Webster* ((1880) 15 Ch. D. 610; 49 L. J. Ch. 620) followed.

In *re Michael's Trusts* ((1877) 46 L. J. Ch. 651; and *In re Ridley* (1879) 11 Ch. D. 645; 48 L. J. Ch. 563; 27 W. R. 527; 41 L. T. 336) not followed.

IN RE FERNELEY'S TRUSTS, [1902] 1 Ch. 543; 71 [L. J. Ch. 422; 50 W. R. 346; 86 L. T. 413—Eady, J.]

303. *Restraint on Anticipation — Gifts, after a Life Estate, to a Married Woman—Validity and Duration of Restraint—Receipt Clause.*—Where property is given to a married woman absolutely, the true test as to whether a clause against anticipation is effectual to prevent her requiring payment of the property is, does the document as a whole show an intention that the trustees should retain the property and pay her the income?

A testator gave his residuary estate to trustees upon trust for his wife, daughters and son for their lives, and, after the death of the survivor of them, for division among the children of his son. By a codicil he imposed a restraint on anticipation in the case of any female who might take under his will; and he also declared that females, whether covert or not, should be able to give a good discharge to the trustees "for the money or property" after the same should actually accrue due.

HELD—that the restraint was not void for remoteness so far as concerned any children of the son born in the testator's lifetime (*Herbert v. Webster*, (1880) 15 Ch. D. 610; 49 L. J. Ch. 620); but that it only lasted (both as to *corpus* and as to income) during the existence of the prior life interests.

IN RE MILLWARD; STEEDMAN v. HODGAY, (1903) 87 [L. T. 476—Joyce, J.]

304. *Uncertainty—Maintenance and Repair of Tomb*—"Until the Period of Twenty-one Years from the Death of the last Survivor of all Persons who shall be Living at my Death"—Void Gift.]—A testatrix bequeathed the sum of £500 New Consols to

trustees, upon trust to apply the dividends thereof in maintaining and keeping in a state of proper repair, condition and protection the grave or tomb of her late brother in a burial ground in Africa, "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death."

HELD—that as it was impossible to ascertain when the last life would be extinguished, and it was therefore impossible to say when the period of twenty-one years would commence, the gift was void for uncertainty.

IN RE MOORE; PRIOR v. MOORE, [1901] 1 Ch. [936; 70 L. J. Ch. 358; 49 W. R. 484; 84 L. T. 501; 17 T. L. R. 356—Joyce, J.]

305. *Valid Gift of Realty in Certain Events—Invalid Trust for Sale—No Direct Gift of Income pending Sale—Trust for Sale Disregarded—Beneficiaries take as Real Estate*—Where it can be seen that a trust for sale is mere machinery for facilitating a division among the persons for whom the property is destined, effect will be given to the equitable interests, though the trust for sale is void.

A testator left realty to trustees for a succession of life tenants, and then (in the events which happened) upon trust for sale and division amongst certain classes of relatives. There was a maintenance clause, but no direct gift of the income until sale. The trust for sale was admitted to be bad as infringing the rule against perpetuities, but the various classes of beneficiaries were all ascertainable within the prescribed period.

HELD—that the trust for sale was merely machinery for purposes of division; and that, as it had broken down, the beneficiaries took the property as real estate without any sale.

Decision of Byrne, J. (51 W. R. 153) affirmed.

IN RE APPLERY; WALKER v. LEVER; WALKER v. [NISBET, [1903] 1 Ch. 565; 72 L. J. Ch. 332; 51 W. R. 455; 88 L. T. 219—C. A.]

**XXI. CREATION OF ESTATE TAIL.**

306. *Cypres Doctrine—Perpetual Life Estates—Stirpital Distribution.*—H., who died in 1835, devised real estate without any words of limitation to his children C., G. and M., declaring that they and the survivors of them should stand seised thereof in trust to retain the income for their own benefit in equal shares during their natural lives, provided that, if any of them should die unmarried, or being married without leaving a child, his or her share should accrue to the survivors equally, and that the last survivor of the three should take all the estate devised. The will continued: "but in case such son or daughter so dying shall leave issue . . . the share of such child so dying to go and be divided equally amongst his or her child or children . . . for life. . . share

Creation of Estate Tail—*Continued.*

and share alike, if more than one, and if but one then the whole share to such only child for life. . . . and so to be continued and distributed in a descending line *per stirpes* from issue to issue for life so long as any issue shall be living descended from my said children." There was no gift over in default of issue.

G. died in 1856, unmarried, and intestate; C. died in 1874, leaving one child, R.; M. died in 1890, without issue, but having devised her real estate to R.

It was admitted that half (and only half) of the property had passed to M. as the survivor of the three children.

HELD—that neither C. nor R. took an estate tail in the other half (the *cy près* doctrine not applying), and that, there being an intestacy, it belonged to H.'s heir.

*Mortimer v. West* ((1828), 2 Sim. 274; 29 R. R. 104) distinguished.

IN RE RICHARDSON; *PARRY v. HOLMES*, [1904] 1 [Ch. 332; 73 L. J. Ch. 153; 52 W. R. 119; 91 L. T. 169—Buckley, J.

307. *Devise of Remainder in Fee Expectant on Estate Tail—Rule in Shelley's Case.*

—A testator devised to trustees (who were vested with the legal estate) all his lands, tenements and hereditaments upon trust for his children, if more than one, in equal shares, as tenants in common in tail, or, if there should be but one child (as in the event happened), upon trust for that only child as tenant in tail. After the death of such child or children the trustees were directed to legally convey and assure the said lands, tenements, and hereditaments in fee simple to the heirs in equal shares "as they shall severally and respectively attain the age of 21 years, or be married, and to their several and respective heirs and assigns for ever."

The testator's child married, and died leaving one child, who attained the age of 21 years, and died unmarried and intestate.

HELD—that the direction to the trustees to legally convey and assure, &c., was not part and parcel of the machinery and apparatus employed by the testator in and about the limitation of the estates or estate tail, but was an independent gift to take effect in favour of designated persons in the line of succession, and that the grandchild took an estate in fee simple by purchase, and not by descent, which passed to the grandchild's heir-at-law.

Decision of the Court of Appeal ((1899) 79 L. T. 617; 15 T. L. R. 115) affirmed.

FOXWELL AND OTHERS *v.* VAN GRUTTEN, (1900) [48 W. R. 653; 82 L. T. 272; 16 T. L. R. 259—H. L. (F.)

308. *Devise to "A and his Heirs"—Gift over to A.'s Brother "if A. die without an Heir"—Gift over to Brother's "Heir or Heirs"—Heirs General.*—Although a devise

over after A. dying without heirs is in general void, yet if the person to whom the limitation over is made be capable of being collateral heir to the devisee, or if the event on which the gift over is made necessarily depends on the existence of a collateral heir of the first devisee at the death of such first devisee, the first devisee takes only an estate tail.

A testator left two cottages to C. for life, after C.'s death one to go to E. "and her heirs," and the other to her brother W. "and his heirs," provided that if either E. or W. should "die without an heir, their share is to go to the survivor's heir or heirs." E. died first unmarried, then W. died unmarried, and lastly C., the life tenant, died.

HELD—(1) that E. and W. both took estates tail in their respective cottages; (2) that the ultimate gift was a gift to the "heirs general" of the survivor, and took effect as a contingent remainder upon C.'s death, for her life estate supported it.

IN RE WAUGH; *WAUGH v. CRIPPS*, [1903] 1 Ch. [744; 72 L. J. Ch. 586; 51 W. R. 461; 88 L. T. 54; 19 T. L. R. 238—Farwell, J.

309. *Estate in Special Tail—Condition.*—

A testator, after leaving certain annuities to his wife and daughter, which he charged on his landed property, left his lands (held in fee-simple) to his son R. J. M., with the exception of what his wife was to get; "but the said R. J. M. shall never have power to sell or mortgage any of these lands, nor no person to inherit any of them, unless a lawful issue of a male child got by marriage with a respectable Protestant female, of proper conducted parents."

HELD (reversing the decision of the Vice-Chancellor)—that R. J. M. took an estate in special tail.

MAGEE *v.* MARTIN, [1902] 1 Ir. R. 367—App.

310. *Gift of Realty by Husband to Wife and Issue of their Marriage—Gift of Realty and Chattels to Wife and Issue.*—

A testator by his will bequeathed a certain farm of land (held in fee-simple) in the following terms:—"To my wife and the issue of our marriage;" and he also bequeathed to his wife and issue that part of his land, houses (also held in fee-simple) where he lived, viz., the public-house, offices attached thereto, also his cattle and chattel property, and also debts due to him, &c. The testator left surviving him his wife and one infant son born in his lifetime.

HELD—that the words "of our marriage" had not the effect of taking the first gift out of the general rule of construction applicable to wills; that issue, in the absence of a context showing a contrary intention, must be held to include all lineal descendants, and that, therefore, the widow took an estate tail in both gifts.

WALSH *v.* JOHNSTON, [1899] 1 Ir. R. 501—V.-C.

**Creation of Estate Tail—Continued.**

311. *Indication of Intention—Wills Act, 1837 (7 Will 4<sup>th</sup> & 1 Vict. c 26), s. 28.*—A testator by his will devised his estates to trustees to pay the rents half-yearly to S. M., but in case S. M. incumbered the lands or rents at any time the testator revoked the gift of the rents "from S. M. and from his heirs male." In the event of S. M. not so forfeiting the same, and dying without male issue him surviving, there was a remainder over to the testator's brother W. M. in tail male.

**HELD**—that what the testator intended to do was to create an estate tail with the consequences which he erroneously imagined would follow upon the creation of an estate tail.

Decision of the Irish Court of Appeal ([1899] 1 Ir. R. 359) affirmed.

*CRUMPE v. CRUMPE*, [1900] A. C. 127; 69 L. J. [P. C. 7; 82 L. T. 130—H. L. (Ir.).

312. *"Issue"—Rule in Shelley's Case.*—A testator devised all his freehold estates to the use of his first and other sons successively in tail male. By a subsequent codicil he "bequeathed" to one of the younger sons named Charles, a certain estate, with power to the eldest son to purchase and redeem it at a certain price, "the proceeds to go with the limitations of this will, that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which . . ." (here followed remainders to other sons in tail male).

**HELD**—that the words of the codicil gave to Charles an estate in special tail male.

Decisions of the C. A. ([1902] 1 Ch. 34; 71 L. J. Ch. 53; 50 W. R. 83; 18 T. L. R. 7) and Buckley, J. (69 L. J. Ch. 875; 49 W. R. 12), affirmed for the reasons given by the latter and by Romer, L.J.

*PELHAM-CLINTON v. DUKE OF NEWCASTLE*, [1903] A. C. 111; 51 W. R. 608; 88 L. T. 273; 19 T. L. R. 275—H. L. (E.).

313. *Life Interest—Devise of Personality—Absolute Interest.*—A devise of personality to M. H. C. "for her life, with remainder to her issue in tail male, and in default thereof to her daughters," and in default over.

**HELD**—that M. H. C. took an interest for life only.

*Knight v. Ellis* (1780) 2 Bro. C. C. 569—Lord Thurlow and *Ex parte Wynch* (1854) 5 De G. M. & G. 188) followed.

*IN RE CULLEN'S ESTATE*, [1907] 1 Ir. R. 73— [Ross, J.

314. *Person "born" in the Testator's lifetime—Child en ventre sa mère—Cutting down Estate to Life Estate.*—The rule of construction which treats a child *en ventre sa mère* at the date of a testator's death as

born in his lifetime applies only when such a construction is for the child's benefit.

A testator by his will gave estates tail successively to the sons of a living person, with proviso that any son born in the testator's lifetime should not take a larger interest than an estate for life.

**HELD**—that a child *en ventre sa mère* at the testator's death and subsequently born alive must not be treated as born in the testator's lifetime, and that therefore the estate tail given to him was not to be cut down to a life estate by application of the rule.

*Blasson v. Blasson* ((1804) 2 D. J. & S. 665—followed.

Decision of C. A. ([1906] 1 Ch. 583; 75 L. J. Ch. 308; 54 W. R. 473; 94 L. T. 424; 22 T. L. R. 347) reversed.

*VILLAR v. GILBEY*, [1907] A. C. 139; 76 L. J. [Ch. 339; 96 L. T. 511; 23 T. L. R. 392—H. L. (E.).

315. *Residue of Freeholds—Income—Annuitants—Tenant for Life—Gift of Accumulations and Freeholds on Death of Tenant for Life to Right Heirs of Tenant for Life—Rule in Shelley's Case.*—A testator gave the residue of his freehold estates to trustees upon trust for management, and out of the net rents and profits to pay certain annuities, and then to pay the residue of such net rents and profits to W. D. for his life, and from and after the respective deceases of the annuitants and the said W. D. upon trust to convey the testates together with the accumulations of rents unto the right heirs of W. D. All the annuitants except two died. The survivors had released their annuities and only one survived. There was no express disposition of the surplus rents as they might accrue between W. D.'s death and the death of any surviving annuitant.

**HELD**—that by virtue of the rule in *Shelley's Case* ((1581) 1 Rep. 93 b), the property would have belonged to W. D. in fee simple if it had not been taken by a railway company, and that W. D. was absolutely and presently entitled to the fund paid into Court by the railway company.

*IN RE YOUMANS' WILL*, [1901] 1 Ch. 720; 70 [L. J. Ch. 430; 49 W. R. 509; 84 L. T. 201—Joyce, J.

316. *Rule in Shelley's Case.*—A. devised fee-simple lands in trust for B. and his assigns for the term of his natural life, and after his decease to the use of B.'s second son C. and his assigns for the term of his natural life and his issue male in succession, so that every such son might take an estate for life, with remainder to his first and every subsequent son successively, according to seniority, in tail male. The will contained a proviso that C. and his issue should take the name of P. when he or they became entitled, and in case of refusal the estate or estates limited for the life of such person so refusing should cease, and the sub-

**Creation of Estate Tail—Continued.**

sequent limitations be accelerated. B. died in 1882; C. died in 1889, leaving two sons, D. and E, who were both living at the death of A. D. executed a disentailing deed.

**HELD**—applying the rule in *Shelley's Case* (1 Co. Rep. 93b), that C. took an estate tail.  
IN RE KEANE'S ESTATE, [1903] 1 Ir. R. 215—  
[Ross, J.]

**317. Rule in Shelley's Case—Gift to A. for Life and to "His Sons and their Sons in Succession."**—A gift of property to A. for life and then to his sons and their sons in succession and in default thereof over to others confers an estate tail. Any expression importing the whole of the inheritable blood is as efficacious as the word "heirs" for the purpose of bringing in the rule in *Shelley's Case*.

IN RE BUCKTON; BUCKTON v. BUCKTON, [1907] 2 [Ch. 406; 76 L. J. Ch. 584; 97 L. T. 332—  
Kekewich, J.]

**318. Successive Life Estates Followed by Successive Estates Tail.**—A testator devised real property for a life estate which had now terminated, and then in "remainder to the eldest and every other son of C. H. for life, with remainder to the first and every other sons of such sons of C. H. in tail."

**HELD**—that the first and other sons of C. H. took successive life estates one after the other, and that it was only after the death of the last survivor of such sons that the remainder to the sons of the eldest son of C. H. took effect.

Decision of C. A. (89 L. T. 378) affirmed.  
HONYWOOD v. HONYWOOD, (1905) 92 L. T. 814—  
H. L. (E.).

**XXII. DIRECTIONS TO TRUSTEES.****(a) Investment Clause.**

**319. Power to Purchase Real Estate—Power to Transpose and Vary Securities—Power to Resell Purchased Realty.**—A testator authorised his trustees to invest in the purchase of real estate, preference stocks of certain companies or any authorised trustee investment "with full power to vary and transpose such securities for others of the description hereinbefore authorised."

**HELD**—that, "securities" was used in the wider sense of investments, *In re Rayner* ([1904] 1 Ch. 177; 73 L. J. Ch. 111; 52 W. R. 273; 89 L. T. 681—C. A.) followed; and that therefore the trustees could make a good title on reselling realty purchased by them.

IN RE GENT AND EASTON'S CONTRACT, [1905] 1 Ch. [386; 74 L. J. Ch. 333; 53 W. R. 330; 92 L. T. 356—Farwell, J.]

**320. Power to Invest on Ground Rents—Whether Meaning "on Security of" Ground Rents.**—A testator authorised his trustees to invest his estate "on government securi-

ties . . . or upon freehold ground rents or upon leasehold ground rents not having less than sixty years unexpired and held direct from the freeholder."

The trustees were to divide the "dividends, rents and annual income" between A. and B. for life; remainder upon their deaths to their issue.

**HELD**—that the words could not be narrowed so as to permit only investment "upon the security of" ground rents, and that the trustees were at liberty to purchase ground rents.

IN RE MORDAN; LEGG v. MORDAN, [1905] 1 Ch. [515; 74 L. J. Ch. 319; 53 W. R. 599, 92 L. T. 488—C. A.]

**321. "Any Corporation or Company, Municipal, Commercial or Otherwise"**—*Company Formed or Registered in United Kingdom, but Carrying on Business Abroad—Company Formed or Registered Abroad.*—A will authorised investment in "any corporation or company, municipal, commercial or otherwise."

**HELD**—(1) that it authorised investments in corporations wherever formed or registered or carrying on business:

(2) that the word "company" is not limited to incorporate associations.

IN RE STANLEY; TENNANT v. STANLEY, [1906] 1 [Ch. 131, 75 L. J. Ch. 56; 54 W. R. 103; 93 L. T. 661—Buckley, J.]

**(b) Maintenance.**

**322. Accumulation—Jurisdiction to Allow Maintenance to Infant "Presumptively Entitled"**—*Ability of Father to Maintain Eldest Son.*—A testator appointed real estates to his daughter for life, and after her death to her first and other sons successively in tail male; and provided that in the event of her marrying without her mother's consent the rents and profits should be accumulated by his trustees during the minority of her eldest son, and empowered them to apply the rents and profits in reduction of charges on the estate. By a subsequent clause in the will he empowered his trustees to apply any part of the annual income to which any object (being a minor) of the trusts already declared should be entitled, or presumptively entitled, towards the maintenance of such object. The daughter married without her mother's consent, and had two sons, infants. An action was brought in the name of the eldest infant to administer the real and personal estate of the testator, and the rents and profits of the real estates, which were very large, were applied by the receiver in reduction of charges. The income of the infant's parents was considerable, but not sufficient to suitably maintain and educate him, having regard to the position in life which he would occupy on attaining his majority.

**HELD**—that the trustees had power, notwithstanding the accumulation clause, to

**Directions to Trustees—Continued.**

make an allowance by way of maintenance, and that, under the circumstances, it was a proper case for making the allowance asked for.

KING-HARMAN v. CAYLEY, [1899] 1 Ir. R. 39—  
[M. R.]

**323. Beneficial Possession of Land — Undivided Share—Contingency—Appointment of Trustees to Apply Share of Income and Accumulations—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 42, 43.]**—Under the will of a testator an infant was, in the events that happened, entitled to receive one undivided share of the fee simple of the lands, contingent (1) on surviving his father, and (2) on attainment of twenty-one or marriage. The trustees of testator's will were directed to pay his share of income to the infant, but had no power of sale of the settled land, or of consenting thereto.

HELD—that the trustees of the will did not come within the enabling provisions of sect. 43 of the Conveyancing and Law of Property Act, 1881, and that the Court had power to appoint them trustees for the purposes of sect. 42 of the Act to enable them in their discretion to apply the share of income and accumulations thereof to which the infant was entitled for his benefit.

TUTHILL v. TUTHILL, [1902] 1 Ir. R. 429—M. R.

**324. Contingent Gifts — Discretionary Power—Vesting.]**—A testator bequeathed certain property to his nephew upon his attaining twenty-five, and directed his trustees to accumulate the profits and invest them in trust for his said nephew on his attaining twenty-five. He also empowered his trustees, in their absolute discretion, to apply any part of the said profits, or the income thereof, for the advancement, maintenance, and education of his said nephew while under such age. The nephew died before attaining twenty-five.

HELD—that the gifts of both capital and income were contingent, and therefore failed.

RUSSELL v. RUSSELL, [1903] 1 Ir. R. 168—  
[V.-C.]

**325. Contingent Legacy by Father—Contingent Life Interest—Settled Legacy—Surplus Income and Accumulations—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43 (r).]**—A father by his will gave £50,000 to each of his daughters who should attain twenty-one; the legacy, however, was not to vest absolutely in her, but was to be retained by his trustees upon trust to pay the income to her for life, and upon trusts (after her death) for her issue.

He authorised his trustees to appropriate part of his personal estate in satisfaction of any legacy; and directed them to make his infant children wards of Court, and to exercise powers of maintenance, &c., only under the direction of the Court.

He left four infant daughters, and a sum of Consols was appropriated to the legacy, due to each.

Subsequently an order was made to allow for the maintenance of the eldest daughter during minority the sum of £1,000 out of the income of the Consols appropriated to her legacy. Upon her attaining twenty-one a question arose as to whether the accumulations of unapplied income belonged to her absolutely, or were to be treated as *corpus*.

HELD—that they formed an accretion to capital, and that she was only entitled to the interest on them for her life.

*In re Scott* ([1902] 1 Ch. 918) disapproved.

In sect. 43 (2) of the Conveyancing Act, 1881, the words "for the benefit of the person who ultimately becomes entitled to the property from which they arise," must read as meaning "the property, the income arising from which has been accumulated."

According to the practice of the Court of Chancery an infant contingently entitled to a legacy under its parent's will is during minority entitled to maintenance out of income; but the legacy is nevertheless a contingent one; and, if the infant dies before becoming entitled, the surplus unapplied income does not pass to his representatives; moreover, if the legacy is a settled one and the infant takes only a life interest in it, then, on his becoming entitled, such surplus income must be treated as an accretion to the capital.

IN RE BOWLEY; BOWLEY v. BOWLEY, [1904] 2 Ch. [685; 73 L. J. Ch. 810; 53 W. R. 270; 91 L. T. 573—C. A.]

**326. Gift of Residue without Words of Severance—Power of Advancement—Joint Tenancy or Tenancy in Common.]**—A power of advancement given to trustees of a will to whom the residue of the property was devised by a testator for the benefit of his children is inconsistent with a joint tenancy, and shows the children to be tenants in common.

A testator devised the residue of his property to trustees for the benefit of six of his children, with power to his said trustees to advance such sum or sums as they might think fit for the education and advancement in life of his said children.

HELD (affirming the decision of Chatterton, V.-C.)—that the power of advancement given to the trustees was inconsistent with a joint tenancy, and that the children were tenants in common of the residue.

L'ESTRANGE v. L'ESTRANGE, [1902] 1 Ir. R. 469—  
[C. A.]

**327. "Maintaining, Educating and Bringing-up"—Immoral Home—Improper Performance of Obligation—Administration of Fund by the Court.]**—A testator bequeathed the residue of his estate to his trustees upon trust to pay the income to his wife during her widowhood, "she maintaining, educating and bringing-up" unmarried infant

**Directions to Trustees—Continued.**

sons and unmarried daughters. The widow, while duly maintaining and educating the infant children, lived in adultery with a married man in the home she provided for them.

**HELD**—that the widow was not properly performing the obligation imposed upon her, and that, under the circumstances, the Court had power to administer the fund.

*Castle v. Castle* ([1857] 1 De G. & J. 352; 5 W. R. 643) applied.

Assuming the custody of all the children to be taken from the mother by reason of her misconduct, and their maintenance, education and bringing-up to be provided for elsewhere than under her roof, she would still be entitled to receive so much of the income as between her and her children, and having regard to the social position of the parties and the amount of available fortune, is adequate to her own personal maintenance and support.

**IN RE G. (INFANTS)**, [1899] 1 Ch. 719; 68 [L. J. Ch. 374; 47 W. R. 491; 80 L. T. 470—Kekewich, J.

**(c) Miscellaneous.**

**323. Executory Trust—Direction to Trustees to see Daughter's Share Settled in a Proper Way on her Marriage—Trusts of Settlement.**—A testator gave the residue of his estate upon trust for all his children who should attain twenty-one years in equal shares, and declared that no daughter should be entitled in any case to receive the share coming to her, but should "receive the income thereof only, with power to dispose of the principal by will if unmarried"; but, in the event of any such daughter marrying, then he empowered his trustees to see that such share was duly and properly settled upon her by deed, so that the same should be preserved for her separate use, independently of her husband.

**HELD**—that the daughters were not entitled to take absolutely; that the will did not merely give a power to the trustees to require a settlement as they thought proper, but directed the trustees to see that the share was settled in a proper way before marriage; that the shares on marriage ought to be settled upon the footing of giving each daughter a life estate for her separate use, without power of anticipation, with no life estate to the husband; and there should be the usual trusts in favour of the children and the ultimate trusts usual in a settlement of the wife's property.

*Loch v. Bagley* ((1867) L. R. 4 Eq. 122 13 W. R. 1103) distinguished.

**IN RE SPICER; SPICER v. SPICER**, (1901) 84 L. T. [195—Buckley, J.

**329. Power to Charge for Professional Services—"Professional or Other Charges"—Non-professional Services.**—A testator directed by his will that "any trustee or

executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate and carrying out of the trusts, powers and provisions of this my will whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person."

**HELD**—that the trustees under this clause were entitled to be paid all charges usual in the profession or business for any business done, whether in the ordinary course of his profession or business, or not in the ordinary course of his profession or business, but the clause did not authorise the trustees to charge for work done outside their profession or business.

**CLARKSON v. ROBINSON**, [1900] 2 Ch. 722; 69 [L. J. Ch. 859—Buckley, J.

**330. Presumption of Death of Legatee—Entitled to Share on Surviving Testator—Disappearance of Legatee in Testator's Lifetime—Onus Probandi—Liberty to Trustees to Divide Share.**—P. D. B., twenty-four years of age on September 1st, 1892, while abroad for a holiday with a friend, received a communication from his firm requiring his attendance in London. Upon receipt of this he at once left his friend, promising to return in a few days, and started by train apparently for London. Since then nothing had been heard of him, although searching inquiries had been made and advertisements published in all the English colonies and in other parts of the world. It appeared that an examination of his accounts showed that he was in default to his employers. The amount of his defalcation was at once made good to the firm by his father. Under his father's will P. D. B. was entitled, if he survived the testator, to a share amounting to about £30,000. The testator died in June, 1893.

**HELD**—that P. D. B. must be presumed to be dead, as there was no reason then why he should hesitate to come home, although there might have been at first; that it was highly probable that he died on September 1st, 1892, or at events shortly after; that the *onus* was on those claiming under him to prove that he survived the testator and this they had not done; and that the trustees were at liberty to divide the share bequeathed in favour of P. D. B., upon the footing that P. D. B. was unmarried and did not survive the testator.

*In re Walker* ((1871) L. R. 7 Ch. 120; 41 L. J. Ch. 219; 20 W. R. 171; 25 L. T. (n.s) 775) followed.

**IN RE BENJAMIN; NEVILLE v. BENJAMIN**, [1902] 1 [Ch. 723; 71 L. J. Ch. 319; 86 L. T. 387; 18 T. L. R. 283—Joyce, J.



## Directions to Trustees—Continued.

331. *Trust for Sale—Declaration of Particular Trust—Resulting Trust of Unexhausted Residue—Trustees' Indemnity and Reimbursement Clause.*—A gift of property to trustees on trust for sale, followed by the declaration of a particular trust which does not exhaust the whole of the property thus given, will be treated as creating a primary general trust of the whole of such property, so that there will be a resulting trust of the unexhausted residue in favour of the testator's heir and next of kin. The insertion of a trustee's indemnity and reimbursement clause will further strengthen the conclusion thus drawn from the presence of the trust for sale.

*Croome v. Croome* ((1888) 59 L. T. 582) and *Williams v. Roberts* ((1857) 27 L. J. Ch. 177; 4 Jur. (n.s.) 18) applied.

IN RE WEST; *GEORGE v. GROSE*, [1900] 1 Ch. 84; [69 L. J. Ch. 71; 48 W. R. 138; 81 L. T. 720 Kekewich, J.

## (d) Precatory Trusts.

332. *Absolute Gift "in confidence"—Gift over in event of Donee not disposing of Property by Will.*—A testator gave to his wife "the whole of my . . . property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to one or more of my nieces as she may think fit; and, in default of any disposition by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces."

HELD (Lord Lindley dissenting)—that the property was given to the wife absolutely, subject to an executory gift of the same at her death to such of the nieces as should survive in equal shares if and so far as she did not by will otherwise dispose of it to one or more of them.

Decision of C. A. (*sub nom. In re Hanbury, Hanbury v. Fisher* ([1904] 1 Ch. 415; 73 L. J. Ch. 222; 52 W. R. 662; 90 L. T. 66; 20 T. L. R. 209—C. A.) reversed.

COMISKEY v. BOWRING-HANBURY, [1905] A. C. [84, 74 L. J. Ch. 263; 53 W. R. 402; 92 L. T. 241; 21 T. L. R. 252—H. L. (E.).

333. *"I Desire"—Moral or Legal Obligation.*—A testatrix appointed her two daughters executrices of her will and gave all her property to them in equal shares "as tenants in common for their own absolute benefit." She then proceeded: "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the money and investments under this my will."

HELD—that there was no enforceable trust in favour of the son.

*In re Williams* ([1897] 2 Ch. 12; 66 L. J. Ch. 485; 45 W. R. 519; 76 L. T. 600—C. A.) followed and applied.

IN RE OLDFIELD; *OLDFIELD v. OLDFIELD*, [1904] 1 Ch. 549; 73 L. J. Ch. 433; 90 L. T. 392—C. A.

## XXIII. CONVERSION

## (a) Leaseholds.

334. *Equitable Tenant for Life—Liability to pay Rent and perform Covenants and Conditions.*—An equitable tenant for life of a leasehold estate and furniture and chattels under a will is bound during his tenancy to pay the rent reserved by and to perform the covenants contained in the lease, and to insure the house and furniture and chattels. The testator's estate is liable in respect of any breaches of covenant prior to the testator's death.

*In re Courtier, Coles v. Courtier* ((1886) 34 Ch. D. 136; 56 L. J. Ch. 350; 51 J. P. 117; 35 W. R. 85; 53 L. T. 574), considered.

*In re Tomlinson, Tomlinson v. Andrew* ([1898] 1 Ch. 232; 67 L. J. Ch. 97; 46 W. R. 299; 78 L. T. 12, *see* SETTLEMENTS, 183), dissented from.

IN RE BETTY; *BETTY v. ATTORNEY-GENERAL*, [1899] 1 Ch. 821; 68 L. J. Ch. 435; 80 L. T. 675—North, J.

335. *Intention—Enjoyment in specie.*—A testatrix gave her residuary estate, which included some leaseholds, to trustees upon trust to pay A. an annuity of £250, and to pay the remainder of the income to be derived from her property or the investments representing same, to her husband for life, and after his death to B., C., and D., in certain shares. In the event of A. dying without issue the incomes so provided for were to be increased by the amount of his annuity; but if A. died leaving issue, the annuity was to be paid for the benefit of his child or children until he or they attained twenty-one, when, out of all her property, a sum of £4,000 was to be raised and distributed as directed in the will. Subject as above the testatrix gave all her property to B., C., and D. in certain shares.

HELD—that, there being no sufficient indication of intention that the property should be enjoyed *in specie*, the rule laid down in *Howe v. Dartmouth* (7 Ves. 137) applied, and the property must be converted for the benefit of those entitled in remainder.

LYONS v. HARRIS, [1907] 1 Ir. R. 32—C. A.

336. *"Life Rent"—Optional Power to Sell—Intended Enjoyment in specie.*—B., who owned freeholds and leaseholds gave to his widow a "life rent" of all his property, with power to sell and reinvest the proceeds on good security, the property to be equally divided after her death among their children.

HELD—that the optional power of sale sufficiently indicated his intention that his widow should enjoy his leasehold property *in specie*, and that the rule in *Howe v. Earl of Dartmouth* ((1802) 7 Ves. 137) was excluded.

**Conversion—Continued.**

*Re Pitcairn; Brandreth v. Colvin*, ([1896] 2 Ch. 199; 73 L. T. 430) followed.

HELD—however, that the expression “life rent” amounted merely to “life interest,” and would not have been sufficient to indicate such an intention.

IN RE BENTHAM; PEARCE *v.* BENTHAM, (1906) 94 [L. T. 307—Kekewich, J.

**337. Mortgage—Tenant for Life—Liability to pay Rent and perform Covenants and Conditions.**—The tenant for life of a leasehold house bequeathed to him directly without the intervention of trustees, and then over, is, in the absence of further provision, liable during his estate to keep down the interest on a mortgage made by the testator on the house, and also to pay the rent reserved by, and perform the covenants and conditions (including the covenant for insurance) contained in, the lease.

In *re Betty; Betty v. Attorney-General* ([1899] 1 Ch. 821; 68 L. J. Ch. 435, 80 L. T. 675 North, J., No. 334, *supra*) and *Kingham v. Kingham* ([1897] 1 I. R. 170, 174; 1 T. L. R. 170) followed.

IN RE GJERS; COOPER *v.* GJERS, [1899] 2 Ch. [54; 68 L. J. Ch. 442; 47 W. R. 535; 80 L. T. 689—Kekewich, J.

**338. Tenant for Life to Pay for Repairs—Liability for Repairs Prior to Testator's Death.**—The testator by his will declared that his trustees might permit his widow to reside in his leasehold house, as long as she might desire, “she paying the rent and all rates, taxes, outgoings and repairs in connection therewith, and my trustees shall not be concerned to see to the upkeep thereof, or be responsible for the said premises in any way during such time as my wife shall reside in the said premises.” The widow resided in the house after the testator's death.

HELD—that the widow was not liable to pay for dilapidations existing prior to the testator's death, but only for current repairs since his death.

*Brereton v. Day* ([1895] 1 I. R. 518) followed.

IN RE SMITH; BULL *v.* SMITH, (1901) 84 L. T. [835; 17 T. L. R. 538—Byrne, J.

**339. Waste—Liability of Tenant for Life**—By a testator's will two leasehold estates were given to a tenant for life and remainderman. The legal tenant in remainder claimed against the executors of the tenant for life for loss from finding on coming into possession the premises were out of repair and having to put them in repair.

HELD—that the claim failed, and that the tenant for life was not liable for non-fulfilment of the covenants to repair.

In *re Cartwright*, (1889) 41 Ch. D. 532; 53 L. J. Ch. 590; 60 L. T. 891—Kay, J.) followed

IN RE PARRY AND HOPKIN, [1900] 1 Ch. 160; 69 [L. J. Ch. 190; 64 J. P. 137; 43 W. R. 345, 81 L. T. 807—North, J.

**(b) Power of Postponement**

**340. “Absolute and Unfettered Discretion” —Time and Mode of Sale—Considerations—Income of Tenants for Life—Postponement of Sale for Three Years.**—A direction to trustees to sell at their absolute and unfettered discretion is not equivalent to a direction that trustees may sell or may not sell at their absolute discretion. In the first case the time and mode of sale are in their discretion, but it is not open to them to take into consideration the reduction in income of the tenants for life, and to decide that they will abstain from following the directions of the will, because the tenants for life will then get a better income.

The only real estate of a testator was in Ireland, and up to 1898 the trustees “for sale at their absolute and unfettered discretion” had found, after inquiries, that a sale of the real estate was impracticable. In 1898 the surviving trustee obtained a report from the Irish land agent that it might be sold with some difficulty. The tenant for life urged him to postpone the sale. The trustee took out a summons asking for liberty to postpone the sale.

HELD—that the summons be directed to stand over and go back to chambers for three years, with liberty to the trustee to abstain during that period, if he shall think fit, from selling the Irish estate, for, after reading the report, the Court had much difficulty in deciding whether a sale was desirable or not. The parties were to have liberty to apply. In the meantime the discretion of the trustee to sell, if he should see fit, was not to be fettered.

IN RE ATKINS; NEWMAN *v.* SINCLAIR, (1899) 81 [L. T. 421—North, J.

**341. Discretionary Power to Postpone Conversion — Reversionary Interest — Non-exercise of Power—Lunacy of Tenant for Life—Intestacy of Tenant for Life—Right of Crown—Rate of Interest.**—A testator, by his will, appointed two executors and trustees thereof, and after bequeathing some legacies, he devised and bequeathed his real and residuary personal estate to the two trustees upon trust for conversion and investment, with a power to vary investments; then to pay or permit the testator's sister to receive the income of the investments during her life, and after her death to stand possessed of the trust funds upon trusts for her children. But if no child of his said sister should attain a vested interest in the trust funds, then they were to go to the trustees beneficially in moieties. There was a discretionary power for the trustees to postpone, for such period as to them should seem expedient, the conversion of any of the real or residuary personal estate, and also a direction, the effect of which was that, if the

*Conversion—Continued.*

conversion of any of the real or residuary personal estate should be postponed, the rule in *Howe v. Earl of Dartmouth* was to be excluded, and the income produced was to be treated as annual income, and to go to the tenant for life. Part of the residuary personal estate consisted of a reversionary interest in a sum of £5,666 Consols, which had been set apart under the will of his father to answer an annuity in favour of his said sister, who at the time of the testator's death was aged 35. She subsequently became a lunatic, and died in 1899 a spinster, intestate and without relations, her estate passing to the Crown.

**Held**—that the trustees never exercised their discretionary power to postpone the conversion of the reversionary interest; that after the intestate became lunatic it was wrong to keep the reversion unsold; that the discretion did not go so far as to enable the trustees to alter the rights of the tenant for life, except that they might postpone the conversion of one portion of the estate rather than another as a matter of management; that the Crown was entitled to have the income which the intestate lost during her lifetime made good out of the capital with interest at 3 per cent. *Mackie v. Mackie* ((1845), 5 Hare, 70) followed.

*In re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643; 52 L. J. Ch. 958; 32 W. R. 361; 49 L. T. 261 and *In re Goodenough* ([1895] 2 Ch. 537; 65 L. J. Ch. 71; 44 W. R. 44; 73 L. T. 152; 13 R. 454) followed.

*Rowles v. Bebb*, [1900] 2 Ch. 107; 69 L. J. Ch. [562; 82 L. T. 633; 48 W. R. 562—C. A.

**342. Implied Power to Mortgage.**—A testator gave all his real and personal property to trustees upon trust for sale and conversion; and gave power to the trustees to postpone the sale and conversion of any part of his real and personal estate as long as in their uncontrolled discretion they should think proper; and he empowered his trustees during such interval or postponement to manage, let, or lease, or to cultivate his real or leasehold estates, "and to make out of the income or capital of my real and personal estate any outlay" for renewals of leases, repairs, &c., for the benefit of his estate. There was no express power to mortgage in the will.

**Held**—that, upon the true construction of the will, the trustees had power to charge the corpus of the real estate, or of so much thereof as was for the time being unsold, with money required for the purposes mentioned in the will.

*In re Bellinger*; *Durell v. Bellinger*, [1898] 2 Ch. 534; 67 L. J. Ch. 580; 79 L. T. 54—Kekewich, J.

**343. Powers Vested in Two Trustees to be Executed by One—Position of Co-trustee.**—A testator devised and bequeathed his real

and personal estate to his wife and eldest son on trust for sale, but with unlimited powers of postponing sale and of management meantime, and of paying legacies before the time specified in the will, and appointed his wife and eldest son executrix and executor. By a subsequent clause in his will the testator declared that, so long as his son should be a trustee of his will, all the powers vested in his trustees should be exercised by his son solely as if he were sole trustee, with complete power of management and of selling and buying and varying investments without the concurrence of or reference to his co-trustees.

**Held** (on an originating summons taken out to ascertain the opinion of the Court)—that the effect of the clause was to vest in the son during his life the powers conferred on the trustees in the earlier clauses of the will as if he were sole trustee, so as to bind the widow to carry out his decisions arrived at in good faith, and that the clause was not inconsistent with the rest of the will, nor invalid nor void.

*In re Arnott*, *deceased*; *Arnott v. Arnott*, [1899] 1 Ir. R. 201—M. R.

**344. Residuary Estate—Accumulation for Twenty-one Years—Rents and Royalties from Coal Seams—Tenants for Life—Remaindermen.**—The testator gave the residue of his property to trustees upon trust for conversion, with power to postpone the conversion of any part of his real or personal estates for such period, not exceeding twenty-one years from his death, as to them should seem expedient, and directed the surplus of the annual proceeds during the said period of twenty-one years, and all accumulations thereof, to go in augmentation of the principal and capital of his residuary estate, and be applied and disposed of as part thereof. The trustees retained the property unsold. Part of the unsold property consisted of valuable seams of coal which the trustees were authorised to let, and did let, with certain surface rights. Under this lease the coal had been extensively worked, and the trustees had received large sums in respect of rents and royalties.

**Held**—that until the testator's residuary real estate was sold and converted in accordance with the directions of the will, the tenants for life of the settled shares were entitled to receive out the rents and royalties accrued and accruing from the said lands, such an annual sum as in the opinion of the Court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received by them if such residuary estate had been sold twenty-one years after his death, and the proceeds had been invested in accordance with the directions of the testator's will. Without laying down any fixed rule as to the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property the Court applied the principle laid down in the cases.

*Conversion—Continued.*

*Meyer v. Simonsen*, ((1852) 5 De G. & Sm 723; 21 L. J. Ch. 678) and *Brown v. Gellatly*, ((1867) L. R. 2 Ch. 751; 17 L. T. N. S. 131) approved.

*WENTWORTH v. WENTWORTH*, [1900] A. C. 163, [69 L. J. P. C. 13; 81 L. T. 682, 16 T. L. R. 81—P. C.

345. *Unauthorised but not wasting Securities—Income from—Enjoyment in specie.*—The ordinary rule as to the income from unauthorised investments, the conversion of which is postponed, applies equally whether such securities are or not of a wasting character.

A testator gave property to trustees upon trust to sell and convert (with power to postpone conversion), and out of the proceeds to pay debts and legacies, and to invest the residue, in trust to pay the income to his widow for her life.

The trustees postponed the conversion of certain subsisting investments not authorised by the investment clause of the will, but not of a wasting character.

HELD—that the widow was not entitled to the full dividends paid on the shares in question, but only to interest at 3 per cent. on the value of the shares calculated at the testator's death; the surplus must be invested and treated as capital.

*Bulkeley v. Stephens* ((1863) 3 N. R. 105) not followed.

IN RE CHAYTOR; *CHAYTOR v. HORN*, [1905] 1 [Ch. 233; 74 L. J. Ch. 106, 53 W. R. 251; 92 L. T. 290—Warrington, J.

346. *Wasting Property—Mining Royalties—National Conversion—Apportionment between Tenant for Life and Remainderman—Rate of Interest to Tenant for Life—Income on Invested Surplus.*—Where wasting property, such as mining royalties, settled by a will has been retained by the trustees under a power to postpone conversion, the tenant for life of such property will now only be entitled to interest at the rate of 3 per cent. upon the estimated value thereof at the death of the testator.

The surplus income from the retained investment must be invested as capital for the remainderman, but the income must be paid to the tenant for life.

*Meyer v. Simonson* (21 L. J. Ch. 678; 5 De G. & Sm. 723); *In re Lynch Blossie, Richards v. Lynch Blossie* (34 L. J. N. C. 136), and *Rowlls v. Bebb* ([1900] 2 Ch. 107; 69 L. J. Ch. 562; 48 W. R. 562; 82 L. T. 633, *supra*, No. 341), followed.

IN RE WOODS; *GABELLINI v. WOODS*, [1904] 2 [Ch. 4; 73 L. J. Ch. 204; 90 L. T. 8—Kekewich, J.

(c) *Tenant for Life and Remainderman.*

347. *Absolute Gift—Subject to an Executory Limitation—Reversionary Interest in Funds—Enjoyment in Specie—Conversion.*

—A testator by his will bequeathed to his wife his business and all other his personal property and effects, and appointed her sole executrix. He afterwards by a codicil provided that in the event of his wife dying without issue leaving their adopted daughter surviving, the property bequeathed to his wife should take effect as if in such bequest the name of the adopted child were substituted for that of his wife. A reversionary interest in trust funds was part of the testator's estate.

HELD—that having regard to the terms of the gift of the will and in the codicil, the testator had shown an intention that the property should be enjoyed in specie, and there ought not to be a sale of the reversion.

The principles laid down in *Howe v. Earl of Dartmouth* ((1802) 1 W. & T. 7th. ed. 68) are not generally applicable to a case of an absolute gift subject to an executory limitation.

IN RE BLAND; *MILLER v. BLAND*, [1899] 2 Ch. [336; 68 L. J. Ch. 745—Stirling, J.

348. *Farming Stock and Implements—Things “quæ ipso usu consumuntur”—Life Interest.*—Farming stock and implements are not things *quæ ipso usu consumuntur*, and the gift of them for life does not confer upon the donee an absolute interest.

*MYERS v. WASHBROOK*, [1901] 1 Q. B. 360; 70 [L. J. Q. B. 357; 83 L. T. 633—Div. Ct.

349. *“Full and Absolute Control”—Tenant for Life—Waste—Timber.*—A testator devised an estate to his wife for life, with remainder to his brother in fee. The testator appointed her sole executrix, with full and absolute control over all her property during her life.

HELD—that the wife had simply a wide power of management over the property, and the testator did not intend to permit her to commit waste, and that she was not entitled to cut down timber and timber-like trees otherwise than in due course of management for the benefit and preservation of the estate.

*PARDOE v. PARDOE*, (1900) 82 L. T. 547; 16 [T. L. R. 373—Stirling, J.

350. *Gift for Life of Shares in Business—Right to Profits in Specie.*—For the purpose of the rule in *Howe v. Dartmouth* (7 Ves. 137) there is no difference in principle between a trade involving risk and a leasehold held under onerous covenants.

A testator, after giving to his wife “all my real and personal estate for her use as long as she remains a widow and at her death all to be divided” among his children, proceeded: “Also my shares and interest in the New Hem Heath Mining Company and the New Rose Vale Brick and Tile Company,” which were two colliery businesses carried on by him in partnership with other persons.

HELD—upon a consideration of the authori-

**Conversion—Continued.**

ties and the construction of the will, that the rule in *Howe v. Dartmouth (Earl)* (*supra*) did not apply, and that the wife was entitled during widowhood to the profits of the shares of the business in specie.

*Kirkman v. Booth* (18 L. J. Ch. 25; 11 Beav. 273) discussed.

*STAINER v. HODGKINSON*, (1904) 73 L. J. Ch. 179; [52 W. R. 260—Buckley, J.

351. *Gift Vested but liable to be Divested—Inference—Rule in Howe v. Lord Dartmouth* (1802), 7 Ves. 137.]—The rule in *Howe v. Lord Dartmouth* (1802), 7 Ves. 137, is founded on an inference derived from the intention of the testator that a particular property should be enjoyed by parties in succession by way of remainder such as a gift to a tenant for life with remainders over. The Court infers from that intention of the testator that the property should be preserved in such a state that those for whom it is destined, after the cesser of the tenancies for life should enjoy it. That inference may be rebutted by various circumstances. In a case where the gift is vested but liable to be divested on the happening of an event, the inference is much less strong in favour of the supposed wish of the testator.

IN RE HAMMERSLEY; *HEASMAN v. HAMMERSLEY* [(1899) 81 L. T. 150—Stirling, J.

352. *Hazardous Securities—Enjoyment in Specie—Power to Trustees to Retain Securities.*]—A testator by his will bequeathed his personal estate to trustees upon trust for his wife for life with remainders over, and the will provided that the trustees might retain any of the investments belonging to the testator at his death for such period as to them might seem proper without being responsible for any loss occasioned thereby. The testator at the time of his death was possessed of fully paid-up shares in a company, the shares being of a hazardous, though not of a wasting, nature.

HELD—that the discretion in the trustees to retain the investments showed a contrary intention which displaced the general rule as to conversion laid down in *Howe v. Earl of Dartmouth* (7 Ves 137); that the trustees therefore were not bound to convert the shares, but might retain them; and that if they did retain them the tenant for life was entitled to the whole income therefrom.

IN RE BATES; *HODGSON v. BATES*, [1907], 1 Ch. [22; 76 L. J. Ch. 29; 95 L. T. 753; 23 T. L. R. 15—Kekewich, J.

## XXIV. PAYMENT OF DEBTS AND LEGACIES.

### (a) Abatement.

353. *Direction by Testator that Debt due to Testator be retained in or towards Satisfaction of Legacy—Specific Legacy—Abatement—Legatee's Bankruptcy—Proof against*

*his Estate.*]—A testator left his son H. W. £10,000. He also left legacies to his other children. He further directed that "as regards any money which shall be due to me at my decease from the said H. W. the same shall (but not an amount exceeding £10,000) be set off against and retained by him in or towards satisfaction of the legacy of £10,000 hereinbefore given him." The testator's executors obtained judgment against H. W. for £26,398 odd after giving credit for the legacy of £10,000. H. W. became bankrupt. The testator's estate, chiefly owing to the default of H. W., was so much reduced in value that the amount available for distribution among the legatees was insufficient for the payment in full of the legacies. The executors proved in H. W.'s bankruptcy for £5,356 odd, being the difference between the amount of the legacy £10,000 with which the bankrupt had been credited, and £4,643 odd, the proportion due on abatement.

HELD—that the legacy of £10,000 was not in a strict sense a specific legacy; that the governing intention of the testator was that the benefit of the legacy was to go only in reduction of the indebtedness of the legatee to his estate, and not for his benefit; that the legacy had no priority, for it was not intended to be payable out of the debt only or in priority to the other legatees; that it was subject to abatement; and that the proof must be admitted.

IN RE RICHARDSON; *EX PARTE THOMPSON v. HUTTON*, (1902) 86 L. T. 25—Wright, J.

354. *Whether Legacies General or Specific—Legacy in Satisfaction of a Debt—Forgiveness of Debts.*]—By his will, A. gave to the trustees of his daughter's marriage settlement £3,000 in satisfaction of his covenant to pay them £1,000. He further forgave his children respectively all debts and sums of money due from them to him. His estate being insufficient to pay all legacies in full,

HELD—that the legacy of £3,000, being a mere bounty, was liable to abatement, the principle as to legacies given in satisfaction of a debt not being applicable to it, but that the release of debts to those children who owed anything amounted to specific legacies which would not abate.

IN RE WEDMORE; *WEDMORE v. WEDMORE*, [1907] 2 Ch. 277; 76 L. J. Ch. 486; 97 L. T. 26; 23 T. L. R. 547—Kekewich, J.

### (b) Apportionment.

355. *Gift of "the whole of the Income" for Life—Express Stipulation against Apportionment—Apportionment Act, 1870* (33 & 34 Vict. c. 35), ss. 2, 5, 7.]—A testator, who was in receipt of the balance of the income from shares in a public trading company which were comprised in a deed of separation, after his wife had been paid an annual sum out of such income, by his will made in 1895 directed that "the whole of the income derived under the said indenture," should

**Payment of Debts and Legacies—Continued.**

after his decease be paid to his wife for life, and gave the residue of his estate to trustees upon trust for other beneficiaries. Upon an originating summons taken out by the trustees of the will,

**HELD**—that the gift to the wife of “the whole of the income derived under the said indenture” amounted to an express stipulation that no apportionment should take place, within the meaning of sect. 7 of the Apportionment Act, 1870, and that she was entitled to the whole income without any apportionment.

**IN RE MEREDITH, STONE v. MEREDITH, (1898) 67 [L. J. Ch. 409; 78 L. T. 492—North, J]**

**356. “Public” Company—Article Limiting Right to Transfer Shares—Will—Construction—Capital and Income—Declaration that Shares Bequeathed shall Carry Dividend Accruing at Death of Testator—Stipulation that no Apportionment shall take place—Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 5, 7.]**—Any company which is formed and registered under the Companies Act, 1862, as a public company, is a public company within sect. 5 of the Apportionment Act, 1870, although the right to transfer the shares to persons who are not already members of the company is restricted by the articles.

A testator bequeathed a large number of shares in a company to trustees upon certain trusts for tenants for life and remaindermen, and declared that every share thereby bequeathed should carry the dividend accruing thereon at death.

**HELD**—that it was “expressly stipulated” that no apportionment should take place within sect. 7 of the Apportionment Act, 1870, and that the accruing dividend must be treated by the trustees as income, and not as capital.

Decision of Kekewich, J., reversed.

**IN RE LYSAGHT; LYSAGHT v. LYSAGHT, [1898] 1 [Ch. 115; 67 L. J. Ch. 65; 77 L. T. 637—C. A.]**

**(c) Charge on Real Estate.**

**357. Devises in Trust—Legal Estate not Vested in Trustees—Power to Sell—Law of Property Amendment Act, 1859 [Lord St. Leonards’ Act] (22 & 23 Vict. c. 35), s. 14.]**—A testator appointed his wife sole executrix, and, after a direction to pay debts and legacies, devised and bequeathed the residue of his real and personal estate to trustees upon trust to pay to or permit and suffer his wife to receive the rents and profits during her life; then upon the like trust for his niece for life for her separate use; then upon trust to pay two legacies, and subject thereto for the children of the niece.

**HELD**—that the real estate was charged with payment of debts and legacies, but that as the trustees took no legal estate therein during the life of the wife, there was no

devise of all the testator’s interest in the realty, and consequently the trustees could not sell the real estate by virtue of sect. 14 of the Law of Property Amendment Act, 1859 (Lord St. Leonards’ Act).

**Doe d. Leicester v. Biggs ((1809), 2 Taunt. 109) and Doe d. Noble v. Bolton ((1839), 11 Ad. & E. 188; 3 P. & D.) followed.**

**Harton v. Harton ((1798), 7 T. R. 652) and Van Grutten v. Foxwell ([1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170—H. L. (E.)) distinguished.**

**IN RE ADAMS AND PERRY’S CONTRACT, [1899] 1 [Ch. 554; 68 L. J. Ch. 259; 47 W. R. 326; 80 L. T. 149—Stirling, J.]**

**358. Residuary Devise.]**—A testator bequeathed pecuniary legacies charged in the first instance upon his personal estate, and, if that should be insufficient, to be charged on his real and personal estate. He then devised his lands at A. to his son G., and other lands specifically mentioned to his son F., “subject as aforesaid.” There was no residuary devise, but the lands devised to F. included, in fact, all the testator’s real estate except the lands at A. devised to G. The personalty was not sufficient to pay the legacies.

**HELD**—that, upon the true construction of the will, the legacies were charged upon the whole of the real estate, including the lands at A. specifically devised to G.

**BANK OF IRELAND v. MCCARTHY, [1898] A. C. 181; [67 L. J. P. C. 13; 77 L. T. 777—H. L. (Ir.).]**

**359. Specific Devise—Debts—Deceased Partner—Devise of Partnership Realty—Solvent Partnership.]**—One of two partners bequeathed his share in the business upon certain trusts, and also specifically devised his share in certain freeholds of the partnership. The other partnership assets were sufficient to pay its debts.

**HELD**—that, as between the beneficiaries, the specific devise of the freeholds was valid, and that the specific devisees took such freeholds free from liability to contribute to the partnership debts.

**Farguhar v. Haddon ((1871) L. R. 7 Ch. 1; 41 L. J. Ch. 260) distinguished.**

**IN RE HOLLAND; BRETT v. HOLLAND, [1907] 2 [Ch. 88; 76 L. J. Ch. 449; 97 L. T. 49.—Neville, J.]**

**(d) Exoneration of Mortgaged Property.**

**360. “Contrary Intention”—Locke-King’s Acts, 1854 and 1867 (17 & 18 Vict. c. 113) and (30 & 31 Vict. c. 69).]**—A testator bequeathed his business and leasehold business premises to his son W., subject to payment of all debts and liabilities in respect of the business; he bequeathed his personal estate on trust for conversion, directing his funeral and testamentary expenses, debts and legacies to be paid out of the proceeds, and the residue to be divided among his children.

**Payment of Debts and Legacies—Continued.**

He had previously deposited with his bankers to secure a private debt the lease of his business premises.

**HELD**—that the intention of the testator was that W. should take the business premises subject to trade debts only; that this was a “contrary intention” within the meaning of the Locke-King’s Act, and that the residue must bear the private debt secured by the equitable mortgage.

*In re Nevill* ([1890] 59 L. J. Ch. 511) followed

*THOMPSON v. BELL*, [1903] 1 Ir. R. 489—M. R.

**361. Direction to pay Incumbrances—Mortgage on Freeholds—Life Policy as further Security—Apportionment—Locke-King’s Acts, 1854 (17 & 18 Vict. c. 113), and 1867 (30 & 31 Vict. c. 69)**—A testator devised certain freeholds upon trusts, and left the residue of his estate in trust for sale and conversion and division after payment of “... the incumbrances which may be charged on my said estate or any part thereof and the said incumbrances on No. 2—Sq.” The freeholds were subject to a mortgage for which a life policy (forming part of the residue) had been deposited as further security.

**HELD**—that the mortgage debt must be apportioned, and that only the proportion on the policy moneys should be paid out of residue.

*In re Athill* ((1881) 16 Ch. D. 211; 29 W. R. 309) followed.

*IN RE PIMM; SHARPE v. HODGSON*, [1904] 2 Ch [345; 73 L. J. Ch. 627; 52 W. R. 648; 91 L. T. 190—Farwell, J.

**362. Gifts of Onerous and Beneficial Property to the Same Person—Freeholds and Leaseholds—Incumbrances—Distinct Gifts—Aggregate Gift—Right to Disclaim—Exoneration of Personal Estate—Locke-King’s Acts (Real Estate Charges Acts), 1854, 1867, 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34).**—Where there are two distinct gifts to the same person, one being onerous and the other beneficial, the donee may disclaim the onerous gift and take the other. If, however, the onerous and beneficial property are included in the same gift, *prima facie* the donee cannot disclaim the onerous and accept the beneficial property, but must take the whole or none.

A testator by his will devised his freehold estates in London and Middlesex to the use that his mother should receive a yearly rent-charge, and subject thereto to the use of his trustees for the term of one thousand years for raising portions, and subject thereto to the uses thereafter declared, of his freehold hereditaments in Wales. The testator devised his freehold hereditaments in Wales and all other his real estate to the use of his brother for life with remainders over in strict settlement; and he bequeathed

all his leasehold hereditaments to his trustees upon trust to pay the rents and perform the covenants of the several leases, and subject thereto to hold the same upon such trusts as should correspond with the uses declared concerning his freehold hereditaments in Wales, or as near thereto as the nature of the premises would permit. Before his death he had contracted to purchase a freehold estate called St. Bride’s, in Wales, which proved to be worth less than the purchase money remaining unpaid after his death. Among his leaseholds was a house which was sold after his death for a sum less than the sum charged on it by mortgage. No tenants in tail were in existence.

Two questions arose: (1) whether the real estate must bear the whole of unpaid purchase money of St. Bride’s under Locke-King’s Acts (The Real Estate Charges Acts), or whether it must be borne by the personal estate; (2) whether the real estate or the personal estate must bear the deficit in respect of the mortgage debt.

**HELD**—that St. Bride’s estate passed under the gift of all “his freehold hereditaments in Wales and all other his real estate” to the devisees, that it was one indivisible gift; that inasmuch as the leaseholds were given on the same trusts, the gift was, so far as the difference in the nature of freeholds and leaseholds would admit, given as one with the freehold property.

*Talbot v. Earl Radnor* ((1834) 3 My. & K. 252; 41 R. R. 64), and *Frewen v. Law Life Assurance Society* ([1896] 2 Ch. 511; 65 L. J. Ch. 787; 44 W. R. 682; 75 L. T. 17—North, J.) followed.

**HELD ALSO**—that the testator made one gift of free property and property subject to a lien, which lien fell on the latter property under Locke-King’s Acts, and the donees taking the property subject to the burden could not refuse to bear the burden whatever it might be, they must take the benefit with the burden; and that the same observation applied to the leasehold house which was mortgaged, and that must be brought into the account as the proper way of ascertaining the real ultimate benefit given to the donees in the one aggregate gift.

*IN RE BARON KENSINGTON, EARL OF LONGFORD v. [BARON KENSINGTON]*, [1902] 1 Ch. 203; 71 L. J. Ch. 170; 50 W. R. 201; 85 L. T. 577; 18 T. L. R. 89—Farwell, J.

**XXV. SURVIVORSHIP**

**363. Accruer.**—A testator left one-fourth of his residuary estate, in trust for one of his daughters with remainder to her children, or issue, living at her death, and the other three-fourths upon similar trusts for three other daughters, with the following survivorship clause—“... The shares or share of my daughters or daughter so dying [i.e., without leaving issue alive] shall fall into and become part of my residuary

**Survivorship—Continued.**

estate, and be held and disposed of on the same trusts. . . .

**HELD**—that upon the death of a daughter without issue her share was to be divided amongst the survivors.

*In re Palmer* ([1893] 3 Ch. 369; 62 L. J. Ch. 988; 42 W. R. 151; 69 L. T. 477—C. A.) followed.

And that, if a second daughter died without issue, the same rule would apply to her accrued (as well as to her original) share.

Rule as laid down in *Barker v. Lea* ((1823) T. & R. 413, 415; 24 R. R. 85, 87) approved.

Decision of Buckley, J., reversed.

*IN RE ALLAN; DOW v. CASSAGNE*, [1903] 1 Ch. [276; 72 L. J. Ch. 159; 51 W. R. 403; 88 L. T. 246—C. A.

**364. Gift by Implication—Gift to Grandchildren during their Lives of an Annuity in Equal Shares—Gift over of Whole Annuity after Death of last—Implied Gift for Life to Survivors of Share of Grandchild dying first.**—A testator had a perpetual annuity of £33 4s. 8d. out of lands of L. He gave to each of three grandchildren £11 1s. 7d a year during their lives, indicating incidentally that the annuity was to provide these sums: he directed that after the death of all these grandchildren the L. annuity was to go to his son.

Two of the grandchildren died.

**HELD**—that, the surviving grandchild was entitled to their shares during his own life.

*M'Dermott v. Wallace* ((1842) 5 Beav. 142) followed.

*Lill v. Lill* ((1856) 23 Beav. 446) distinguished.

*JENNINGS v. HANNA*, [1904] 1 Ir. 540—M. R.

**365. Gift of Income to two Persons in Equal Parts "that they shall each receive the half amount" during their Natural Lives—Right of Survivor to the whole Income.**—A testator by his will gave the income of his residuary estate to his widow for her life, and after death to his sister-in-law "in equal parts—that is to say, that they shall each receive the half amount" of the income during their natural lives. After their death the income was to be paid to his wife's niece during her natural life.

**HELD**—that the testator intended that the survivor of the sister-in-law should take the whole income for her life.

*IN RE TELFAIR; GARRICK v. BARCLAY*, (1902) [86 L. T. 496—Farwell, J.

## XXVI. EXERCISE OF POWER OF APPOINTMENT.

**366. Settlement—Power of Revocation and New Appointment—Wills Act, 1837 (7 Will 4 & 1 Vict. c. 26), s. 27.**—The principle that a general devise and bequest does not operate under sect. 27 of the Wills Act, 1837, as an

exercise of a power of revocation and new appointment applies to the case where the power of revocation and new appointment is that contained in the instrument originally creating it, as well as to the case where the power is that reserved by an appointment made in exercise of the original power.

*IN RE GOULDING'S SETTLEMENT; DOBELL v. DOBELL*, (1900) 43 W. R. 183—

Cozens-Hardy, J.

**367. Subsequent Wills—Probate of First and Last Wills, Omitting Intermediate Will.**—The testatrix made three wills, bearing date respectively April 21, 1890, July 5, 1894, and September 5, 1895, and died a widow, leaving several children. Under the will of her father, the testatrix had a power of appointment over a sum of £4,000, and by her first will she gave that sum, "being the sum left to me by the will of my late father," to her then unmarried daughter, Gertrude, for her sole use and benefit absolutely. Between the dates of the first and second wills the daughter married, and two of the testatrix's sons received some benefactions under the will of an uncle.

By the second will, made in 1894 by a different solicitor and containing no revocation clause, she bequeathed to her daughter "the sum of £4,000 for her own absolute use and benefit and to dispose of as she may think fit." She repeated the gift to her steward, and the residue outside the £4,000 of her property (which was said to be small), she gave to the same daughter and to a third son, equally. This son died in June, 1895, and, the steward having also died, the testatrix in September, 1895, executed a third will which contained no revocation clause but which purported to dispose of the whole of her property. The bequest to her daughter G. was in these terms "All the property, real, freehold, or personal, wheresoever situate of which I may die seized or possessed, for her own absolute use and benefit and to dispose of as she may think fit."

It was conceded that the words employed in the second and third wills did not constitute a valid execution of the limited power of appointment vested in the testatrix.

**HELD**—that, as there was no express revocation of the first will, and the second and third wills contained nothing inconsistent with the execution of the power, admittedly wrought by the first will, and as, moreover, the 27th section of the Wills Act did not apply, the general words of bequest contained in the later wills could not revoke or affect the previous valid execution of the power.

But held, that, as the second and third wills professed to deal with the whole of the testatrix's own property, the latter by implication revoked the former, and that probate should only be granted of the will of 1895 and the will of 1890, as together constituting



**Exercise of Power of Appointment—Continued.**

the testamentary dispositions of the testatrix.

Whether, if the power of appointment had been general, and not, as it was, limited, the general bequests in the second and third wills would have wrought an effectual execution of the power, but would also have effected a revocation of the prior execution of the power, *quære*.

CADDELL *v.* WILCOCKS, [1898] P. 21; 67 L. J. P. 78; 78 L. T. 83; 14 T. L. R. 100; 46 W. R. 394—Jeune, P.

368. *Testamentary Documents not admitted to Probate.*—A power of appointment conferred by a will, exercisable by deed or writing duly executed or by will, is not validly exercised by testamentary documents executed by the donee, but attested by one witness only, and containing no reference to the power or to the property subject to it.

IN RE EDMONSTONE; BEVAN *v.* EDMONSTONE, (1901) [49 W. R. 555—Byrne, J.

369. *Will dated prior to the Creation of the Power—Presumption—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), ss. 24, 27.—H. the younger by his will, dated 29th December, 1884, gave all the residue of the property over which, at the time of his death, he should have a disposing power, upon trusts (*inter alia*) to pay the yearly income to his wife for life or widowhood, and afterwards for his children.

H. the elder—the father of H. the younger—by his will, dated 10th June, 1893, empowered each child of his by his or her will to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in his—H. the elder's—residuary estate, for the life of such wife or husband, or for any interest determinable on or before the death of such wife or husband. H. the elder died in 1895, and H. the younger in 1899, leaving a widow and three children.

HELD—that the case was not within sect. 27 or sect. 24 of the Wills Act; that there was a presumption against an intention to execute by anticipation a special power which had not been created till after the alleged execution; that the donor could not have intended to execute a power giving the donee the right of determining in which of two or more directions a certain fund should fall at a time when he could not know the conditions or limitations imposed by the donor; and that the words of the will could not fairly be construed as disclosing an intention to execute a non-existent special power.

Decision of Byrne, J. ([1900] 2 Ch. 322; 69 L. J. Ch. 691; 49 W. R. 21; 83 L. T. 152; 16 T. L. R. 448), affirmed.

IN RE HAYES; TURNBULL *v.* HAYES, [1901] 2 Ch. [529; 70 L. J. Ch. 770; 49 W. R. 659; 85 L. T. 85; 17 T. L. R. 740—C. A.

**XXVII. ANNUITIES.**

370. *Annuity to Widow—"Further Annuity" for Education and Maintenance of Daughter—Death of Widow—Necesser of further Annuity.*—A testator by his will directed his trustees to pay to his wife so long as she should continue his widow "such a sum as should, together with the income from her marriage settlement, amount to the sum of £1,000 per annum," by equal quarterly payments, and also to pay to his said wife, by the like equal quarterly payments, a "further annuity" of £300 per annum until his daughter should attain the age of twenty-one years, to be applied by her in and about the maintenance and education of his daughter. Her receipt was to exonerate his trustees from all liability to see to the application thereof, and there was a direction to accumulate the surplus income subject to the payment of this annuity.

HELD—that the widow was nothing more than a trustee for the daughter of the annuity, and that the annuity did not cease by reason of the death of the widow during the infancy of the daughter, but was still available for her education and maintenance.

IN RE YATES; YATES *v.* WYATT, [1901] 2 Ch. 438; [70 L. J. Ch. 725; 49 W. R. 646; 85 L. T. 393—Byrne, J.

371. *Equally among Children who should attain Twenty-one—Minors at Time of Enjoyment.*—A testator charged his residuary real and leasehold estates with the payment to his two daughters of an annuity, and provided that from and after the decease of either of his said daughters the annuity to which his daughter so dying was entitled should, during the joint lives of the survivor of his daughters and his son and the lifetime of the survivor of them "be received and enjoyed by the child if only one, and all the children equally if more than one, of my said daughters so dying who either before or after the decease of their parent shall attain the age of twenty-one years." One of the daughters died leaving four children, two of whom had attained twenty-one years, and two were minors.

HELD—that the two children who had attained twenty-one were entitled to receive one moiety of the annuity between them.

IN RE LATHAM; SNEYMOUR *v.* BOLTON, [1901] [W. N. 248; 36 L. J. N. C. 653; 112 L. T. J. 177—Byrne, J.

372. *Interest on Arrears—Practice.*—Owing to an honest mistake, an annuity, or annual sum payable out of income of a testator's residuary real and personal estate, had been treated as determined, whereas it, in fact, according to the construction of the will as subsequently ascertained, continued. The mistake was set right as regards the continuance of the annuity.

**Annuities—Continued.**

**HELD**—that the interest could not be allowed on the arrears of the annuity, because it was the practice that arrears of annuity do not carry interest.

IN RE HISCOE; *HISCOE v. WAITE*, (1902) 71 [L. J. Ch. 347—Kekewich, J.

**373. Power to Raise Deficiency out of Capital—Apportionment—Hotchpot.**—A testator gave his widow a life interest in certain real estate called A., and he also gave her a life interest in his residuary real and personal estate, subject to two annuities of £150 and £450 to his son and daughter, with an overriding paramount annuity to his widow of £400.

On the death of the widow in 1903 there was a fund in Court representing the proceeds of the sale of A., on which the annuities had only been charged subject to her life interest.

It appeared that for many years part of the widow's annuity and the whole of the other two annuities had been paid out of *corpus* pursuant to a power contained in the will. The son and daughter had predeceased the widow, but under the will the daughter's children took her annuity, and the question now arose as to how the annuities ought to be valued for the purpose of winding up the estate.

**HELD**—that the annuities to dead persons ought to be valued at the amount of the arrears due at the date of their respective deaths, and those to live persons at the amount of the arrears *plus* an actuarial estimate of the value of future payments, and that payments previously made out of capital to the son and daughter ought not to be brought into hotchpot.

*Potts v. Smith* (1869) L. R. 8 Eq. 683, 17 W. R. 1083; 21 L. T. 54—James, V.-C.) followed.

IN RE METCALFE; *METCALFE v. BLENOWE*, (1903) [72 L. J. Ch. 786, 51 W. R. 650; 88 L. T. 727—Farwell, J.

**374. To be Paid out of Income—Whether a Continuing Charge.**—There is no general rule that (apart from some indication of such an intention) a direction to pay an annuity out of the income of residue creates a continuing charge upon income.

B. gave her residuary estate to trustees upon trust to realise and invest out of the income to pay certain annuities. Subject to such annuities they were to pay the income to T. for life, and after her death to distribute the estate. The current income was not sufficient to pay the annuities in full.

**HELD**—that they were not charged on the *corpus*, nor were they a continuing charge on the income, but were only charged on current income, and must fail so far as it was insufficient.

IN RE BIGGE; *GRANVILLE v. MOORE*, [1907] 1 Ch. 714; 76 L. J. Ch. 413; 96 L. T. 903—Neville, J.

**375. Whether Charged on Corpus as well as on Income—Alternative Gifts—Continuing Charge upon Income.**—A testator left his whole estate to trustees upon trust, so long as any child of his should live, to pay to his wife "out of the income of my residuary trust funds" such a sum as with her income from their settlement funds should make up a total annual income of £8,000. In default of children (which happened) there was a direction "to pay to her during her life such further sum as with the income derived from the said settlement shall make up the annual sum of £10,000." There was also a direction that "the said annual sums of £8,000 or £10,000, as the case may be, shall be deemed to commence and be payable as from my death." The estate was unable to pay out of income the annual amount necessary to make up the widow's income to £10,000.

**HELD** (Moulton, L.J., dissenting)—that the direction to pay the £8,000 "out of income" must be regarded as applicable also to the alternative gift of £10,000, and that there was no charge upon the *corpus* and no continuing charge upon the income.

IN RE BODEN; *BODEN v. BODEN*, [1907] 1 Ch. 132; 76 L. J. Ch. 101; 95 L. T. 741—C. A.

**376. Whether for Life or Perpetual.**—A testator devised all his property to his two sons, William and Thomas, charging a portion, item by item, with certain annuities. The will contained the following direction: "My two sons Thomas and William are to pay out my property as follows: to pay to my wife yearly during her life £18 4s.; to my daughter Mrs. O'Neill yearly £36 8s.; to my son Tim Ward yearly £18 4s.; to said William Ward's eldest son yearly £3 12s." The testator then directed that after the death of his wife her annuity was to be equally divided between Thomas, William, and Tim Ward and Mrs. O'Neill, and that after the decease of Mrs. O'Neill her annuity was to be divided equally between her surviving children. Should Tim Ward not come home or die without issue, his annuity was to be divided equally "on the surviving families, viz., Mrs. O'Neill, Thomas, William, and mother."

**HELD**—that the annuities were for the lives of the annuitants only, and not perpetual.

WARD v. WARD, [1903] 1 Ir. R. 211—V.-C.

**377. Whether Perpetual or Not.**—A. devised her interest in certain lands on trust "to permit my nephew R. to receive every year the sum of £100 during his natural life, and after his death to the use of his son or sons as may be most deserving, or as he may by will appoint."

**HELD**—that the annuity terminated upon

**Annuities—Continued.**

the death of the survivor of R. and his sons.  
IN RE SMITH, [1905] 1 Ir. R. 453—C. A.

**XXVIII. CHARITABLE BEQUESTS.**

And see titles CHARITIES; EDUCATION.

**378. Charitable Bequest with Conditions—Construction of Will**—A testator by his will gave a variety of charitable bequests with conditions attached thereto, and then added the following clause: "Each such society or institution shall not be entitled to receive all or any part of my respective benefactions hereinbefore mentioned in their favour until the would-be recipient shall produce indisputable proof, or such as would satisfy the County Court Judge, that my respective legacy has been the means of obtaining fresh donations respectively to meet my gift, either entirely or in part, that is to say, pound for pound, thus doubling the sum in each case taken or obtained from my estate under this will. . . . And it is my will that the whole or any part of these charitable bequests respectively not absorbed or taken up, or not met with equivalent sums as aforesaid, shall after four years be offered to the charitable institutions herein named . . . provided that at the end of seven years all such sums not taken up shall sink with my residuary estate herein-after disposed of."

HELD—that the period of four years ran from the testator's death, and that a charity which had in part complied with the condition by raising funds to meet the bequest in part would be entitled to the benefit of the bequest *pro tanto*.

IN RE GLUBB, (1898) 14 T. L. R. 66—North, J.

**379. Condition Precedent—Perpetuity—Statutes of Mortmain.**—A testator, who died in 1894, by his will dated in July, 1893, after devising his residuary real estate to trustees upon trust for sale, and to hold the proceeds upon the trusts declared of his residuary personal estate, gave the sum of £10,000 to his trustees upon trust to transfer the same to trustees to be appointed by them, or the trustees for the time being of his will (such appointed trustees to be not less than three or more than six in number), to be held by them upon trust "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting almshouses" in a certain parish for the deserving poor of that parish, without regard to religious denomination, and in making weekly or other periodical allowances to the inmates of such almshouses; and he empowered the trustees so appointed, in conjunction with the trustees of his will, to make rules for the regulation and maintenance of such almshouses. And, after giving other charitable and general legacies, the testator gave all his residuary personal estate to his trustees upon trust for sale and

conversion, and to pay debts and legacies, and hold the residue of the moneys upon trust, to pay or transfer the same to trustees to be nominated and appointed by the trustees of his will, upon trust "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting and maintaining" a certain orphanage or institution; and the will contained directions for the management and regulation of such institution.

HELD—that the language of the will did not constitute a condition precedent to the gifts, but was introduced for the purpose of mere machinery so as to avoid the provisions of the Statutes of Mortmain; and that the principle to be applied to the present case was that explained in *Chamberlyne v. Brockett* (L. R. 8 Ch. App. 206).

HELD—therefore, that, without prejudice to any question, if land could not be obtained there must be a declaration that the sum of £10,000 and the residue were well given to charities; and that special trustees thereof must be appointed as directed by the will.

Decision of North, J., reversed.

IN RE GYDE; *WARD v. LITTLE*, (1898) 79 L. T. 261  
[—C. A.]

**380. Failure—National Schools—Education Authority—Education Act, 1902** (2 Edw. 7 c. 42), ss. 1, 5, 6, 7, 13.]—A testator bequeathed by his will certain funds in trust for the income thereof to be applied towards the annual expenses of certain National schools, "so long as the said schools should be supported by voluntary subscriptions as now and heretofore in addition to the Government grant," but with a gift over to the vicar, and churchwardens of the parish in the event of the schools "ceasing to be so supported or becoming subject to the control of a school board." In consequence of this bequest there had been practically no need for voluntary subscriptions since the death of the testator, but the managers had incurred a small amount of debt. By the Education Act, 1902, the county council became the education authority for the schools. Upon a summons to determine whether the gift over had taken effect.

HELD—that there had been no forfeiture either by cessation of voluntary subscriptions or by the schools being subject to a school board, upon the true construction of the will and the Act.

IN RE BEARD'S TRUSTS; *BUTLIN v. HARRIS*, [1904] 1 Ch. 270; 73 L. J. Ch. 176; 68 J. P. 141; 52 W. R. 312; 90 L. T. 274; 20 T. L. R. 163; 2 L. G. R. 320—Byrne, J.

**381. Gift to Oxford and Cambridge Universities—Founding Exhibitions, Scholarships, and Professorships—Law and Divinity—Discretion of Trustees**—A testatrix by her will appointed the plaintiffs executors and trustees thereof, and directed her trustees to hold her residuary estate upon trust to lay out, expend, apply, or make over the

Charitable Bequests—*Continued.*

same in such amounts and shares and in all respects in such manner and form and subject to such terms, rules, provisions, and restrictions whatsoever as her trustees, in their sole, uncontrolled discretion should please in founding, endowing, supporting, and enlarging, as to some in the name of her brother J. W. S., and as to others in her own name, at the University of Oxford as to some, and at the University of Cambridge as to the rest, of exhibitions, scholarships, and professorships for law and divinity respectively, and of a law library, and of the librarian thereof, and in the erection of a building for the law library, and in the purchase of furniture and books therefor, or some one or more of the said several purposes.

**HELD**—that the trustees had been given the amplest possible discretion; they might restrict the holding of the scholarships to the sons of British subjects domiciled in England; they might make them tenable at a college or hall; they might give a preference founded upon kinship or locality; the scholarships might be founded so as not to be under the control of the University and not University scholarships; that if the trustees founded a scholarship for Oxford, either in law or in divinity, they would comply with the terms of the will and it would be competent for them to devote the rest to Cambridge; and that the trustees ought not to exercise their discretion upon the known views of the testatrix.

*IN RE SQUIRE'S TRUSTS; CHESTER AND FLOWER v. UNIVERSITIES OF OXFORD AND CAMBRIDGE,* (1901) 17 T. L. R. 724—Kekewich, J.

## XXIX. CONDITIONAL WILLS.

382. *Conditional Codicils.*—Two codicils to a will, by which a wife had appointed her husband sole executor, commenced "In case I survive him, I appoint the following persons to be executors": then followed various bequests.

**HELD**—upon a consideration of the codicils as a whole, that the condition applied only to the appointment of executors, and not to the remainder of the codicils.

*TOWNSEND v. MOORE,* [1905] P. 66—C. A.

383. *Principles on which a Will is Decided to be Conditional or not.*—Where a testator refers to a possible impending calamity in connection with his will, and the question arises whether he intends to limit the operation of the will to the time during which such calamity is imminent, if the language used by him can by any reasonable interpretation be construed to mean that he refers to the calamity and the period of time during which it may happen as the reason for making a will, then the will is not conditional; but if he refers to the calamity or the possible occurrence

of some event as a reason for a certain disposition of his property, and mixes up the disposition of the property with the event so that it is dependent on the other, then the Court must hold the will to be conditional.

*In the Goods of Porter* ((1869) L. R. 2 P. & D. 22; 39 L. J. P. 12; 21 L. T. (N.S.) 680), followed.

*EDMONDSON v. EDMONDSON AND OTHERS,* (1901) 17 [T. L. R. 396—Barnes, J.

## XXX. MUTUAL WILLS.

384. *Fresh Will made by Party who Predeceases the Other—Notice on Death—No Relief to Survivor.*—Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable. But on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor, who has, on the death of the other party to the arrangement, notice of the alteration, cannot claim to have the later will of the deceased set aside or modified, either by way of declaration of trust or otherwise.

*STONE v. HOSKINS,* [1905] P. 194, 74 L. J. P. [110; 54 W. R. 64; 93 L. T. 441; 21 T. L. R. 528—Barnes, P.

385. *Probate of Part only.*—A husband and wife wrote out and signed a document as their will, leaving all their property to each other, and further making provisions as to what was to be done with the property in the event of the survivor dying without altering these provisions. The wife died first.

Upon the application of the husband, the Court granted probate to him of so much only of the document as became operative through the death of the wife.

*IN THE GOODS OF PIAZZI-SMYTH,* [1898] P. 7; 67 [L. J. P. 4; 77 L. T. 375; 46 W. R. 426—Jeune, P.

## XXXI. CONFLICT OF LAWS.

386. *Bequest to "Next of Kin" of a Foreigner—Sister of the Half-blood—Nephews and Nieces—Priority—Conflict of English and Foreign Laws.*—The will of a domiciled Englishman must be governed by the law of England so far as construction is concerned.

A testator, a domiciled Englishman resident in India, bequeathed to his niece, in Hamburg, Germany, Government 4 per cent. promissory notes for Rs.6,500. The testator

**Conflict of Laws—Continued.**

declared by his will that in the event of the death of a legatee in the lifetime of the testator, the legacy was not to lapse, but should "be divided amongst the next of kin of the deceased legatee." The testator's niece died in the testator's lifetime, in Hamburg, a domiciled German subject, without any issue; her nearest relations were a half-sister and nephews and nieces, the children of a deceased brother.

**Held**—that the testator's will must be governed by English law, that the gift to the "next of kin" meant a gift to the niece's nearest blood relations in the ascending and descending line, including those of the half-blood; and that the sister of the half-blood was entitled to the legacy to the exclusion of the nephews and nieces, though by the local law of Hamburg nephews and nieces were entitled to the exclusion of the half-sister.

IN RE FERGUSON'S WILL, [1902] 1 Ch. 483; 71 L.J. Ch. 360; 50 W. R. 312—Byrne, J.

387. *Domiciled Foreigner—Unattested Will—Bequest of Leaseholds in England—Lex Rei Sitæ—Lex Domicilii—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 9.]—The will of a foreigner domiciled abroad, though valid according to the *lex domicilii*, and though admitted to probate in England, will not pass the beneficial interest of leaseholds in England unless executed in accordance with the formalities required by the Wills Act, 1837.

Decision of Kekewich, J. ([1900] 2 Ch. 504; 69 L. J. Ch. 730; 48 W. R. 671; 93 L. T. 106), affirmed.

PEPIN v. BRUYERE, (1901) 50 W. R. 34; 85 L. T. 461; [1902] 1 Ch. 24; 71 L. J. Ch. 39—C. A.

388. *Marriage of Domiciled Frenchman and Domiciled Englishwoman—English Marriage Settlement—General Power of Appointment—English Will—Law Applicable.*—In contemplation of the marriage between a domiciled Frenchman and a domiciled Englishwoman, a settlement in English form, and of which the trustees were English, of English personal property belonging to the intended wife was executed. The settlement gave the wife a general testamentary power of appointment over the settled property, which was given to her for her separate use in default of appointment. The wife made an English will purporting to dispose of the property, subject to the settlement, in a manner that to some extent would not be permitted by the law of France if it were her own absolute property.

**Held**—that English law was to prevail, and that (1) the will was a good exercise of the power given by the settlement; (2) the will was an effective disposition of the whole property.

IN RE MEGRET; TWEEDIE v. MAUNDER, [1901] 1 Ch. 547; 84 L. T. 192—Cozens-Hardy, J.

389. *Will of Frenchwoman—Subsequent Marriage in England to French Fugitive—Criminal—Revocation—Domicil—Animus Revertendi—Wills Act, 1837* (7 Will. 4 & 1 Vict. c. 26), s. 18.]—The validity of the pre-nuptial will, so far as it affects movable property, depends not only on the laws of the domicile of the testator at the time of his death, but also on the law of his domicile at the time of his making his will, and at the time of his subsequent marriage; but the domicile of the testator on each of these occasions must be determined by the English Court of Probate in the English sense—*i.e.*, according to those legal principles which are recognised in this country and are part of its law.

To acquire an English domicile in the English sense not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period.

According to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends *prima facie* on the domicile of the husband in the English sense at the time of the marriage; and even assuming that it is possible for the parties to accept in this respect by express agreement (*e.g.*, by marriage settlement) a matrimonial régime different from that of the country of the husband's domicile at the time of the marriage, yet no such intention ought to be circumstantially inferred in the absence of such express agreement.

Per Vaughan Williams, L.J. The rule that a pre-nuptial will is revoked by the subsequent marriage of the testator is part of the matrimonial régime of England.

A Frenchwoman, in 1870, made a will in England in the French language, which was a holograph will valid by the law of France, whether she was domiciled in England or France. She was in service in England, and this by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was in England, and according to French law she was domiciled (in the French sense) in England. In May, 1874, she married a French refugee, known by the name of Martin, and continued to live in England until her death in 1895. According to French law and in the French sense, her husband was domiciled in England when he married. He dared not go back to France for many years, but he could safely do so at the end of twenty years from the time he fled from his own country. He went back in 1890, a few years after it was safe to do so, and remained there, living with his own relatives. One of his reasons for returning was the state of his health; another, probably, the unsatisfactory state of his relations with his wife.

**Held**, by Rigby, L.J., and Vaughan Williams, L.J. (Lindley, M.R., dissenting)—

**Conflict of Laws—Continued.**

that (in the English sense) the domicile of the testatrix at the time of her marriage was English, and her marriage revoked her will, and that the grant of letters of administration with the will annexed must be revoked.

Decision of Jeune, P. (68 L. J. P. 106; 81 L. T. 459), reversed.

IN RE MARTIN; LOUSTALAN v. LOUSTALAN, [1900] P. 211; 69 L. J. P. 75; 48 W. R. 509; 82 L. T. 807; 16 T. L. R. 354—C. A.

**XXXII. MISCELLANEOUS.**

390. *Cumulative Legacies—Identical Legacies in two Documents—Presumption—Simultaneous Execution.*—The presumption that identical legacies given by two documents are cumulative may be rebutted by the fact that the two documents were executed simultaneously.

Per Vaughan Williams, L.J.  
TOWNSEND v. MOORE, [1905] P. 66; 92 L. T. [335—C. A.]

391. *Devise on Death of Life Tenant without Issue to Right Heirs—Females—Whether Coparceners or Joint-tenants—Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3.*—A testator who died in 1858 devised real estate upon trust to pay the rents and profits to his niece S. N. for life, and afterwards for her children on their attaining twenty-one years. And if there should be no such child, then to his right heirs for ever. S. N., who, together with three other ladies who were still living, were the testator's co-heiresses, died in 1898 without issue. A summons having been taken out to ascertain whether these co-heiresses succeeded as joint-tenants or coparceners,

HELD—that, having regard to sect. 3 of the Inheritance Act, 1833, they took as devisees and not by descent. That co-parceny was an incident of descent, and that there was nothing in the Act to show an intention to annex it to the estate of devisees. That accordingly the three surviving ladies took as joint-tenants.

IN RE BAKER; PURSEY v. HOLLOWAY, (1898) 79 [L. T. 343; 19 Cox C. C. 81—Stirling, J.]

392. *Gift by Implication—"What is left"—Devise after Wife's death to some of several Co-heirs.*—A devise of realty "after the death of A." to the testator's heir-at-law gives to A. a life estate by necessary implication: but the rule does not apply where the gift is "after the death of A." to one or more out of several co-heirs.

Hutton v. Simpson ((1716) 2 Venn. 722) discussed.

A testator appointed his wife sole executrix with power to sell all his property and land, and "at her death what is left to be divided between" two of his daughters. He left five co-heiresses (including these two daughters).

HELD, by Farwell, J.—that the words "what is left," meant the "net residue" after payment of debts, etc.; that the wife took no interest in the estate by implication, and that until her death there was an intestacy.

IN RE WILLATTS; WILLATTS v. ARTLEY, 74 L. J. Ch. 269; 92 L. T. 195; [1905] 1 Ch. 378; 21 T. L. R. 194.—Div. Ct.

HELD—on appeal, that the wife took some interest; and the parties agreed upon an order.

IN RE WILLATTS; WILLATTS v. ARTLEY, [1905] 2 [Ch. 135; 74 L. J. Ch. 564; 93 L. T. 256; 21 T. L. R. 571—C. A.]

393. *Portions—Power given to Successive Tenants for Life to Raise Portions up to Limited Amount—Limitation as to Total Amount to be raised at any one Time.*—A testator devised his freehold hereditaments to successive tenants for life. He empowered each of the several persons respectively made tenants for life to charge the hereditaments with payment of a jointure not exceeding £1,000 per annum and any sums for portions for younger children not exceeding in the whole £20,000. The will contained a proviso that the freehold hereditaments so devised should not, by virtue of the aforesaid power, "at any one time" be liable to the payment of more than the annual sum of £1,500 for jointures, and the sum of £30,000 for portions.

HELD—that having regard to the forms of precedent in common use in 1860, the date of the will, the words "at any one time" applied to portions as well as to jointures; and that, therefore, portions charged by preceding tenants for life which had been raised and discharged did not prevent a subsequent tenant for life raising further portions, although the amount so raised would, with the previous amounts, exceed the total of £30,000 allowed to be raised at any one time.

IN RE BECKETT; BECKETT v. GRIMTHORPE, (1906) [93 L. T. 746; 22 T. L. R. 84—Joyce, J.]

394. *Reverter—Possibility of Reverter—Fee Simple Conditional—Right of Entry for Condition Broken—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3.*—A possibility of reverter on failure of a fee simple conditional on the birth of male issue is within sect. 3 of the Wills Act, 1837, and is devisable as a right of entry for condition broken.

Seemle—that such possibility of reverter is an estate.

PEMBERTON v. BARNES, [1899] 1 Ch. 544; 68 [L. J. Ch. 192; 47 W. R. 444; 80 L. T. 181—North, J.]

395. *Succession—Provision for Widow in Full of all Claims of Terce and Jus Relictæ—Partial Intestacy—Effect of.*—A testator declared by his will that the provision he thereby made for his wife and children should be in full of all that his wife could claim in name of *terce*, *jus relictæ*, or otherwise. The portion of the estate in question had fallen into intestacy.

**Miscellaneous—Continued.**

**HELD**—that the clause was intended to enable full effect to be given to the testator's testamentary dispositions by putting his wife under a disability to put forward legal claims which would have the effect of withdrawing something from the estate disposed of, and that as regards all that remained over when the provisions of the will were satisfied—the whole residue—the law of intestacy took effect upon it.

**NASMITH v. BOYES**, [1899] A. C. 495—H. L. [(Sc.).

**396. Testator Solicitor in Partnership—Gift to Partner of "All my Share and Interest in the Business of Solicitors"—Unpaid Capital and Undrawn Profits.]—**A testator gave to E. T. C. "for his own absolute use and benefit . . . all my share and interest in the business of solicitors carried on by me and him as co-partners by virtue of the deed of partnership, conditional on his acting as solicitor to my estate free of charge, except moneys taken by him from my said estate." The testator had done really no work for several years, and the partnership accounts had been made out on that footing. At his death there was standing a small sum to the credit of testator's capital account in the business, and a considerable sum representing undrawn profits.

**HELD**—that it could not be supposed that the testator intended to pass nothing at all except the shadowy right to goodwill; that the Court must find something answering to "my share and interest in the business" so as to give some meaning to the gift; that the "share" was half part of the profits and half the capital assets; that the testator had in the business an "interest" in respect of his lien as a partner on the unpaid capital and the undrawn profits; and therefore the testator intended to give all his share and interest in the business, including everything which appeared on the balance-sheet.

**IN RE BARFIELD; GOODMAN v. CHILD**; (1901) 84 [L. T. 23—Farwell, J.

**WINDING-UP.**

See **BUILDING SOCIETIES: COMPANIES.**

**WINDOWS.**

See **EASEMENT.**

**WITNESSES.**

See **EVIDENCE.**

**WOMEN, EMPLOYMENT OF.**

See **FACTORIES AND WORKSHOPS.**

**WORK AND LABOUR. . .**

And see title **FACTORIES AND WORKSHOPS.**

**1. Agreement for Specific Sum—Failure to Perform Contract—Allowance for Materials—Liquidated Damages—Separate Classes of Work.]—**The plaintiff agreed to execute certain specified work in and about laying electric wires and blocks by a certain date, and to fix certain lamps and fittings which were to be supplied to him by the defendant within fourteen days from the delivery to him of such fittings. The plaintiff also wrote in substance as follows:—"I undertake to carry out the work in connection with the cables, wires, and fittings, in strict accordance with the specification and schedule within the time stated in the said specification for the sum of £276 10s, and I consent to pay the sum of £5 as liquidated damages and not as a penalty for every day exceeding the number of days within which the work has to be completed." The work was so badly done that it had to be done over again, a different and inferior quality of wire from that specifically named was put in, and the conduct of the plaintiff was such as to entitle the defendant to take the contract out of his hands. The referee while giving the plaintiff the value of some materials used by the defendant, allowed the defendant a set-off and counterclaim for £50 liquidated damages and gave judgment for the defendant for a balance of £38 1s.

**HELD**—that a sum of £5 was agreed upon as liquidated damages for each day's delay in executing each part of the contract; the times limited were two separate periods at the expiration of which the damages began to accrue and not one continuous period at the end of which only they became payable; the word "work" (in the singular) must be read in reference to the two separate classes of work as to which "times" (in the plural) were by the contract expressly assigned; and the damages, for the same reason, were specific sums agreed upon for each breach of presumably equal importance since the effect of each was identical, viz., delay, and therefore presumably to be compensated by the same sum per diem.

Decision of Queen's Bench Division (80 L. T. 234) affirmed.

**STEGMANN v. O'CONNOR**, (1900) 81 L. T. 627; [—C. A.

**2. Contract—Offer and Acceptance—Estimate—Reasonable Time.]—**The plaintiff invited the defendants to send in a tender in competition for work. The defendants sent a letter headed "Estimate."

**HELD**—that the letter sent in by the defendants was an offer to do the work at the price mentioned. If the specification leaves a blank as to the time within which the work is to be completed, then the work has to be done in a reasonable time.

**Work and Labour—Continued.**

CROSHAW v. PRITCHARD, (1899) 16 T. L. R. 45—  
[Bigham, J.]

**3. Railway Company—Contractors—Agreement for Construction—Completion—Interest on Shares—Payment out of Penalties due from Contractors.**—By a contract for making the line of the plaintiff railway, it was to be completed to the satisfaction of the engineer of the company in two years from the commencement of the works. The contract price was to be paid in debentures and shares of the company, which were to be issued at the request of the contractors to their nominees, or offered for public subscription. The contractors having requested the debentures and shares to be offered for public subscription entered into an agreement to pay to the company interest on the debenture and preference stock issued by the company until the railway was completed.

The works were commenced on the 15th January, 1890, but the time for completion was afterwards extended to 31st May, 1892.

They were not completed for more than a year after the time fixed. Interest on the debentures and preference stock in the meantime became due which was not paid by the contractors, and was therefore paid by the company.

This action was afterwards brought and certain of the matters in dispute were referred to arbitration, but the award was to be enforced only in the present action.

**HELD** (affirming the decision of Stirling, J.)—that the contractors had not completed the line within the time fixed, and were liable to pay the interest between the 1st October and the 31st December, 1892; but that the arbitrator having found that the company were liable for not taking over the line when it was completed, the contractors were entitled to have the amount for which the company was so liable applied in reduction of the interest, but (reversing the decision of Stirling, J.) that the contractors were not liable for the interest between the 15th January and the 31st May, 1892, between which dates the time for completion was extended.

**HELD ALSO** (reversing the decision of Stirling, J.), that it was not *ultra vires* the company to apply penalties due from the contractors in payment of interest on shares, as such penalties were not capital, and dividends can be paid out of other money besides profits.

ALCOY and GANDIA RY. & HARBOUR CO., LD. v.  
[GREENHILL, (1898) 79 L. T. 257—C. A.]

**4. Shipbuilding Contract—Time for Completion—Allowance for Delay—“Circumstances beyond Builders’ Control”—Delay due to Non-completion of another Vessel occupying suitable Berth.**—A contract dated July 6th, 1898, provided for the building of a steamship by shipbuilders, to be delivered to a shipowner not later than June

30th, 1899, due allowance being made for delays through certain specified causes “or other circumstances beyond builders’ control.” A suitable berth for the building of the steamship at the shipbuilders’ yard did not become vacant and the work was not begun until March, 1899, up to which time the berth in question was occupied by another vessel in course of building at the date of the contract, the completion of which was delayed by causes of the same nature as those specified in the contract. The delivery of the steamship was delayed beyond the contract date. An arbitrator having found that the parties contemplated that the steamship was to be built at the shipbuilders’ yard as soon as a suitable berth became vacant, and that the berth in question was the first suitable vacant berth,

**HELD**—that in fixing the time for the completion of the steamer allowance must be made for delays during the building of the previous vessel.

LOCKIE v. CRAIGS, (1902) 86 L. T. 388; 7 Com.  
[Cas. 7; 9 Asp. M. C. 296—Wright, J.]

**5. Sub-contractor taking no Responsibility for Bad Workmanship beyond Liability to replace—Costs of Action against Contractors in respect of Bad Workmanship.**—The plaintiffs, who were repairing a steamship for her owners, employed the defendants to construct a crank shaft; the latter expressly disclaimed all responsibility for bad material and workmanship, beyond the replacement of faulty work.

In an action for the contract price the plaintiffs were met by a counter claim for general damages on the ground of the breakage of the shaft; and after communicating with the defendants, who repudiated all liability, they defended the counter-claim unsuccessfully. The shaft was found to have been badly made.

**HELD**—that upon the true construction of the sub-contract the defendants must pay to the plaintiffs the costs of the counter-claim, except so far as they were increased by the raising of any issue other than those of bad material, or bad workmanship.

Hammond v. Bussey ((1888), 20 Q. B. D. 79; 57 L. J. Q. B. 58—C. A.) discussed.

PRINCE OF WALES DRY DOCK CO., LD. v.  
[FOWNES FORGE AND ENGINEERING CO., LD.,  
(1904) 90 L. T. 527; 9 Asp. M. C. 555—C. A.]

**6. Work, Labour, and Services—Contract—Repairs to Ship—Lump Sum—Variation—Authorised and Forbidden Repairs—Rectification.**—There are two conditions under which a contractor for a lump sum, who has not performed the stipulated work, can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done.

The plaintiffs sought to make the ship *Liddesdale* answerable for the cost of repairs



**Work and Labour—Continued.**

executed upon her. That the plaintiffs had not done the work specified by the contract was undisputed. Authorised repair of stranding damage had passed into forbidden repair of deterioration. The defendants, however, took the ship and sold it.

• **Held**—that the plaintiffs could not recover for work which they had done, and that the mere fact that the defendant took the ship, which was his own property, and made the best he could of it, could not give the plaintiffs any additional right.

*Appleby v. Myers* ((1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331; 16 L. T. (n.s.) 669) followed.

*FORMAN & CO. PROPRIETARY v. THE SHIP "LID-DESDALE,"* [1900] A. C. 190; 69 L. J. P. 44; 82 L. T. 331; 9 Asp. M. C. 45—P. C.

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**WORKING CLASSES,  
HOUSES OF.**

*See PUBLIC HEALTH.*

**WORKMEN.**

*See MASTER AND SERVANT.*

**WORKSHOPS.**

*See FACTORIES AND WORKSHOPS.*

**WRECK.**

*See ADMIRALTY, SHIPPING AND NAVIGATION.*

**YACHTS.**

*See SHIPPING AND NAVIGATION.*

**YEAR.**

*See TIME.*

**ZANZIBAR.**

*See DEPENDENCIES AND COLONIES.*

END OF VOLUME III.